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A Unique International Problem': The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History

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‘A UNIQUE INTERNATIONAL PROBLEM’: THE SVALBARD TREATY, EQUAL ENJOYMENT, AND TERRA NULLIUS: LESSONS OF TERRITORIAL TEMPTATION FROM HISTORY

CHRISTOPHER R. ROSSI*

ABSTRACT

The 1920 Svalbard Treaty conferred full and absolute sovereignty on Norway but paradoxically limited that sovereignty by conferring on states party to the treaty equal enjoyment and liberty of access provisions on Svalbard and in its territorial waters. Whether these provisions now extend to geographic areas adjacent to Svalbard’s territorial sea—specifically to Svalbard’s oil-rich continental shelf and abundant fishing stock of the superjacent waters of its Exclusive Economic Zone (EEZ)—is a matter of considerable debate. Norway repudiates the dynamic legal extension of the Svalbard Treaty to these geographic areas, which post-date the treaty; other Arctic stakeholders, notably Russia, disagree. This Article concentrates on the problematic meaning of full and absolute yet qualified sovereignty within the context of the Svalbard Treaty. Focusing on the factual and historical circumstances, or effectivités pertaining to the archipelago’s 400 year human history are of essential but limited use given competing historical narratives. Instead, this Article concentrates on the historical and legal development of the concept of terra nullius, a term more elusive than commonly thought, and the ways in which states historically made use of that concept to forward territorializing interests over Svalbard’s newly emerging resources, even when pronouncing or professing interest in shared or condominium-like resource management arrangements. In an age of rapid ice melt in the cryosphere, accompanied by emergent technology and increasing access to previously unavailable or un contemplated resources, Svalbard’s extended geographical area challenges global governance regimes and presents a cautionary tale about territorial temptation in the High Arctic’s diminishing global commons.

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I. INTRODUCTION

In April 2015, Russia's deputy prime minister Dmitry Rogozin paid an unscheduled visit to Norway's High Arctic archipelago, Svalbard. His presence sparked an angry response from Norway, whose Foreign Ministry had been caught unaware. Norway, like other western countries, had banned him from entry as a personal punishment for his role in Russia's annexation of Crimea and destabilization of Eastern Ukraine.¹

Russia's Foreign Ministry lampooned the Norwegian sanction as 'inexplicable and absurd'.² While sovereign states are free to engage in

1. See Thomas Nilsen, *Strong Norwegian Reaction to Rogozin's Svalbard Tour*, BARENTS OBSERVER, Apr. 18, 2015, <http://barentsobserver.com/en/politics/2015/04/strong-norwegian-reaction-rogozins-svalbard-tour-18-04>.

2. See *'Inexplicable and Absurd'—Russia Blasts Norway's Overreaction on Official Svalbard Visit*, RT, Apr. 20, 2015, <http://rt.com/politics/251209-russia-rogozin-svalbard-ministry/>; Trudde Pettersen, *Norway has no right to stop anyone from visiting Svalbard*, BARENTS OBSERVER, Apr. 21, 2015, <http://barentsobserver.com/en/politics/2015/04/norway-has-no-right-stop-anyone-visiting-svalbard-21-04>.

such a retorsion, Norway's sovereignty over Svalbard fell into a special category established by the 1920 Svalbard Treaty (Spitsbergen Treaty).³ Unlike other unclaimed territories, which historically have been acquired by discovery, effective or symbolic occupation,⁴ or by force,⁵ Norway's sovereignty over Svalbard was conferred on it by this treaty. The treaty contained "equal enjoyment" and "equal liberty of access" provisions for nationals of states parties to the convention,⁶ which includes Russia.⁷ These provisions restricted Norway's sovereignty and the ideas of conferring and restricting sovereignty are the treaty's most unusual features.

Rogozin said bad weather prompted his unannounced stop-over, but he easily could have claimed, as head of the State Commission for Arctic Development, that he wanted to visit the historical Russian mining community at Barentsburg,⁸ not that Russia conceded he needed any reason to visit.⁹ Others sensed a more troubling explanation. Analysts called it a "deliberate provocation,"¹⁰ obliquely reinforced by Rogozin's

3. *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden Concerning Spitsbergen Signed in Paris 9th February 1920*, http://www.sysselmannen.no/Documents/Sysselmannen_dok/English/Legacy/The_Svalbard_Treaty_9ssFy.pdf [hereinafter *The Svalbard Treaty*]. Prior to 1920, when the treaty was signed, the archipelago was commonly referred to as Spitsbergen; when the treaty came into effect in 1925, the King of Norway proclaimed the islands as Svalbard. This article maintains that distinction and will refer to the archipelago as Spitsbergen when discussing events prior to 1920/1925 and Svalbard when discussing events after 1925.

4. See generally James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111 (1938) (discussing transition from symbolic to occupational claims of title to *terra nullius*).

5. See 1 William Blackstone, *Introduction to COMMENTARIES ON THE LAWS OF ENGLAND*, § IV, 105 (1765), http://avalon.law.yale.edu/18th_century/blackstone_intro.asp (discussing acquisition of conquered or ceded colonies that were unclaimed but inhabited).

6. See *The Svalbard Treaty*, *supra* note 3, art. 2 ("Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified"), and art. 3 ("The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason").

7. Fourteen states were original signatories. The Soviet Union and Germany signed the agreement in 1924 and 1925, respectively. Currently, forty-two states have ratified the treaty. They include: Afghanistan, Albania, Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, the Czech Republic, Denmark, Dominican republic, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Italy, Japan, Lithuania, Monaco, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Saudi Arabia, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom, United States, and Venezuela.

8. See *supra* note 2.

9. See Pettersen, *supra* note 2 (quoting Russian Foreign Ministry view that Oslo has "no legal grounds" against Rogozin's visit).

10. Kjetil Malkenes Hovland, *Norway Summons Ambassador After Banned Russian Visits Svalbard*, WALL ST. J., Apr. 20, 2015, <http://www.wsj.com/articles/norway-summons-ambassador-after-banned-russian-visits-svalbard-1429536060> (citing Norwegian foreign policy researcher, Jakob Godzimirski); Eirik Palm, *Uønsket gjest dukket opp: "Edda bædda" fra Rogozin [Unwanted Guest Appeared: "Edda bædda" from Rogozin]*, SVALBARDPOSTEN (Nor.), Apr. 19, 2015, <http://svalbard>

statement that “the Arctic is a Russian Mecca.”¹¹ Rogozin set foot on turf Russia once claimed as a preferential interest. But Bolshevik predecessors traded away any future sovereign claim during the Soviet Union’s turbulent formative years in the 1920s.¹² Perhaps Rogozin wanted to spitefully grudge Norway what Russia could not itself secure,¹³ or worse, perhaps his unannounced presence suggested an interest in Svalbard that Russia never fully relinquished: “Russia has begun to understand its place, its borders and its interests,” Rogozin said after the visit; referencing Crimea’s annexation in 2014, he continued: “We saw something historic take place last year. Russia’s territorial integrity was restored. This year, we are casting our glance elsewhere. We are taking a closer look at the development of the Arctic. The two things are the same.”¹⁴

Rogozin’s reputation for bluster¹⁵ is more easily set aside than the timing of his visit. The month before, Russia’s ambassador to Norway filed a sharp diplomatic protest when Norway began soliciting bids to develop areas of the Barents Sea for energy exploration adjacent to Svalbard’s territorial waters.¹⁶ Russia claimed Norway’s solicitation violated the peculiar conditions placed on sovereign rule by the Svalbard

posten.no/index.php?page=vis_nyhet&NyhetID=5799&sok=1 (citing Nansen Institutt’s Jørgen Holten Jørgensen’s view that the Russians were probing Norway’s reaction to see how far they could go).

11. Steffen Pedersen Øberg, *Rogozin: “Arktis er det russiske Mekka”* [Rogozin: “The Arctic is Russian Mecca”], AFTENPOSTEN (Nor.), Apr. 20, 2015, <http://www.aftenposten.no/nyheter/iriks/Rogozin-Arktis-er-det-russiske-Mekka-7987876.html> (quoting Rogozin).

12. Official Soviet accession to the treaty “without any conditions and reservations,” including Norway’s sovereignty over Bear Island, occurred on May 7, 1935, although the Soviet pledge “not to advance objections” was recorded on February 16, 1924. See A.N. VYLEGZHANIN & V.K. ZILANOV, SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS 24, 25 (W.E. Butler ed. and trans., 2007) [hereinafter VYLEGZHANIN & ZILANOV].

13. See generally Aesop’s fable, *The Dog in the Manger*.

14. Erik Lund, *When Dmitry Rogozin Speaks, People Worry*, THE ARCTIC J. (Green.), May 7, 2015, <http://arcticjournal.com/politics/1562/when-dmitry-rogozin-speaks-people-worry> (quoting Rogozin).

15. See Clifford J. Levy, *Russia’s NATO Envoy, Big on Bluster, Modifies His Tone*, N.Y. TIMES, Aug. 27, 2008, http://www.nytimes.com/2008/08/27/world/europe/27iht-moscow.4.15691237.html?pagewanted=all&_r=0 (labeling Rogozin blustery); Emily Gertz, *Russian Bluster Aside, What Will Become of the ISS*, POPULAR SCI., May 19, 2014, <http://www.popsoci.com/article/technology/russian-bluster-aside-what-will-become-iss> (citing Rogozin’s threat to end cooperation on the International Space Station); Roger McDermott, *Russian Military Modernization: Rogozin Promises a ‘Nuclear Surprise’*, EURASIA DAILY MONITOR, Oct. 7, 2014, http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=42926&cHash=419d2173f0771cbff161b9709d5a39a7#.VXG6vc9Viko (noting Rogozin’s “nuclear surprise” for adversaries following military modernization).

16. See Rolf Stange, *Russia Protests against Norwegian Oil Development in the Barents Sea*, SPITSBERGEN/SVALBARD ARCTIC BLOG, May 12, 2015, <http://www.spitsbergen-svalbard.com/2015/05/12/russia-protests-against-norwegian-oil-development-in-the-barents-sea.html?lang=en>.

Treaty.¹⁷ Implicit in the Russian view is Norway's provocation, which upsets a relatively quiet *status quo* arrangement in a bid to territorialize new resources that changing circumstances now allow.¹⁸

This Article investigates the dispute over Svalbard's sovereignty. It takes the position that rapid ice melt and conditions of global warming, together with technological advances and increasingly accessible resources, have awakened competing interests over the legal regime that both confers on Norway full and absolute sovereignty and limits that sovereignty by establishing equal access and non-discrimination rights for all states parties to the treaty. Understanding how this paradoxical arrangement came about, bearing some similarity to the Mandates System under the League of Nations,¹⁹ better informs of the challenges facing its application and High Arctic governance in the unfolding age of rapidly receding ice. With technological changes making more accessible and safe offshore oil development, pressure increases to open up new unexplored areas to replace barren North Sea oil fields; with rapid ice melt, prospects enhance to explore and exploit the High Arctic's massive oil and gas reserves;²⁰ with commercial fishing fleets competing world-wide for diminishing stocks, Svalbard's plentiful waters present an enticing lure. These factors, taken together, present obvious territorial temptations.²¹

17. See Alf Bjarne Johnsen, *Russland Protesterer Mot Oljeboring I Svalbard-Sonen: UD Mottok Skarp Note Fra Moskva [Russia Protects against Oil Drilling in the Svalbard Zone]*, VG NYHETER (Nor.), May 2, 2015, <http://www.vg.no/nyheter/innenriks/norsk-politikk/russland-protesterer-mot-oljeboring-i-svalbard-sonen/a/23444540/>.

18. See Katarzyna Bozena Zysk, *Russian Military Power and the Arctic*, EU-RUSSIA CENTRE 82 (2008), <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=99789> (discussing a widespread Russian conviction that Norway's Svalbard policy aims to drive Russia away from the archipelago and adjacent waters).

19. See GEIR ULFSTEIN, *THE SVALBARD TREATY: FROM TERRA NULLIUS TO NORWEGIAN SOVEREIGNTY* 50 (1995) [hereinafter ULFSTEIN, *THE SVALBARD TREATY*]; Torkel Opsahl, *Norwegian Dependencies, Particularly Spitsbergen and the European Communities*, in *LEGAL PROBLEMS OF AN ENLARGED EUROPEAN COMMUNITY* 179 (M.E. Bathurst et al. eds., 1972).

20. See *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, U.S. GEOLOGICAL SURVEY, July 23, 2008, <http://www.usgs.gov/newsroom/article.asp?ID=1980#.VbJqDvIViko> (projecting undiscovered, technically recoverable energy reserves above the Arctic Circle).

21. A giant 2011 discovery of oil and gas deposits in the Johan Castberg sector of Norway's Barents Sea continental shelf has turned "this huge area into a hotspot" for exploration; several dry wells in the Norwegian Sea have diverted oil company attention and enthusiasm elsewhere, certainly toward the High North; reports of diminishing expectation for oil recovery in the North Sea abound, but supergiant strikes on the Utsira High in 2010 and 2011 (renamed Johan Sverdrup), a mature part of the North Sea, may rank as Norway's largest discovery ever, focusing renewed interest in Norwegian North Sea oil prospects. See Halfdan Carstens, *Small Is Also Beautiful*, 10 GEOEXPRO, no. 6, at 20 (2013), available at <http://www.geoexpro.com/articles/2014/01/small-is-also-beautiful>. The phrase 'territorial temptation' is taken from Bernard Oxman. See generally Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM J. INT'L L. 830 (2006).

Discussions about the complexities of Svalbard's sovereignty are not new, but they tend to focus, and properly so, on the applicability of that regime structure to the geographical regions beyond Svalbard's territorial waters and not on the treaty's antecedents. These antecedents add texture and meaning to the peculiar and paradoxical shared resource arrangement the Svalbard Treaty created. They help to explain why current differences regarding the treaty's seaward extension will not be resolved easily, and probably not without Norway's further accommodation of competing interests. They also shed light on state practices that arise in *status quo* arrangements and how those practices provide second-best rewards when not interpreted as creeping jurisdictional threats to secure sovereign control. By delving into the history of Svalbard, a deeper understanding of Svalbard's constructed *terra nullius* status obtains along with the vagaries of that phrase, which also help to explain the peculiar equivocations reflected in the Svalbard Treaty. Placing current discussions in a more global and historical context also enhances this Article's assertion that capable states have long displayed territorial temptations regarding the resources of the archipelago when they have become apparent and accessible. But when not able to assert sovereignty over this harsh land void of indigenous population, history reveals that states created their own *de facto* course of dealing—which maximized parochial interests regarding resource extraction—sometimes in the name of common use, sometimes in the form of a *quasi*-condominium arrangement—if only to preclude any other individual state's perfection of sovereign interests over Svalbard. Preclusive interests again are on display as Norway seemingly seeks to test the limits of its ultimate parochial design to perfect its sovereignty over resources adjacent to Svalbard's territorial sea. Its efforts give rise to the central question of this Article: Does Norway's grant of sovereignty in the 1920 Svalbard Treaty extend to the modern maritime zones adjacent to Svalbard's territorial sea?

In addition to this introduction, this Article proceeds as follows: Part II will discuss increasing tensions in the High Arctic brought about by rapid ice melt and perceived ambiguities in the Svalbard Treaty, conditions that motivate Norway's contested newest claims. Part III will discuss the current dispute among the principals. Part IV will discuss the meaning of 'full and absolute sovereignty' as presented in the Svalbard Treaty. Part V will review competing historical narratives regarding the discovery of Spitsbergen and the challenges associated with historical claims based on factual circumstances or *effectivités*. Part VI will review the resurgent interest in Spitsbergen following the whaling epoch, which resulted in a proto-commons agreement. Parts VII and VIII will discuss evolving

constructions of the *terra nullius* idea concentrating on the important views of Robert Lansing and the discussions over resources acquisition in Polynesia, which informed and paralleled Svalbard discussions and led to the 1856 Guano Island Act. This law introduced a means of securing parochial resource interests while ambiguously avoiding a claim of sovereign authority. Part X concentrates on the early twentieth century attempts to establish Spitsbergen as a condominium arrangement. Part XI notes the subtle and effective Norwegian diplomatic attempts at the Paris Peace Conference to undo condominium considerations, which led to the formation of the current regime for Svalbard as expressed by the Svalbard Treaty. Part XI draws conclusions about the historical attempts to territorialize Svalbard and assesses prospects for the archipelago's future mineral and living resource exploitation.

II. INCREASING TENSIONS OVER RESOURCES AND THE DYNAMIC INTERPRETATION OF THE SVALBARD TREATY

The seaward extension of the territorial rule allowing for control over resources conforms to a basic principle of the law of the sea: The land dominates the sea.²² Sovereignty over the riches of an archipelago's continental shelf is legally "an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State."²³ Norway claims it owns Svalbard's continental shelf because it reigns over Svalbard; Russia claims Svalbard's sovereignty is conferred by mutual agreement and that the unusual equitable and non-discriminatory provisions bestowed by that authority extend to the administration, ownership, and exploitation of resources off Svalbard's coast, which (presumably) also must be equally beneficial to the states parties to the Svalbard Treaty. Scholars deem this interpretation 'dynamic'; this dynamism views the treaty as an all-encompassing package solution, whereby Norway's sovereignty hinged originally on the understanding that other states parties "retained certain *terra nullius* rights."²⁴ If Norway's treaty-conferred rights were to expand, other parties' rights would, too.

22. *Grisbardana Case* (Nor. v. Swed.), 11 R.I.A.A. 155, 159 (Perm. Ct. Arb. 1909) (noting the fundamental principle "'tant tant ancien que modern' that 'le territoire maritime est un dépendance nécessaire d'un territoire terrestre'"); *North Sea Continental Shelf Cases* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 51, ¶ 96 (Feb. 20) (the "land dominates the sea").

23. *Aegean Sea Continental Shelf* (Gr. v. Turk.), Judgment, 1978 I.C.J. 3, 36, ¶ 86 (Dec. 19).

24. See, e.g., Sarah Wolf, *Svalbard's Maritime Zones, Their Status Under International Law and Current and Future Dispute Scenarios* 2, at 18 (Stiftung Wissenschaft und Politik, Working Paper FG

A. *Signs of Cooperation*

Svalbard's maritime surroundings have been disputed for decades, although two principal stakeholders—Norway and Russia—have been fairly content to avoid direct confrontation over the Treaty's 'long-arm reach,'²⁵ absent a pressing need to resolve ambiguities and contested interpretations,²⁶ until now.

Although vastly different in terms of size, population, and military strength, Norway and Russia closely compete in oil and gas industries. Both countries are among the world's largest net exporters of energy; and both have major stakes in Europe: Norway supplies 21 percent of Europe's natural gas; Russia is the EU's leading supplier of oil and gas; a Norwegian concession was the first to strike offshore oil in 1969 and production has since that time moved from the North Sea into the Norwegian Sea, off the midsection of the country, and most recently into the High North reaches of the Barents Sea.²⁷ Russia historically focused oil production on land but shifted policy in the mid-1980s and now decidedly is rotating its industry into High North waters.²⁸ Despite its smaller size, Norway benefits from extensive experience in offshore production and a more coherent policy,²⁹ making it a formidable and enviable competitor. Moving geographically in clockwise and counter-clockwise directions across the northern expanse, these energy-producing titans are increasingly setting sights on availing but formerly out of reach resources surrounding Svalbard.

For forty years, an offshore border dispute in the Barents Sea between the island chains of Svalbard and Novaya Zemlya (the so-called "Loop Hole") complicated Norwegian-Russian relations. Where and how to draw

2, No. 2, 2013), available at http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/WP_Wolf_2_2013.pdf.

25. See generally Peter T. Ørebech, *The 'Long-Arm' Reach of the Svalbard Treaty?*, EXPRESSO (July 2015), http://works.bepress.com/peter_orebech/1.

26. See Robin Churchill & Geir Ulfstein, *The Disputed Maritime Zones Around Svalbard*, in CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA 593 (Myron H. Nordquist, Tomas H. Heidar & John Norton Moore eds., 2010) [hereinafter Churchill & Ulfstein].

27. Jeremy Cresswell, *Norway Claims First Strike*, OILCITY, <http://www.oilcity.co.uk/home/article.asp?pageid=470> (detailing the Ocean Viking strike by Phillips Petroleum in the Ekofisk field on December 23, 1969). See also, *Norway Supplies More than 20% of Europe's Natural Gas Needs*, US ENERGY INFO. ADMIN., May 16, 2014, <http://www.eia.gov/todayinenergy/detail.cfm?id=16311> (citing that Norway supplies 21 percent of total European natural gas); and *Energy Production and Imports*, EUROSTAT (2015), http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports (citing Russia as the EU's main supplier of crude oil and natural gas (and solid fuels)).

28. See Arild Moe, *Russian and Norwegian Petroleum Strategies in the Barents Sea*, 1 ARCTIC REV. L. & POL. 225, 226 (2010).

29. See *id.*

that line stymied development of an area of open sea the size of Florida, containing under its subsoil an estimated 39 billion barrels of oil.³⁰ But in 2010, the countries came to terms on a compromise delimitation, opening up the prospect of offshore development.³¹ Russia emphasized, however, that the accord did not resolve the two countries' disagreement over the waters around Svalbard.³² The dispute was not purely bilateral. Voices in the European Parliament questioned whether the delimitation improperly divvied up a portion of Svalbard's fishery resource belonging to neither state.³³

B. A Dramatic Deterioration

Despite long-standing cooperation in the Norwegian and Barents Seas through the Russian-Norwegian Fisheries Commission, and more recent ventures, including a 2012 agreement to explore jointly frontier areas, and a Russian stake in a license in the Barents Sea operated by Norway's state-owned Statoil, relations deteriorated dramatically when Norway offered its twenty-third licensing round in January 2015.³⁴ This round opened up fifty-seven blocks for exploration, thirty-four of which were in formerly disputed waters with Russia,³⁵ including, controversially, three blocks in waters offshore from Svalbard.³⁶ Russia reiterated long-simmering objections pertaining to these waters: It claimed Norway violated the

30. See Andrew E. Kramer, *Russia and Norway Agree on Boundary*, N.Y. TIMES, Sept. 15, 2010, http://www.nytimes.com/2010/09/16/world/europe/16russia.html?_r=0.

31. See Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Nor.-Russ., Sept. 15, 2010, available at https://www.regjeringen.no/globalassets/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf.

32. See Lotta Numminen, *A History and Functioning of the Spitsbergen Treaty*, in THE SPITSBERGEN TREATY: MULTILATERAL GOVERNANCE IN THE ARCTIC 7, 13 (Diana Wallis & Steward Arnold eds., 2011).

33. See Andreas Raspotnik & Andreas Østhagen, *From Seal Ban to Svalbard-The European Parliament Engages in Arctic Matters*, THE ARCTIC INST., Mar. 10, 2014, www.thearcticinstitute.org/2014/03/from-seal-ban-to-svalbard-european.html (noting a Polish parliamentarian's inquiry about a European Commission claim for compensation). The European Union is not party to the Treaty but bases its interests on the principle of "conferral of competence" owing to certain shared competences some of its member states have involving Svalbard. See *id.*

34. Exclusive rights extended to companies for oil licenses are regulated by a designate block system operated by the Norwegian Petroleum Directorate. See generally *Exploration Policy*, NORWEGIAN PETROLEUM, <http://www.norskpetroleum.no/en/exploration/exploration-policy/> (detailing licensing position for the Norwegian continental shelf as of April 2015).

35. See Atle Staalesen, *Norway Offers 34 Arctic Blocks along Russian Border*, BARENTS OBSERVER, Jan. 20, 2015, <http://barentsobserver.com/en/energy/2015/01/norway-offers-34-arctic-blocks-along-russian-border-20-01>.

36. See Trude Pettersen, *Russia Protests Drilling in Svalbard Zone*, BARENTS OBSERVER, May 5, 2015, <http://barentsobserver.com/en/energy/2015/05/russia-protests-drilling-svalbard-zone-05-05>.

Svalbard Treaty by offering drilling opportunities in those three blocks; that Svalbard has its own continental shelf subject to inter-temporal interpretations of the non-discrimination provisions of the 1920 Treaty; and that Norway obdurately refused to negotiate.³⁷ Spain and Iceland share the view that the equal access and non-discrimination provisions of the treaty restrict Norway's sovereign rights off Svalbard's coast, and periodically have indicated they will refer the question to the International Court of Justice (ICJ).³⁸ Norway, in turn, claimed Svalbard has an undifferentiated continental shelf (notwithstanding the general legal view that islands, save for uninhabitable rock outcroppings, generate their own continental shelves);³⁹ that the shelf extends from its mainland and around and past Svalbard,⁴⁰ save for the treaty's exception of Svalbard's "territorial waters;"⁴¹ that Norway does not need to negotiate rights with any country as its rights are secured under the 1958 Continental Shelf Convention;⁴² and that the Svalbard Treaty's equal treatment provisions have no applicability beyond the treaty's original scope,⁴³ which limits the treaty's application solely to the land and territorial waters.⁴⁴ In line with

37. *See id.*

38. *See* Torbjørn Pedersen, *Conflict and Order in Svalbard Waters*, 187 (Apr. 2008) (Ph.D. dissertation, University of Tromsø) [hereinafter Pedersen, *Conflict and Order*] (noting Spain's 1986 and Iceland's 1994 indications to refer the question to the ICJ); Torbjørn Pedersen, *The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 OCEAN DEV. & INT'L L. 339, 345 (2006) [hereinafter Pedersen, *Svalbard Continental Shelf Controversy*] (noting Iceland and Russia most vigorously object to Norway's view); Nkeiru Scotcher, *The Sovereignty Dilemma, THE SPITSBERGEN TREATY: MULTILATERAL GOVERNANCE IN THE ARCTIC* 21, 22 (Diana Wallis & Stewart Arnold eds., 2011).

39. *See* Churchill & Ulfstein, *supra* note 26, at 567 (pointing out how UNCLOS art. 121 regards every island, apart from uninhabitable rock, as having a continental shelf).

40. *See* Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 344 (summarizing the Norwegian view that the continental shelf of Svalbard is "physically and inherently one continuous seabed adjacent to the Norwegian coastline."). The Norwegian Foreign Ministry compares Svalbard's geological situation to the Shetland Islands on Great Britain's continental shelf, or Novaya Zemlya and Franz Josef Land on Russia's continental shelf. *See also* *The Continental Shelf—Questions and Answers*, UTENRIKSDEPARTEMENTET, REGJERINGEN.NO, Oct. 30, 2009, available at <https://www.regjeringen.no/no/dokumenter/the-continental-shelf---questions-and-an/id583774/> [hereinafter Utenriksdepartementet] (noting that the Norwegian Foreign Ministry compares Svalbard's geological situation to the Shetland Islands on Great Britain's continental shelf, or Novaya Zemlya and Franz Josef Land on Russia's continental shelf).

41. *See* The Svalbard Treaty, *supra* note 3, art. 2 ("Ships and nationals of all High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.").

42. *See* Pettersen, *supra* note 36.

43. Øystein Jensen & Svein Vigeland Rottem, *The Politics of Security and International Law in Norway's Arctic Waters*, 46 (236) POLAR REC. 73, 79 (2010).

44. *See* D.H. Anderson, *The Status Under International Law of the Maritime Areas Around Svalbard*, 40 OCEAN DEV. & INT'L L. 373, 374, 380 (2009) (noting they are the only two spaces mentioned in the Treaty).

the famous *S.S. Lotus dictum*, Norway argues that restrictions on its sovereignty are not to be presumed;⁴⁵ and that restricting sovereignty conferred by treaties must conform to the literal and ordinary meaning of the treaty, which has no ambulatory, dynamic, or inter-temporal significance.⁴⁶ Instead, the treaty set in stone only those legal interests secured by its express terms and cannot be enlarged imaginatively to trump subsequent developments in the law of the sea even though its fundamental intent and purpose was to secure an “equitable regime” for “peaceful utilization” based on equal enjoyment and non-discrimination.⁴⁷ In line with Lord Asquith’s reasoning in the famous *Abu Dhabi Arbitration* (1951), “it would be a most artificial refinement to read back into [an agreement] the implications of a doctrine” not established at the time of its creation.⁴⁸

Some experts think there is too much at stake not to settle the dispute; others see Russia and Norway on a collision course.⁴⁹ Either way, the waters off Svalbard highlight increasing tensions regarding the legal status of the archipelago and its surroundings, making it an emerging centerpiece of a new global power race for influence and resources.⁵⁰ “For anyone interested in geopolitics,” noted the president of the Norwegian Scientific Academy for Polar Research, “this is the region to follow in years to come.”⁵¹

45. See *id.* at 379 (citing the 1999 Norwegian Ministry of Justice White Paper); see also Churchill & Ulfstein, *supra* note 26, at 565–66 (noting the opinion of Norwegian Foreign Ministry consultant Carl August Fleischer).

46. See UTENRIKSDEPARTEMENTET, *supra* note 40, at 7 (rejecting any connection between Norway’s outer continental shelf submission and the Svalbard Treaty). See also Anderson, *supra* note 44, at 380 (summarizing Norway’s view, which differs from the author’s view).

47. See The Svalbard Treaty, *supra* note 3, at preamble and art. 1.

48. *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, 18 I.L.R. 141, 152 (1951). The case concerned a petroleum concession contract allowing for exclusive rights to drill for oil in the whole of the lands, islands, and sea, which belong to the Ruler of Abu Dhabi. The question was whether the concession also extended to the area of the continental shelf? Lord Asquith’s award held that the continental shelf had not attained legal status as a matter of customary law at that time.

49. See Patrick McLoughlin, *Norway, Russia on Collision Course Over Arctic Oil Drilling*, PLATTS, May 27, 2015, <http://www.platts.com/latest-news/oil/london/norway-russia-on-collision-course-over-arctic-26102429> (quoting oil industry expert stating an agreement likely because too much is at stake; noting neither side is backing down).

50. Elisabeth Braw, *The Tip of the Iceberg: Arctic Island Svalbard Is at a Center of a New Global Power Race- for Influence, and Oil*, POLITICO, May 17, 2015, <http://www.politico.eu/article/svalbard-iceberg-tourism-travel-ban/>.

51. Andrew Higgins, *A Rare Arctic Land Sale Stokes Worry in Norway*, N.Y. TIMES, Sept. 27, 2014, www.nytimes.com/2014/09/28/world/europe/a-rare-land-sale-stirs-concerns-in-norway.html?_r=0 (quoting Willy Østrem).

C. Coordinated Opposition to Norway

Russia's objection to the *status quo* is long-standing. Soviet Foreign Minister Molotov thought the treaty should have been "thrown in the trashcan" in the 1940s; that sovereignty over the southernmost island in the archipelago, Bear Island (Bjørnøya), more properly (that is, historically) belonged to Russia anyway, and that a Russo-Norwegian condominium should administer the remainder.⁵²

Coordinated opposition to Norway extends beyond Russia's historical view, signaling that multi-party disputes are consolidating around the binary positions of Norway and other Arctic stakeholders.⁵³ In 2004, the European Union (EU) delivered an 'unprecedented and hostile' *note-verbale* demanding Norway halt enforcement policies in Svalbard's waters;⁵⁴ in 2005, Finland withdrew its support of Norway during a Barents Euro-Arctic Council session;⁵⁵ Spain and Iceland have protested Norway's fishing restrictions off Svalbard;⁵⁶ and in 2006, Great Britain hosted the US, Canada, Denmark, France, Germany, Iceland, the Netherlands, Russia, and Spain in discussions about Svalbard's continental shelf. Norway was not invited.⁵⁷ The US once described Norway's interpretation of sovereign rights off Svalbard's continental shelf and superjacent water as "wishful thinking,"⁵⁸ and has since 1974 steadfastly reserved its rights with regard to the problematic interpretation of the Svalbard Treaty, thus preserving its option to oppose Norway while keeping open strategic and economic options *vis-à-vis* Russia.⁵⁹

III. ORIGINS OF THE CURRENT DISPUTE

The current dispute dates to 1970, one year before Norway ratified the United Nations Continental Shelf Convention. In that year Norway prescribed straight baselines around the archipelago, defining inland waters and territorial waters, which it asserted extended four nautical miles

52. See Torbjørn Pedersen, *The Dynamics of Svalbard Diplomacy*, 19 *DIPLOMACY & STATECRAFT* 237 (2008) [hereinafter *Dynamics of Svalbard Diplomacy*].

53. See Pedersen, *CONFLICT AND ORDER*, *supra* note 38, at 204.

54. See Pedersen, *Dynamics of Svalbard Diplomacy*, *supra* note 52, at 250.

55. See *id.* at 251.

56. See *id.* at 250.

57. See Torbjørn Pedersen, *International Law and Politics in U.S. Policymaking: The United States and the Svalbard Dispute*, 42 *OCEAN DEV. & INT'L L.* 120, 131 (2011) [hereinafter Pedersen, *U.S. Policymaking*].

58. See *id.* at 124 (quoting a 1974 statement by U.S. ambassador to Norway, Thomas Byrne).

59. See *id.* at 120 and 131.

from shore.⁶⁰ The Svalbard Treaty confirmed that Svalbard had a maritime zone because it specifically mentions Svalbard's "territorial waters." But it was the only zone mentioned in the treaty. It was the only zone aside from 'high seas', and perhaps historic bays,⁶¹ that existed at that time. The contiguous zone, the continental shelf, extended continental shelf assertions, exclusive fishing zones (EFZ/FPZ—Fisheries Protection Zones) and exclusive economic zones (EEZ) mark developments in the law of the sea that post-date the Svalbard Treaty. Deep divisions exist among parties to the treaty as to whether the treaty applies beyond the territorial sea.⁶² Legal opinions divide⁶³ or equivocate⁶⁴ on this question, but it seems the prevailing view supports the proposition that recognizes Norway's sovereignty and jurisdiction in maritime areas adjacent to Svalbard's territorial waters while also acknowledging the application of Svalbard's non-discrimination treaty provisions.⁶⁵

A Norwegian intelligence report indicated the purpose of demarcating the territorial sea around Svalbard in 1970 was to lay the formal foundation for Norway's long-term plan: To claim *unrestricted Norwegian jurisdiction* over the seabed from North Cape (near the northernmost tip of

60. See Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1970_DelimitationDecree.pdf; See Anderson, *supra* note 44, at 373–76.

61. See *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.; Nicar. Intervening), Judgment, 1992 I.C.J. 351, 733, ¶ 11 (dissenting opinion of Judge Oda) (noting the term "historic bay" arose around 1910). See also Christopher R. Rossi, *Jura Novit Curia? Condominium in the Gulf of Fonseca and the "Local Illusion" of a Pluri-State Bay*, 37 Hous. J. Int'l L. 793, 801 (2015).

62. See NORWEGIAN MINISTRY OF FOREIGN AFFAIRS, THE NORWEGIAN GOVERNMENT'S HIGH NORTH STRATEGY 17 (2006), available at <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/strategien.pdf> (acknowledging disputes with Spain, Iceland, and Russia over Norway's Fisheries Protection Zone and continental shelf). See also ODD GUNNAR SKAGESTAD, THE 'HIGH NORTH': AN ELASTIC CONCEPT IN NORWEGIAN ARCTIC POLICY 12 (2010) (noting various challenges to the Fisheries Protection Zone around Svalbard).

63. Norway's position has been supported ardently by Carl August Fleischer. See, e.g., Carl A. Fleischer, *Norges rettigheter i 200 mils sonen ved Svalbard*, in FISKEVERNSONEN VED SVALBARD 2–24 (G. Ulfstein ed., 1983); for the opposite view, see generally Wolf, *supra* note 24, 2–37; ROBIN CHURCHILL & GEIR ULFSTEIN, MARINE MANAGEMENT IN DISPUTED AREAS: THE CASE OF THE BARENTS SEA (1992) (especially ch. 2). The U.S. State Department Legal Adviser once opined that the Treaty does provide resource rights to non-Norwegians beyond Svalbard's territorial sea; but the general counsel to the U.S. Department of Defense concluded Norway's claim was strongest. See Pedersen, *U.S. Policymaking*, *supra* note 57, at 129 (footnotes omitted).

64. See Churchill & Ulfstein, *supra* note 26, at 593 (concluding it is "not possible to reach a clear-cut and unequivocal conclusion as to the geographical scope of the non-discriminatory right of all parties to the Svalbard Treaty to fish and mine in the waters around Svalbard.").

65. See Wolf, *supra* note 24, at 18 (citing R.R. Churchill's G. Ulfstein's views). Denmark shifted toward this view in the early 1980s, when Danish fleets moved into Svalbard waters after depleting fishing stocks elsewhere. See Torbjørn Pedersen, *Denmark's Policies Toward the Svalbard Area*, 40 OCEAN DEV. & INT'L L. 319, 329 [hereinafter Pedersen, *Denmark's Policies*].

Europe) to Svalbard as well as around Svalbard *except from* the areas within the four mile limits, which would be subject to Svalbard treaty provisions.⁶⁶ In 2004, to conform to the United Nations Law of the Sea Convention (UNCLOS),⁶⁷ the territorial limit was extended from four to 12 nautical miles.⁶⁸ Anticipating that treaty, Norway established a 200 nautical mile EEZ in 1976 off its mainland coast,⁶⁹ Norway aimed at establishing an EEZ around Svalbard but other states objected based on the equal enjoyment provision of the Svalbard Treaty.⁷⁰ Seeking “to avoid outright confrontation,”⁷¹ Norway chose not to press its claimed exclusive rights in the area.⁷² Instead, by Royal Decree in 1977, Norway proclaimed—“for the time being”⁷³—a 200 mile FPZ around Svalbard to regulate non-Norwegian fishing vessels.⁷⁴ Several observers interpret Norway’s approach as a long-range means of institutionalizing its management claim by minimizing “attention to conflicting interests in the Svalbard offshore area.”⁷⁵ Access would be shared by all nationals of those countries that had an established record of fishing in these waters in a 10-year period prior to the decree⁷⁶—a framework meant to accord with the non-discriminatory spirit of the Svalbard Treaty.⁷⁷

The FPZ problematized Norway’s position, however, generating criticism that Norway denies Svalbard has its own continental shelf and

66. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 343.

67. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

68. Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 344.

69. See Act No. 91 of 17 December 1976 relating to the Economic Zone of Norway, DOALOS/OLA, ¶ 1, available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Act.pdf; see also Anderson, *supra* note 44, at 376. In the first year of UNCLOS’ negotiation, the U.S. and U.S.S.R. were quick to signal to others they would support the concept of a 200 nautical mile EEZ. See Rachel Tiller & Elizabeth Nyman, *Having the Cake and Eating It Too: To Manage or Own the Svalbard Fisheries Protection Zone*, 60 MARINE POLICY 141, 144 (2015).

70. See The Svalbard Treaty, *supra* note 3, art. 2; see also Wolf, *supra* note 24, at 13–14.

71. Tiller & Nyman, *supra* note 69, at 143.

72. See Torbjørn Pedersen, *The Constrained Politics of the Svalbard Offshore Area*, 32 MARITIME POLICY 913, 916 (2008).

73. See *id.* (“for the time being”); see also Ministry of Foreign Affairs, *3 Issues of International Law*, GOVERNMENT.NO, https://www.regjeringen.no/en/find-document/dep/UD/reports-to-the-storting/20042005/report_no-30_to_the_storting_2004-2005/3/id198409/ (rephrasing as “until further notice”).

74. Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 344. The Norwegian government nevertheless justified the establishment of the FPZ on the basis of UNCLOS and its grant to coastal states a 200 nautical mile EEZ. See Numminen, *supra* note 32, at 14.

75. Pedersen, CONFLICT AND ORDER, *supra* note 38, at 202 (summarizing the ‘attention cost’ sensitivity small-state Norway cultivates to stabilize the regime in maritime areas adjacent to Svalbard); see also Tiller & Nyman, *supra* note 69, at 143.

76. See Pedersen, *U.S. Policymaking*, *supra* note 57, at 127.

77. Pedersen, *Denmark’s Policies*, *supra* note 65, at 322–24.

yet claims Svalbard generates a 200 nautical mile FPZ.⁷⁸ While Norway did not exclude non-nationals from fishing in the zone, it maintains the right to do so;⁷⁹ in 1986 it issued cod quotas, which were extended in 1996 to shrimp,⁸⁰ and periodically has skirmished with non-national vessels to enforce its restrictions.⁸¹ And yet, when Norway delimited a boundary with Denmark in 2006, it derived basepoints using markings from the headlands and outermost islands of the two opposing sides, which is a normal means of constructing a provisional equidistance line.⁸² The Norwegian basepoints, however, did not lie on the mainland of Norway but between the nearest basepoints between Greenland and Svalbard, which necessarily suggested that Svalbard must have a continental shelf.⁸³ Moreover, Norway's formulation of an application to extend the continental shelf north of Svalbard, in its submission to the Commission on the Limits of the Continental Shelf (CLCS),⁸⁴ demarcated an area as "Continental Shelf beyond 200 miles"—as measured from Svalbard. "But if Svalbard has no continental shelf the "Continental Shelf beyond 200 miles" would have to be delimited from the Norwegian mainland, not Svalbard."⁸⁵

It appears Norway has sought to make good use of the Svalbard Treaty and Svalbard's 'lack of a continental shelf' to emphasize issues of sovereignty, natural prolongation of the continental shelf from its mainland, and Norwegian ownership of resource exploration and exploitation rights in portions of the Barents Sea. But where it has been beneficial for Norway to rely on Svalbard's own continental shelf—to

78. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 346; Churchill & Ulfstein, *supra* note 26, at 567–68; see also Numminen, *supra* note 32, at 12.

79. As implied by the language employed by the 1977 Royal Decree (for the time being); see Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 346.

80. See Wolf, *supra* note 24, at 23.

81. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 346 (discussing conflicts over Norway's Fisheries Protection Zone); Numminen, *supra* note 32, at 13 (citing specific skirmishes with Spanish and Russian trawlers); Kristian Åtland & Kristin Ven Bruusgaard, *When Security Speech Acts Misfire: Russia and the Elektron Incident*, 40 SECURITY DIALOGUE 333–54 (2009) (discussing the hot pursuit of the Russian trawler *Elektron*, which refused arrest for illegal fishing in the FPZ, and headed for Russian territorial waters with two Norwegian coast guard inspectors on board). In 2004, the arrest of two Spanish trawlers in Svalbard's FPZ, prompted a suit settled in favor of Norway by the Norwegian Supreme Court. The applicability of the Svalbard Treaty was argued but not a basis for the decision, which instead, highlighted the non-discriminatory application of the FPZ. See Tiller & Nyman, *supra* note 69, at 143.

82. See Anderson, *supra* note 44, at 377.

83. Numminen, *supra* note 32, at 12 ("Svalbard cannot provide basepoints for determining an equidistant line if it does not have a continental shelf."); see also Churchill & Ulfstein, *supra* note 26, at 567.

84. See UNCLOS, *supra* note 67, art. 76 (establishing the Commission).

85. Numminen, *supra* note 32, at 12; see also Churchill & Ulfstein, *supra* note 26, at 568.

delimit boundaries with Denmark; to present to the CLCS continental shelf extension considerations northward of Svalbard—it displays a tendency to seek control over previously unsecured resources because it is in an enviable position to do so.⁸⁶ This tendency has a firm basis in the history of the law of the sea. It was principally framed by the great jurist, Hugo Grotius (1583–1645), who represented Dutch mercantile interests to exclude the Portuguese and Spanish from seventeenth century commercial trade routes to Asia all in the name of freedom of the seas (*mare liberum*).⁸⁷ But D.H. Anderson argued Norway cannot have it both ways: It cannot interpret its sovereignty in an ambulatory (inter-temporal/dynamic) way to maximize control over its land and original waters, but also to the extended territorial sea, the continental shelf, and fisheries zone, while at the same time “interpret[ing] the reference to other states’ rights strictly so that [their] rights were confined to the land and the original territorial sea.”⁸⁸ It appears beneficiary countries of Norway’s FPZ seemingly are wanting it both ways, as well. While some reserve their rights to declare the Svalbard Treaty’s geographic applicability to the continental shelf adjacent to Svalbard’s territorial waters, and others dispute Norway’s claim to both the continental shelf and the FPZ, all benefit from Norway’s inclusion of their nationals’ fishing interests in the resource-rich waters within the zone⁸⁹ and the exclusion of other national fleets that had no traditional fishing presence there ten years prior to Norway’s enclosure of that fishing zone.⁹⁰ Additionally, all benefit as free-riders as management costs are borne by Norway alone. For this reason,

86. On the Grotian tendency in international law, *see generally* Christopher R. Rossi, *A Particular Kind of Dominion: The Grotian Tendency and the Global Commons in a Time of High Arctic Change*, 11 J. INT’L L. & INT’L REL. 1–60 (2015).

87. *See generally id.*; PETER BORSCHBERG, *HUGO GROTIUS, THE PORTUGUESE AND FREE TRADE IN THE EAST INDIES* (2010); and MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES (1595–1615)* (2006).

88. Anderson, *supra* note 44, at 381. If the equitable treatment provisions of the Svalbard Treaty were deemed to cover activity on the continental shelf of Svalbard, ancillary issues would arise regarding the Svalbard Treaty’s tax provision (which limits Norway’s imposition of higher taxes strictly to what is required for administration of the archipelago, thus serving as a boon for oil companies) and Mining Code (and whether its mining provision on Svalbard’s land and in territorial waters extends by analogy to petroleum and gas operations on the continental shelf).

89. The zone is particularly rich in cod, haddock, and capelin, with 25 percent of cod catches in the Barents Sea coming from the zone and 18 percent of Norway’s total fish catch coming from the Svalbard zone. *See* Churchill & Ulfstein, *supra* note 63, at 100.

90. *See* Numminen, *supra* note 32, at 14–15; *see also* Anderson, *supra* note 44, at 374.

many of the conservation measures undertaken in the FPZ are respected,⁹¹ less so its enforcement measures, however.⁹²

It appears Canada and Finland supported for a time Norway's view that the treaty does not apply seaward of Svalbard's territorial sea but these views have changed.⁹³ Iceland and Russia vociferously dispute that claim, as does the Netherlands, Spain, and the United Kingdom. Other states parties to the treaty have reserved their positions or have not made them known publicly.⁹⁴ Relevant international case law is modest and inconclusive, but portions of one case support Norway's opponents. In the *Aegean Sea Continental Shelf* case, Greece asked the ICJ to adjudicate a continental shelf dispute with Turkey. Greece had made a reservation to the ICJ's jurisdiction long before the continental shelf doctrine existed; the reservation excepted from the ICJ's purview disputes "relating to the territorial status of Greece."⁹⁵ Greece attempted unsuccessfully to argue its reservation could not be used against it to excuse judicial review because it was not made in contemplation of the zone in dispute. But the Court found it applicable, holding that the Greece intended the reservation pertaining to the "territorial status of Greece" as a "generic term" that had ambulatory significance: "[i]ts meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time."⁹⁶ Robin Churchill and Geir Ulfstein have argued this case parallels the Svalbard situation: If Greece's "maritime rights had changed over time to include the continental shelf, so had there been a corresponding change in the scope of Greece's acceptance of jurisdiction."⁹⁷ Likewise, if Norway's right to sovereign claims over Svalbard has increased over time, "so, it can be argued, there has been a corresponding increase in the limitations on that sovereignty" as expressed

91. See Olav Achram Stokke, *Kampen om rovfisket i nord [The Struggle over Illegal, Unreported and Unregulated Fishing in the Barents Sea]*, AFTENPOSTEN (NOR.), Oct. 22, 2005, translation available at www.fni.no/doc&pfd/oss-kronikk-eng.PDF.

92. See generally Geir Hønneland, *Fisheries in the Svalbard Zone: Legality, Legitimacy and Compliance*, in *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 317–36 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2001); Wolf, *supra* note 24, at 22. There are some complaints that Norway has turned something of a blind eye to Russian laxity with regard to its reported catch. *Id.* at 25. Russian authorities refuse to accept Norwegian managerial sovereignty in the Svalbard zone and refuse to submit and sign inspection reports to the Norwegian Fisheries Directorate in Bergen. See Tiller & Nyman, *supra* note 69, at 145–46. For tabulated instances of Russian challenges to Norwegian sovereignty in the Svalbard FPZ, see *id.* at 146.

93. See Churchill & Ulfstein, *supra* note 26, at 564–65.

94. See *id.* 565.

95. See *supra* note 23.

96. *Id.* at 32, ¶ 77.

97. Churchill & Ulfstein, *supra* note 26, at 578.

in Articles 2 and 3, the equal enjoyment and equal liberty of access provisions.⁹⁸

IV. THE MEANING OF FULL AND ABSOLUTE SOVEREIGNTY

The 1920 Svalbard Treaty conferred “full and absolute sovereignty” on Norway over Svalbard,⁹⁹ but not in accordance with the ordinary and plain meaning of that phrase.¹⁰⁰ Conditions attached to Norway’s sovereignty obligating Norwegian authorities to respect certain restrictions as the *quid pro quo* for international recognition of it rule.¹⁰¹ Fundamental to the treaty are the principles of non-discrimination and equal enjoyment. Citizens and companies from all treaty nations enjoy equally the same right of access to and residence in Svalbard. Rights to fish, hunt, or undertake any kind of maritime, industrial, mining or commercial enterprises on land and in the territorial waters are granted to them all on equal terms. While Norway is granted allowance to maintain suitable environmental controls, such protections must apply equally to all. All parties have equal liberty of access to the islands’ waters, fjords, and ports. Nationality accords no preferential treatment among signatories. On matters of international trade, the nationals of all parties to the agreement shall not be subject to any charge or restriction not borne by the nationals to whom Norway grants most favored nation status. Property rights, including mineral rights, are granted to all nationals of parties to the agreement on the basis of complete equality. Taxes collected on Svalbard may only benefit Svalbard, not the mainland, and the islands must remain demilitarized.¹⁰²

The curious and qualified meaning of Norway’s ‘full and absolute sovereignty’ over Svalbard and its territorial waters are at the heart of this dispute, as is the idea of limiting sovereignty over previously un contemplated but newly accessible resources. ‘Qualified yet full and absolute sovereignty’ has the ring of an oxymoron. But surprisingly, it has an involved history that predates the Svalbard Treaty; the problematic phrase can better be understood within the context of Svalbard’s 400 year human history. Even in this context, a definitively clear understanding

98. *Id.*

99. The Svalbard Treaty, *supra* note 3.

100. See BARBARA KEMPEN, DER VÖLKERRECHTLICHE STATUS DER INSELGRUPPE SPITZBERGEN 54–71 (1995).

101. See Wolf, *supra* note 24, at 9 (noting Norway’s sovereignty was recognized in conjunction with other states parties’ non-discriminatory rights *ab initio*).

102. See The Svalbard Treaty, *supra* note 3, arts. 1–9.

remains elusive, perhaps because states historically reaped delicate territorializing rewards by maintaining an artifice of temporary sovereignty. Svalbard's history presents a tidal flow of equivocating interest in the archipelago, rising and receding with estimates of its economic potential. Void of an indigenous population, the region nevertheless bears the imprint of the human hand; commonly called a no man's land, it never unequivocally embraced the meaning of a *terra nullius*, a term that escapes a single, precise, and agreed upon meaning.¹⁰³ The ICJ defined *terra nullius* as a "territory belonging to no one,"¹⁰⁴ where, as Peter Ørebech claims, the term's "core characteristic is lack of governmental regulation."¹⁰⁵ And yet states historically have proposed various schemes for the international administration of the archipelago while acknowledging that it should remain a *terra nullius*.¹⁰⁶

V. THE POVERTY OF COMPETING HISTORICAL NARRATIVES

National historical traditions contribute to multiple and competing narratives regarding the colonization of Spitsbergen, including one hypothesis dating to the Stone Age.¹⁰⁷ These narratives are legally significant. They play an important, sometimes essential, role in showing how title to territory has been interpreted in practice.¹⁰⁸ Judges and arbitrators refer to them as *effectivités* and they seek them out where

103. See generally MICHAEL CONNOR, *THE INVENTION OF TERRA NULLIUS: HISTORICAL AND LEGAL FICTIONS ON THE FOUNDATIONS OF AUSTRALIA* (2005). Blackstone, *supra* note 5, at 106-108, makes reference to "deserted" or "uncultivated" or "uninhabited" land, but never uses the term; other usages relate to inhabited but undeveloped land. Geoffrey Partington notes Blackstone never used the term *terra nullius*. Geoffrey Partington, *Thoughts on Terra Nullius*, 19 PROCEED. OF THE NINETEENTH CONF. OF THE SAMUEL GRIFFITH SOC'Y 96, 96 (2007), available at www.samuelgriffith.org.au/papers/html/volume19/v19chap.11.html.

104. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 38, ¶ 79.

105. Ørebech, *supra* note 25, at 9.

106. See *id.* at 9 (noting Norway's stance at the beginning of World War I "that Spitsbergen should remain a 'no man's land' (*terra nullius*) and that the management of the archipelago should become international.").

107. See generally Thor B. Arlov, *The Discovery and Early Exploitation of Svalbard. Some Historiographical Notes*, 22 ACTA BOREALIA 3 (2005) (discussing Svalbard's controversial historiography relating to its discovery, including the possibility of a Stone Age settlement); S.E. Albrethsen & T.B. Arlov, *The Discovery of Svalbard—A Problem Reconsidered*, FENNOSCANDIA ARCHAEOLOGICA V, 105 (1988) (reviewing Stone Age, Viking 12th–13th century, Russian Pomor 16th century and Barents hypotheses); Edwin O. Okhuizen, *Dutch Pre-Barents Maps and the Pomor Thesis about the Discovery of Spitsbergen*, 22 ACTA BOREALIA 21 (2005) (surveying archaeological investigations favoring and disfavoring the Pomor thesis on Spitsbergen's discovery).

108. Frontier Dispute, 1986 I.C.J. 587; cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 212, 219 (Mar. 16) (separate opinion of Judge Al-Khasawneh).

definitive legal or historic title is lacking as they may provide concrete considerations leading to determinations of good title. But they cannot upend the *status quo* if good title already exists. Much is made of them from national perspectives to buttress competing claims of first-finder or first-occupier, but they can become all consuming.¹⁰⁹ An arbitral panel once received these types of claims with indulgence, noting they may be voluminous in quantity but sparse in useful content.¹¹⁰ The important early twentieth century American legal authority, James Brown Scott, animated by the conquest of the North Pole in 1909, took up the *terra nullius* implications of Arctic exploration and international law, but promptly “disregarded” *les effectivités* of early (pre-modern) Arctic expeditions “just as the predecessors of Columbus are ordinarily passed over in considering the discovery of America.”¹¹¹ According to Scott, they lacked the jarring impetus and incentive to stimulate “conflict and controversy” and the need for legal regulation.¹¹²

A selective recourse to history, perhaps, but an observation of relevance to the *effectivités* and human history of Spitsbergen: Russian hunters of the high northwest (the Pomors) are said to have referred to the islands, which they called Grumant, since medieval times; a leading Russian monograph concludes Russian discovery rights to Spitsbergen are persuasive;¹¹³ the Vikings mentioned it in Icelandic sagas (the *Landnámabók*) in 1194,¹¹⁴ supporting the prevailing Norwegian theory that Norsemen discovered the islands;¹¹⁵ the Danes were said to frequent the archipelago by the 16th century, and claimed them under a mistaken

109. See, e.g., ROBERTO C. LAVER, *THE FALKLANDS/MALVINAS CASE: BREAKING THE DEADLOCK IN THE ANGLO-ARGENTINE SOVEREIGNTY DISPUTE* (2001) (detailing withering historical and legal disputes between Argentina and Great Britain over competing sovereignty claims to Falkland/Malvinas islands).

110. *Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen)*, 22 R.I.A.A. 209, 268 (Perm. Ct. Arb. 1998). Disputed islets in the South China Sea doubtless have and will give rise to extensive and competing claims of historical title, the legal significance of which remains to be seen.

111. James Brown Scott, *Arctic Exploration and International Law*, 3 AM. J. INT’L L. 928, 928 (1909).

112. *Id.* at 928–29.

113. A leading Russian monograph concludes Russian rights to Spitsbergen are persuasive. See VYLEGZHANIN & ZILANOV, *supra* note 12, 1–2.

114. See FRIDTJOF NANSEN, IN *NORTHERN MISTS VOL. II: ARCTIC EXPLORATION IN EARLY TIMES* 166 (Arthur G. Chater trans., 1911) (noting “*Svalbaros furdr*” [Svalbard discovered] “surely no great geographical discovery has ever been more briefly recorded in literature.”).

115. See ULFSTEIN, *THE SVALBARD TREATY*, *supra* note 19, at 33 (1995). See also WILLY ØSTRENG, *POLITICS IN HIGH LATITUDES: THE SVALBARD ARCHIPELAGO 2* (R.I. Christophersen, trans., 1978).

identity;¹¹⁶ England asserted Sir Hugh Willoughby made the discovery in 1553 before perishing in a tempest off Norway;¹¹⁷ but most credit the Dutch explorer, Willem Barents, with the discovery in 1596. On a third voyage in search of the elusive Northeast Passage to Cathay, piloting ships commanded by Jacob van Heemskerck and Jan Cornelisz Rijp, Barents spied a land consisting only of mountains and pointed hills, and named it 'Spitsbergen,'¹¹⁸ mistaking it for a part of Greenland.¹¹⁹ In the early twentieth century, the Dutch attempted to attach priority to Barents' name as the sole discoverer of Spitsbergen.¹²⁰ Aside from conflicting historical narratives, Spitsbergen indisputably forms the largest island in the archipelago now called Svalbard, an Old Norse term meaning "cold coast."¹²¹

With Barents' sighting, conflict and controversy followed. Henry Hudson, looking for the elusive Northwest Passage in service of the Dutch East India Company (VOC), caught sight of numerous whales off Spitsbergen in 1607. Buttressed by additional pod sightings in 1611, a robust whaling industry commenced.¹²² By the late seventeenth century, the Spitsbergen area hosted 200–300 whaling ships carrying upwards of 12,000 men.¹²³ The Dutch alone caught 1100 whales in 1722, but already the industry take probably exceeded the replenishment of stock.¹²⁴ This industry first attracted Englishmen, then embittered Dutchmen, whose maritime interests were caught in a vice: By royal decree in 1609,¹²⁵

116. Danish King Christian IV also claimed them in his capacity as King of Norway owing to the general sovereignty over the Northern Sea that this title bestowed. See THOR B. ARLOV, *A SHORT HISTORY OF SVALBARD* 18 (1989) [hereinafter ARLOV, *SHORT HISTORY*].

117. See ULFSTEIN, *THE SVALBARD TREATY*, *supra* note 19, at 34 (noting the claim has been rejected).

118. See generally V.F. Starkov, *Russian Arctic Seafaring and the Problem of the Discovery of Spitsbergen*, *FENNOSCANDIA ARCHAEOLOGICA* III, 67–72 (1986).

119. See MARTIN CONWAY, *NO MAN'S LAND: A HISTORY OF SPITSBERGEN FROM ITS DISCOVERY IN 1596 TO THE BEGINNING OF THE SCIENTIFIC EXPLORATION OF THE COUNTRY* 14 (2011) [1906].

120. See Elen C. Singh & Artemy A. Saguirian, *The Svalbard Archipelago: The Role of Surrogate Negotiators*, in *POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES* 54, 61 (Oran R. Young & Gail Oserenko eds., 1993).

121. NANSEN, *supra* note 114, at 166.

122. See Louwrens Hacquebord, Frits Steenhuisen & Huib Waterbolk, *English and Dutch Whaling Trade and Whaling Stations in Spitsbergen (Svalbard) before 1660*, 15 *INT'L J. MAR. HIST.* 117, 117 (2003). Apparently the earliest English whalers set sights first on herds of walruses, which were plentiful on the west coast of Spitsbergen. See *17th Century Whaling, History of Spitsbergen*, <http://www.spitsbergen-svalbard.com/spitsbergen-information/history/17th-century-whaling.html>; see also CONWAY, *supra* note 119, at 20 (discussing commencement of walrus hunting in 1603–1604).

123. See ARLOV, *SHORT HISTORY*, *supra* note 116, at 25.

124. See *id.* at 32–33.

125. *By the King, A Proclamation Touching Fishing, Westminster, May 6, 1609, James I: Volume 45, May, June, 1609*, in *CALENDAR OF STATE PAPERS DOMESTIC: JAMES I, 1603–1610* 507, 509 (Mary

English King James I had blocked them from fishing herring off England's coast; and Spain and Portugal had since 1598 blockaded Dutch access to the Mediterranean Sea. In response, Grotius published his famous tract on *Mare Liberum* (The Free Sea, 1609),¹²⁶ and a year later, the Dutch articulated the 'cannon shot' rule, to reclaim control over waters encroached on by England. This claim reformulated a 1598 Danish decree establishing an exclusive two-league fishing belt around Iceland's waters, owing to Denmark's functional inability to assert broader sovereign interests over the Northern Sea. The Dutch claimed no sovereign could control more of the sea than he can command with a cannon, a distance from the shore of three nautical miles.¹²⁷ The Dutch publicist, Cornelius van Bynkershoek, later crystallized this famous 'cannon-shot' rule in doctrinal form, establishing the territorial extension of sovereignty into the seas.¹²⁸ The seafaring seventeenth century soon enough would belong to the Low Countries, but at the beginning of that century, excluded from the North and Mediterranean Seas, they had to set sail farther north in search of fish and a wishful passageway to eastern emporia.

Their sea roving led to Spitsbergen, where they established an on-shore flensing camp at Smeerenburg ('Blubbertown'), on the northwest tip of the island. The English, shortly before, had set up camp in the southwestern Bell Sound near Bottle Cove.¹²⁹ At these stations and others, hunters harvested seal, walrus tusks, baleen, and blubber to trade with the rest of Europe. Baleen is the comb-like filtration system found in the upper jaw of baleen whales that Europeans transformed into parts for parasols, furniture, wagons, and corsets. At times, its price was so high, whales were caught exclusively to acquire it.¹³⁰ Blubber was rendered into oil for lamps, lubricants for industry, tanning fats for hides, soap—and good money. Its most-prized and pursued supplier was the Bowhead (Right)

Anne Everett Green ed., 1857), <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1603-10/pp507-523> (last visited May 13, 2015).

126. Grotius withheld publication of the pamphlet, the re-worked 12th chapter of a much larger, never published work (*De Jure Praede*) on the instruction of his mentor, the Land Advocate of the rebellious Dutch Republic, Johan van Oldenbarnevelt, who at that time was involved in delicate negotiations with Spain, which resulted in the Twelve Year Truce, easing Dutch access into the Mediterranean. See Rossi, *supra* note 86, at 20–21.

127. See H.S.K. Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537, 538–39 (1954).

128. See generally CORNELIUS VAN BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATIO* (1702).

129. See Hacquebord et al., *supra* note 122, at 117–19; NOAA Fisheries Office of Protected Resources, *Bowhead Whale*, <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/bowhead-whale.htm> (up to 50 cm layer of blubber).

130. J.N. TØNNESSEN & A.O. JOHNSEN, *THE HISTORY OF MODERN WHALING* 6 (R.I. Christophersen trans., 1982).

whale,¹³¹ layered in up to 50 centimeters (1.6 feet) of blubber.¹³² Its population estimate “prior to the beginning of commercial exploration in the early sixteenth century was a minimum of 50,000, of which almost half (24,000) were in the ‘Spitsbergen stock’ of the Greenland Sea.”¹³³ Captain Ahab plied the nineteenth century South-Sea in vengeful pursuit of one Sperm whale, *Moby Dick*, but the novel’s author, Herman Melville drew real-life inspiration from the English Arctic whaleman, William Scoresby, who attracted fame from ventures in the Greenland Sea; his first-hand accounts of the Arctic whale trade¹³⁴ attained a kind of canonical status among mariners.¹³⁵ Melville cited Scoresby’s accomplishments in his great novel’s curious 32nd chapter. There, Melville diverts the narrative account of the *Pequod*’s impending doom “to attend to a matter almost indispensable”—cetology.¹³⁶ The book’s narrator praises Captain Scoresby as the supreme exemplar of the “harpooner and whaleman,” the “best existing authority” on the Greenland (Right) [Bowhead] whale; the narrator’s only criticism of Scoresby is his ignorance that “the great sperm whale now reigneth!,” not the “Greenland or right-whale.”¹³⁷

French sea hunters followed the Dutch to Spitsbergen, with Basque masters on board to school them in the craft of harpooning.¹³⁸ Scandinavians from the united kingdom of Denmark-Norway appeared, as did Germans,¹³⁹ and a two hundred and fifty year enterprise began. This industry waned in the mid-seventeenth century due to the development of open sea flensing techniques, which contributed to over-fishing; this development diminished the need for *terra firma* whaling stations,

131. Called the ‘Right’ whale because it was the right whale to hunt. See NOAA Fisheries, *Right Whales*, <http://www.afsc.noaa.gov/nmml/education/cetaceans/right.php>.

132. See ARLOV, SHORT HISTORY, *supra* note 116, at 22.

133. I THE ARCTIC WHALING JOURNALS OF WILLIAM SCORESBY THE YOUNGER: THE VOYAGES OF 1811, 1812 AND 1813, xxxviii (C. Ian Jackson ed., 2003) [hereinafter SCORESBY]. Regulatory protections of the Bowhead whale date to the 1931 League of Nations Covenant but the Spitsbergen stock never recovered from whaling epoch. They currently number less than one hundred in these waters and remain “endangered” in this area.

134. See generally AN ACCOUNT OF THE ARCTIC REGIONS WITH A HISTORY AND DESCRIPTION OF THE NORTHERN WHALE-FISHERY, vols. I and II (1968/1969) [1820].

135. See GORDON JACKSON, BRITISH WHALING TRADE xi (2005) (concluding “any work on the traditional whaling trade must be deeply indebted to William Scoresby”); Sir Alister Hardy, *Introduction*, in AN ACCOUNT OF THE ARCTIC REGIONS WITH A HISTORY AND DESCRIPTION OF THE NORTHERN WHALE-FISHERY I (1968) [1820] (citing volume I as a “classic” and “one of the most remarkable books in the English language” and volume II as “the finest account of Arctic whale fisheries ever written.”).

136. HERMAN MELVILLE, *MOBY DICK, OR, THE WHALE* ch. 32, 133 (1979) [1851].

137. *Id.* at 134.

138. See Philippe Henrat, *French Naval Operations in Spitsbergen During Louis XIV’s Reign*, 37 ARCTIC 544, 544 (1984).

139. See KEMPEN, *supra* note 100, at 14.

provided more time at sea to hunt, and pushed fleets farther west into unadulterated waters of the Greenland Sea. By the 1870s, massive overexploitation¹⁴⁰ and commercial substitutes for whale oil¹⁴¹ took their toll and ended the commercial trade. But from the moment of its discovery in the modern age, the history of Spitsbergen became associated with the exploitation of natural resources;¹⁴² denuded of its cetological economy, human interest in Spitsbergen swept away, along with the detritus left by flensers at the water's edge.

VI. THE PROTO-COMMONS AGREEMENT OF 1872

By 1872, following a forestalled effort by a united Sweden-Norway to claim sovereignty,¹⁴³ an unusual reversal of territorial temptation took place: Through a diplomatic exchange of notes, Russia and Sweden-Norway declared Spitsbergen to be a *terra nullius*—commonly called a ‘no man’s land’,¹⁴⁴ thought to be valueless except to occasional Russian and Norwegian fur trappers,¹⁴⁵ whose numbers already had diminished by then due to scurvy, murder, and privation.¹⁴⁶

A. *A Different Kind of No Man’s Land*

But the Russo/Swedish-Norwegian Agreement of 1872 established a different kind of no man’s land. The agreement employed the term *terra nullius* but did not construe Spitsbergen as a landmass void of overarching law.¹⁴⁷ Rather, the agreement—as between the two countries—

140. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 341. Data from Dutch, German, and British sources suggest depredations in stock upwards of 10,000 per decade in the late seventeenth century. See 1 SCORESBY, *supra* note 133, at xxxviii.

141. See John R. Bockstoce & John J. Burns, *Commercial Whaling in the North Pacific Sector*, in THE BOWHEAD WHALE 563, 570 (1993) (noting negative price effect by the 1880s).

142. Dag Avango, *Svalbard Archaeology* (2005), <http://www.svalbardarchaeology.org/history.html>.

143. Denmark ceded Norway to Sweden in 1814 (the Treaty of Kiel) and the United Kingdoms of Sweden and Norway lasted until 1905, when Norway formed as its own constitutional monarchy. On Russia’s opposition to Sweden-Norway’s brief 1871 attempt to claim sovereignty, see KEMPEN, *supra* note 100, at 16.

144. See R.N. Rudmose Brown, *Spitsbergen in 1914*, 46 THE ROYAL GEOGRAPHICAL SOC’Y (WITH THE INSTITUTE OF BRITISH GEOGRAPHERS) 10, 15 (1915).

145. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 341. See also CONWAY, *supra* note 119, at 3. Norwegian fur traders first appeared in 1795. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 5.

146. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 4; Marek E. Jasinski, *Russian Hunters on Svalbard and the Polar Winter*, 44 ARCTIC 156, 156 (1991) (noting that Russian trappers left the archipelago completely around the middle of the 19th century).

147. VYLEGZHANIN & ZILANOV, *supra* note 12, at 10.

consolidated their preferential rights to clarify the emerging legal status of Spitsbergen on behalf of the international community—a preferential movement toward a special kind of condominium whereby “Spit[s]bergen was regarded as a territory which could not be the object of exclusive possession by any State.”¹⁴⁸ The binding implications of this exchange of notes would be revisited in the early twentieth century in line with the principle of *pacta tertiis*, which precludes the application of agreements against the rights of third parties absent their consent.¹⁴⁹ But the 1872 diplomatic exchanges marked an important historical first step in Spitsbergen’s legal development, conceptualizing it more as a *res communis*—at least in terms of subjecting its administration to common oversight by two self-deputized stewards—rather than as a *terra nullius*. As noted by Geir Ulfstein, “[t]he legal difference between the two concepts is that sovereignty over *terra nullius* may be acquired by occupation (equating the notion of *terra nullius* with *res nullius*¹⁵⁰), whereas *res communis* cannot be the object of occupation.”¹⁵¹ Important Russian legal scholars support the contention that the 1872 diplomatic exchanges meant Spitsbergen could no longer be considered a *terra nullius*, if interpreted as a land subject to any state’s sovereign claim.¹⁵²

148. *Id.* at 9 (quoting Dekanozov’s interpretation of the 1872 exchange of notes). Responding to Sweden-Norway’s query whether Russia would object to the former’s assertion of sovereignty over Spitsbergen, the Russians responded in its diplomatic note 15 of May 27, 1871 with ‘the more practical proposal to maintain by tacit agreement that this group of islands remain as an area accessible to all (“*Il nous paraîtrait dès lors plus pratique de ne point les aborder et de nous borner à la situation de fait maintenue jusqu’ici par un accord tacite entre les Gouvernements et qui fait considérer ce groupe d’îles comme un domaine indécis accessible à tous les Etats*”). See ULFSTEIN, THE SVALBARD TREATY, *supra* note 19, at 37 n.53.

149. See, e.g., the perspectives added following the 1914 Conference on Spitsbergen, *infra* text accompanying notes 219–22.

150. *Res nullius*: A thing that has no owner, in which case it may be appropriated by the first finder. See generally F.S. Ruddy, *Res Nullius and Occupation in Roman and International Law*, 36 UMKC L. REV. 274–87 (1968).

151. ULFSTEIN, THE SVALBARD TREATY, *supra* note 19, at 37.

152. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 10–11 and accompanying notes (citing Dekanozov, Buromenskii, and Timchenko and attributing the inaccuracy to Oreshenkov’s reading of Bekiashev’s PUBLIC INTERNATIONAL LAW (3d ed.) (2004)). The authors also claim the diplomatic exchange of notes did not renounce Russia’s historical rights to the archipelago. See *id.* at 10. The important American international law scholar and practitioner, James Brown Scott, also mischaracterized the conclusion of the diplomatic exchanges. See Scott, *supra* note 111, at 941 (finding “the two governments agreed formally that the region should remain as it had been, no man’s land (*terra nullius*).”

*B. The Historical Difficulty with Spitsbergen's Common Administration:
Contested Claims*

The proto-commons administration idea stood in opposition to the early seventeenth century mindset. Disputes about title to Spitsbergen arose almost immediately after human colonization—on land and in the blubber-rich western waters off Spitsbergen. English whalers “removed the Dutch marker set up by Barents,”¹⁵³ contesting whatever implications of *dominium* it might imply. English and Dutch commanders secured an uneasy peace by mutually agreeing to exclusive whaling grounds in 1614, but the peace would not hold.¹⁵⁴ Denmark-Norway dispatched warships to collect tribute from interloping whalers;¹⁵⁵ camps were raided and destroyed,¹⁵⁶ vessels were seized; the Dutch belligerently penetrated Bell Sound and in 1618 dispatched a fleet of twenty-three men-of-war to respond to provocation and to intimidate the English.¹⁵⁷ Motivated by the lingering belief Spitsbergen formed part of Danish-Norwegian Greenland, King James I offered to purchase the islands in 1613. Failing a reply from the union's King Christian IV, he claimed them for England in 1614.¹⁵⁸ Christian IV responded by sending warships north and intermittently continued to do so as late as 1643, still defending the mistaken belief that Spitsbergen formed part of Danish-owned Greenland. In a demonstration of its astonishingly rapid rise as the century's maritime superpower, the United Provinces asserted military and seamanship superiority over the English hunting fleet in 1618, effectively securing for its fleet access to Spitsbergen's whaling rewards.¹⁵⁹

The waning of the whaling industry gave way to a late-eighteenth to mid-nineteenth century period of commercial quietude—turning Spitsbergen into a *de facto terra nullius*; but twentieth century economic pursuits, this time mineral pursuits, brought renewed human interest in the archipelago. A four hundred million year succession of metamorphic geology layered Spitsbergen's 15,000 meter-thick sedimentary bedrock

153. Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 341.

154. Hacquebord et al., *supra* note 122, at 120.

155. ARLOV, *SHORT HISTORY*, *supra* note 116, at 18.

156. See ULFSTEIN, *THE SVALBARD TREATY*, *supra* note 19, at 34.

157. Hacquebord et al., *supra* note 122, at 120.

158. Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 341; Brown, *supra* note 144, at 15 (noting England's proxy authority to claim the land as “King James his New Land” was given to ships operating under the authority of the English Muscovy Company, which was created for trade with Russia). See VYLEGZHANIN & ZILANOV, *supra* note 12, at 3.

159. See Pedersen, *Svalbard Continental Shelf Controversy*, *supra* note 38, at 341.

with coal.¹⁶⁰ Norwegians commenced the first commercial mining operation in 1899 and British-Norwegian, American-Norwegian, Russian, Swedish, and Dutch mining towns sprouted up before World War I,¹⁶¹ establishing a human presence that continues to this day. Svalbard's main city, Longyearbyen, bears the name of the American head of the Arctic Coal Company, John M. Longyear, whose company, chartered in West Virginia,¹⁶² established the settlement in 1906.

The comingling of mining nationalities soon created conflicts. But Spitsbergen's location presented a strategic problem, too. Both the United States and Russia recognized the military importance of the archipelago.¹⁶³ In 1899, Russia dispatched the naval vessel *Svetlana* to Bear Island, the southernmost island of the archipelago, to counter a German presence and to preempt its possible claim of sovereignty.¹⁶⁴ Russian foreign policy archivists regarded Bear Island as a station on its maritime route from the Baltic Sea to its Far North and to Siberia.¹⁶⁵ Connecting Spitsbergen to the maritime route to Siberia implies its connection to the Northern Sea Route, the intercoastal route established to develop and extract resources from Russia's High Arctic interior.¹⁶⁶ The United States Foreign Office briefly entertained the thought of making Spitsbergen an American protectorate in 1909.¹⁶⁷ Establishing strategic refueling stations for far-flung naval fleets was a major preoccupation for maritime powers at this time and posturing for port access to well-placed coaling stations stimulated keen competition among U.S., European, and Japanese navies in Caribbean and Pacific waters surrounding the soon-to-be open Panama Canal.¹⁶⁸ The U.S. Navy's surprisingly successful use of colliers for refueling during its world cruise of 1907–1909, soon would lessen the importance of this

160. See Ole Humlum, *A Geographical-Historical Outline of Svalbard*, http://www.unis.no/35_staff/staff_webpages/geology/ole_humlum/SvalbardOutline.htm.

161. See *id.*

162. ELEN C. SINGH, *THE SPITSBERGEN (SVALBARD) QUESTION: UNITED STATES FOREIGN POLICY, 1907–1935* 12 (1980).

163. For Russia's view, see KEMPEN, *supra* note 100, at 18 (“*Russland erkannte die militärstrategische Bedeutung des Archipels*”); for the U.S. view, see *infra* note 168 and accompanying text.

164. See ULFSTEIN, *The Svalbard Treaty*, *supra* note 19, at 38.

165. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 22 (footnote omitted).

166. This cabotage system would play an important military role for the Soviets in World War II.

167. See Brown, *supra* note 144, at 15.

168. The competition was a motivation behind the August 1914 Bryan-Chamorro Treaty between the U.S. and Nicaragua. Art. II granted the U.S. an exclusive and renewable 99 year lease on a naval base on islands in the Gulf of Fonseca. See generally *Interoceanic Canal (Bryan-Chamorro Treaty)*, in *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949* 379–81 (C. Bevans ed., 1968–76).

imperial temptation, perhaps diverting military but not economic attention away from High Arctic waters.¹⁶⁹

C. *The Problematic Rise of the Term Terra Nullius*

But in 1906, a non-military matter arose: Norwegian coal miners, employed extensively among the foreign mining companies at varying wages, went on strike.¹⁷⁰ The strike presented Spitsbergen's first dangerous development given the land's lack of legal authority.¹⁷¹ At one point, mounting tensions prompted an English mining company to petition for Royal Navy support to quell labor strife at a camp called Advent City.¹⁷² Labor unrest would persist in Spitsbergen until 1920,¹⁷³ the year Norway undertook to draft a Mining Code in anticipation of achieving sovereign rights over Spitsbergen (which it would later rename Svalbard).¹⁷⁴

It was specifically within this Arctic context that the problematic term *terra nullius* again came to prominence, appearing in the pages of the *Revue générale de droit international public* and in the writings of Camille Piccioni, James Brown Scott, Ernest Nys, and Franz Depagnet.¹⁷⁵ But what did *terra nullius* mean in Spitsbergen's twentieth century context? Did it preclude possession by states as a confused or commingled expression of *res communis*? Did it imply a condominium arrangement among interested parties? Did it require formal multilateral legal administration through treaty creation? Or did it express a beachcomber's delight, bestowing treasures on privateers who were lucky or capable enough to fall first into possession of ownerless property? Each of these usages attached to the meaning of *terra nullius* in Spitsbergen's history, but the term also faded from the lexicon alongside periods of Spitsbergen's diminishing economic appeal, and with the return of Spitsbergen's economic potential, legal views began to reformulate applications of the *terra nullius* term.

169. See Rossi, *supra* note 61, at 833–34.

170. See KEMPEN, *supra* note 100, at 17.

171. See *id.* at 17 (noting “*die ersten gefährlichen Folgen*”).

172. See ARLOV, SHORT HISTORY, *supra* note 116, at 58.

173. See *id.* at 58.

174. Treaty Relating to Svalbard art. 8, Feb. 9, 1920, 2 L.N.T.S. 8 (requiring Norway to undertake mining regulations); See ØSTRENG, *supra* note 115, at 16–18 (discussing the origins of the Mining Code).

175. See Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, 38 AUSTRALIAN HISTORICAL STUDIES 1, 2–4 and accompanying notes (2007).

VII. ROBERT LANSING'S VIEW

None of these reformulations exceeded the significance of Robert Lansing's views. Lansing served as U.S. State Department Legal Advisor and then as U.S. President Woodrow Wilson's Secretary of State in World War I through the Paris Peace Conference. He distinguished himself as the leading U.S. authority on High North affairs, representing U.S. interests in the 1892–1893 Bering Sea Arbitration, the 1896–1897 Bering Sea Claims Commission, the 1903 Alaskan Boundary Tribunal, the 1910 North Atlantic Fisheries Arbitration, and the North Atlantic Fisheries and Fur Seals Conferences in 1911.¹⁷⁶ By 1914, he “had served on more international arbitrations than any other living American.”¹⁷⁷ In 1911, he drafted two memoranda that helped shape the evolving discussion about staking claims in the ownerless land of Spitsbergen, distinguishing political sovereignty (“the exclusive exercise of sovereignty over particular persons without regard to the place of such exercise”) from territorial sovereignty (“the exclusive exercise of sovereignty within a defined special sphere”).¹⁷⁸ His main point was that a governance regime presiding over a *terra nullius* was possible because “the right of sovereignty [was] not uniformly dependent upon a special sphere [i.e., a state] for its exercise.”¹⁷⁹ In effect, Lansing's view cleaved sovereignty from its post-Westphalian identification with the territorial state—a view that had antecedents in the idea of agency or divided sovereignty as discussed by Grotius in his *Mare Liberum* defense of Dutch colonial interests in Asia.¹⁸⁰ It seems Lansing intended to articulate a variant of sovereignty to preside over *terra nullius* to protect, even temporarily,

176. See DANIEL M. SMITH, ROBERT LANSING AND AMERICAN NEUTRALITY, 1914–1917, at 1 (vol. 59, 1958). See also U.S. Department of State Office of the Historian, *Biographies of the Secretaries of State: Robert Lansing*, <https://history.state.gov/departmenthistory/people/lansing-robert>.

177. SMITH, *supra* note 176, at 1.

178. Singh & Saguirian, *supra* note 120, at 85 and accompanying note 58 (quoting Lansing's 1911 “Note: Government over persons within *terra nullius*—General Principles”). Lansing's other memorandum was: “General Statement of Conventional Plan for Government in Spitzbergen,” which circulated in February 1911. See *id.* at 85 n.60. The distinction between political and territorial sovereignty extended his division between the political and territorial state, which he detailed in 1907. See Robert Lansing, *Notes on Sovereignty in a State*, 1 AM. J. INT'L L. 105, 109 (1907).

179. Singh & Saguirian, *supra* note 120, at 85 (quoting Lansing's “Note: Government over persons within *terra nullius*—General Principles.”).

180. See generally EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS (2002) (discussing the prevalence of divisible sovereignty).

“established interests”¹⁸¹—a reference doubtless to extant U.S. mining interests in Spitsbergen.

The subject preoccupied Lansing and he reformulated his thoughts in an article published in 1917 in the *American Journal of International Law*. According to Lansing’s common but somewhat misleading assessment, Spitsbergen first presented ‘a unique international problem’: Overlooking its modern history, much as Scott did, he wrote: “No nation has ever considered it worth its while to occupy them or to assert sovereignty over them;” “[t]hus the archipelago remained unoccupied, and it became generally recognized that Spit[s]bergen was *terra nullis*, a ‘no man’s land.’”¹⁸² But it was ownerless property in the unusual sense that states were maneuvering to preclude any state’s sole title to this territory that nevertheless had become enmeshed in conflicting multinational private property disputes. If no one state could perfect its sovereign interest over Spitsbergen, the archipelago’s *terra nullius* status meant no other state should perfect such an interest either. More correct was Lansing’s sense of the Grotian tendency, at least as reflected between the whaling and mining epochs: “[T]he intense cold and the long period of the year when [the islands] are ice-bound necessarily made an attempt to develop their resource extremely difficult, so that they seemed to be an undesirable possession, a probable source of expense rather than a source of profit.”¹⁸³ He correctly noted that view changed in recent years in view of its possible mineral wealth.¹⁸⁴

Interestingly, even from Lansing’s ice-bound vantage point, Spitsbergen’s ambiguous *terra nullius* characterizations—evolving as they were—had a Polynesian analog, making his estimation of the problem, if ‘unique’, also comparable to the issue presented for legislative solution by the 1856 Guano Islands Act.¹⁸⁵

VIII. GUANO

Guano—bird droppings—was a fertilizer known for its potency due to the inquisitive mind of the German naturalist and explorer, Alexander von Humboldt. He collected a sample while sojourning in Peru, took it back to

181. Singh & Saguirian, *supra* note 120, at 85 n.59.

182. Robert Lansing, *A Unique International Problem*, 11 AM. J. INT’L L. 763, 764 (1917).

183. *Id.* at 764.

184. *See id.* at 764.

185. The Guano Islands Act, 48 U.S.C. §§ 1411–19 (1856).

Europe in 1804, and had it chemically analyzed.¹⁸⁶ Its phosphate-rich properties circulated in French then American and British chemical journals.¹⁸⁷ By mid-nineteenth century, American farmers in the Chesapeake basin were touting its “magical influence on the soil,” prompting an almost insatiable demand.¹⁸⁸ ‘Guano island mania’ ensued, sparking keen competition in British and American agriculture markets for the product.¹⁸⁹ Its supply traced to mines long established on Peru’s three Chincha Islands.¹⁹⁰ As its principal export and source of foreign currency, Peru tightly controlled its excavation, elevating its price to a quarter of the price of gold.¹⁹¹ A world-wide search for alternatives uncovered hundreds of potential repositories on islands off Mexico, in the Caribbean, and later on the west coast of Australia and the East Indies.¹⁹² But speculative pursuit in the crowded waters of the Americas provoked “numerous [and] protracted diplomatic disputes.”¹⁹³ British and American prospectors clashed with Peruvian officials on the Lobos Islands in 1852—there, military threats rose to the highest diplomatic levels and the issue occupied several paragraphs in U.S. President Millard Fillmore’s 1852 State of the Union Address;¹⁹⁴ Venezuela expelled Baltimore merchants from the Los Monjes islands; Mexico ejected foreigners from the Alacranes islands off the coast of Yucatan; and in the so-called Aves Affair—involving prospectors’ claim-jumping—the Venezuelan navy expelled both claimants and staked its own tenuous claim of sovereignty.¹⁹⁵ Spain’s final gasp to restore its three hundred year empire in South America ended badly in a Guano war against a quadruple alliance of South American

186. ALEXANDER DE HUMBOLDT, *PERSONAL NARRATIVE OF TRAVELS TO THE EQUINOCTIAL REGIONS OF THE NEW CONTINENT, DURING THE YEARS 1799–1804* xiii n* (Helen Maria Williams trans., 1815) (noting “the guano of the islands of Peru” as one of the substances brought from America and submitted to chemical analysis).

187. See RICHARD A. WINES, *FERTILIZER IN AMERICA: FROM WASTE RECYCLING TO RESOURCE EXPLOITATION* 34–35 (1985).

188. *Id.* at 40.

189. See generally *id.* 54–70.

190. See Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 *AM. Q.* 779, 782–83 (2005); WINES, *supra* note 187, at 42–47.

191. Dan Vergano, *Bird Droppings Led to U.S. Possession of Newly Protected Pacific Islands*, *NAT’L GEOGRAPHIC*, Sept. 28, 2014, <http://news.nationalgeographic.com/news/2014/09/140926-pacific-island-guano-national-monument-history/>.

192. See WINES, *supra* note 187, at 58–68.

193. *Id.* at 54.

194. See Millard Fillmore, United States President, State of the Union Address, Dec. 6, 1852, <http://www.presidentialrhetoric.com/historicspeeches/fillmore/stateoftheunion1852.html> (discussing the Lobos Island guano dispute with Peru). President Fillmore also noted the rapidly increasing commercial intercourse involving American whalers and the Arctic Sea. *Id.*

195. See WINES, *supra* note 187, at 56–60.

Pacific coast states in 1866; and control over guano deposits in the Atacama Desert region, one of the world's driest and most desolate places, played a major part in starting the War of the Pacific (1879–1884) between Bolivia/Peru and Chile.¹⁹⁶

A grander opportunity to circumvent Peru's monopoly control over production arose in the expansive Pacific. Since the 1820s, American and British whalers had plied the waters of the central Pacific; their observations prompted rumors of guano islands. Speculators had interviewed these whalers and had drawn up a list of islands for the U.S. navy to reconnoiter.¹⁹⁷ The massive US Surveying and Exploration Expedition—a fully-equipped six-vessel flotilla of weather men, vegetation specialists, naturalists, cartographers, artists, scientists, and military men under the captaincy of Charles Wilkes,¹⁹⁸ set sail between 1838 and 1842. Wilkes' thickly descriptive narrative of the expedition's encounters, including dutifully recorded track records of the voyage, clearly document the expedition's crisscrossing of many uninhabited islets teeming with guano deposits.¹⁹⁹ Jarvis, Howland and Baker Islands on the equator; Kingman Reef, the 50-island Palmyra Atoll, and the Johnston Atoll slightly southwest of Hawaii—lands broadly falling within what now comprises the largest marine conservation area in the world²⁰⁰—became the object of congressional attention. Estimates throughout the central Pacific were staggering: Some deposits measured as much as 150 feet deep,²⁰¹ inciting a Klondike-like fever among privateers, who set out

196. See generally BRUCE W. FARCAU, *THE TEN CENTS WAR: CHILE, PERU, AND BOLIVIA IN THE WAR OF THE PACIFIC, 1879–1884* (2000) (discussing the Chincha Islands War between Spain and Peru, Chile, Bolivia, and Ecuador, and the War of the Pacific).

197. See WINES, *supra* note 187, at 61.

198. See *id.* Wilkes narrative account of his Polynesian encounters apparently inspired Melville's description of the tattooed Rokovoko harpoonist, Queequeg. See Nathaniel Philbrick, *The Scientific Legacy of the U.S. Exploring Expedition* (Jan. 2004), <http://www.sil.si.edu/digitalcollections/ussex/learn/Philbrick.htm>. Wilkes would be court-martialed and materially acquitted for a massacre that would take place in Fiji (Tahitians had forewarned that he should “go to your own land; this belongs to us and we don't want anything to do with you.”).

199. See generally CHARLES WILKES, *NARRATIVE OF THE UNITED STATES EXPLORING EXPEDITION DURING THE YEARS 1838, 1839, 1840, 1841, 1942* (1845). Sina Najafi & Christina Duffy Burnett, *Islands and the Law: An Interview with Christina Duffy Burnett*, 38 *CABINET* (Summer 2010), http://www.cabinetmagazine.org/issues/38/najafi_burnett.php.

200. See Proclamation No. 9173, 79 Fed. Reg. 58,645 (Sept. 25, 2014), http://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Pacific_Remote_Islands_Marine_National_Monument/Documents/Presidential%20Proclamation%209173.pdf (expanding the monument to create the largest marine reserve in the world).

201. See Matt Rosenberg, *Guano Island Act, About Education*, <http://geography.about.com/od/politicalgeography/a/guanoisland.htm>.

to extract an estimated 12 million tons of Polynesian “white gold”²⁰² to take to British and North American markets.

With military threats and claim-jumping disputes heating up in the Gulf of Mexico and Caribbean, increasing demands were put on U.S. legislators by powerful agricultural lobbyists to secure the resource. Agriculture employed four-fifths of the working population in the U.S. in the early 1850s.²⁰³ American warships dispatched to Baker and Jarvis islands to “procure guano samples.”²⁰⁴ U.S. Senator, William Seward, later derided for arranging as Secretary of State the U.S. purchase of Alaska from Russia, drafted legislation that would ultimately become the Guano Islands Act, establishing U.S. territorial control over area in the Pacific almost three times the size of California.²⁰⁵ Like the later Russo/Swedish-Norway Agreement of 1872, the Guano Islands Act re-worked the concept of sovereignty to avoid provoking a backlash.

The act allowed any U.S. citizen to take peaceable possession of any island, rock, or key not within the lawful jurisdiction of any government and claim it, at the discretion of the President, as *appertaining* to the U.S.²⁰⁶ The Act “virtually assigned ownership of unclaimed islands to the United States” and John Longyear unsuccessfully lobbied the State Department officials to amend the act to cover coal, thereby making it applicable to Spitsbergen,²⁰⁷ but Congress, sensitive to anti-imperialism charges at home and abroad, produced a solution that allowed the U.S. to territorialize its interests yet avoid criticisms of flagrant annexation that could provoke conflict. Certain provisions allowed the U.S. to defend these claims through military force,²⁰⁸ while other provisions allowed the

202. See WINES, *supra* 187, at 54; see also Council on Hemispheric Affairs, *The Great Peruvian Guano Bonanza: Rise, Fall, and Legacy* (July 13, 2011), <http://www.coha.org/the-great-peruvian-guano-bonanza-rise-fall-and-legacy/> (12 million tons); Vergano, *supra* note 191 (“White Gold”).

203. Four-fifths of Americans were employed in the cultivation of the soil in 1851. See Millard Fillmore, United States President, State of the Union Address (Dec. 2, 1851), <http://www.presidentialrhetoric.com/historicspeeches/fillmore/stateoftheunion1851.html>.

204. WINES, *supra* note 187, at 62.

205. See GLENN R. SCHROEDER-LEIN AND RICHARD ZUCZEK, ANDREW JOHNSON: A BIOGRAPHICAL COMPANION 3 (2001) (discussing Seward’s drafting of the Guano Islands Act); Vergano, *supra* note 191 (noting the Obama Administration’s expansion of the resulting Pacific Remote Island Marine National Monument to cover an area three times larger than California).

206. See 48 U.S.C. § 1411.

207. SINGH, *supra* note 162, at 37–38.

208. See 48 U.S.C. § 1416, (“The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns.”).

U.S. to relinquish claims once the resource was removed.²⁰⁹ The acquisition of territory and the projection of power accompanied a provision to disclaim sovereignty and deny territorial *dominium*.²¹⁰ Earlier drafts of the bill excised references to the U.S. “sovereignty,” “territory,” and “territorial domain,” over guano islands,²¹¹ substituting the term “appertaining to” which became law.

An exhaustive analysis of the legal status of the American guano islands prepared by the State Department in 1931–1932 summed up an eighty-year history of efforts to make sense of the Guano Islands Act with the remark that “the only conclusion which can fairly be drawn from [these efforts] is that no one knew what the Guano Act really meant. In particular, no one understood precisely what it meant to say that a guano island could “be considered as appertaining” to the United States.²¹²

It meant that the US intended to protect the interests of its privateers, ambiguously claim title while preserving an option of disavowing ownership so as to not incite anti-expansionist sentiment at home or counter-claims from abroad. Establishing a governance regime closely approximating but not necessarily dependent on state sovereignty would later inform Lansing’s view, which conformed the concept of *terra nullius* to territorial temptation but only so long as necessary to secure parochial interests of nationals. This perspective expresses a recurring equivocating sentiment in Spitsbergen’s legal history.

Interestingly, the problem of Caribbean guano claim jumping would foreshadow claim jumping in High Arctic coal mining operations.²¹³ Recognizing the improbable challenges presented by labor and territorial unrest in a ‘no-man’s’ land located 78 degrees North, in addition to crafting a governance regime divorced from the concept of statehood, Norway began to re-formulate ideas for a shared-sovereignty arrangement.²¹⁴

209. 48 U.S.C. §1419, (“Nothing in this chapter contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys, after the guano shall have been removed from the same.”).

210. See Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 781.

211. *Id.* at 784.

212. *Id.* at 786.

213. See Singh & Saguirian, *supra* note 120, at 64.

214. See KEMPEN, *supra* note 100, at 17 (“*In dieser Situation schlug die norwegische Regierung vor, dass die Inselgruppe entweder von Norwegen als Mandat im Namen der interessierten Staaten oder aber durch sämtlichen Mächte gemeinsam verwaltet werden sollte.*”).

IX. THE CONDOMINIUM DISCUSSIONS OF 1910, 1912, AND 1914.

In 1910, the first of three conferences on Spitsbergen convened. Norway (now a constitutional monarchy), Sweden, and Russia held *pourparlers* in Christiania (renamed Oslo in 1924) and agreed on additional discussions to create a supreme public authority for legal and administrative authority in Spitsbergen.²¹⁵ The nationality principle of jurisdiction emerged as a starting point for resolving conflicts or matters of island administration. This principle held that relative rights of persons residing in Spitsbergen vested in the authority nations have over their nationals wherever they may be found.²¹⁶ Based on its perceived application, additional international conferences convened in Christiania in 1912 and in 1914 to “frame an international administration for the archipelago.”²¹⁷ The 1912 conference contemplated establishment of a joint administration agreement—a condominium arrangement—whereby the territory would remain neutral and open to all nations but administered by Sweden, Norway, and Russia.²¹⁸ That idea was fleshed out, in terms of establishing an international police force, a self-financing tax structure based on mining claims, and explorations of scientific and environmental issues. Struggling still with the concepts of *terra nullius* and common use, article 1 of the draft proposal conflated these usages, holding that Spitsbergen should remain a *terra nullius* and should not be capable of annexation.²¹⁹ J.H.W. Verzijl coined this provision as an ‘artificial *terra nullius*’,²²⁰ akin to the U.S. Congress’ claim that guano islands ‘appertained to’ but did not belong to the U.S. Other proposals were submitted for ratification at the 1914 conference, which added representatives from Germany, Belgium, U.S., Denmark, France, Great Britain, and the Netherlands, whose nationals had established historical

215. *See id.* at 18; Ulfstein notes a draft commission proposal consisting the three conference attendees produced German and U.S. objections after circulation for comments. *See* ULFSTEIN, THE SVALBARD TREATY, *supra* note 19, at 39.

216. *See* Fred K. Nielsen, *The Solution of the Spitsbergen Question*, 14 AM. J. INT’L L. 232, 232–33 (1920). *See also* Lansing, *supra* 182, at 766 (“wherever such persons may be, they are under the regulation of the sovereign power”).

217. Nielsen, *supra* note 216, at 232. Norway hosted all conferences in its capital. The second conference convened in May 1912 and included Norway, Sweden, and Russia. *See* Brown, *supra* note 144, at 15. The third conference took place in June 1914 and was attended by representatives of Germany, U.S., Denmark France, Great Britain, Norway, the Netherlands, Russian and Sweden. *See* Nielsen, *supra* note 216, at 232.

218. Brown, *supra* note 144, at 15.

219. *See* ULFSTEIN, THE SVALBARD TREATY, *supra* note 19, at 39.

220. *See id.* at 40 n.68 (quoting volume IV of Verzijl’s *International Law in Historical Perspective*).

connections to the islands.²²¹ There, Norway favored joint management among all powers doing business in Spitsbergen; Sweden favored joint management with Russia and Norway; the U.S. sought a veto power to preserve economic claims but mostly advocated in favor of Sweden's position;²²² while Germany advocated enlargement of the administrative commission to include its representative, which Russia and Sweden opposed.²²³ It appears the composition of the administrative commission, and not the idea of condominium, became the major sticking point.²²⁴ Willy Østreng concluded these attempts may have exacerbated disagreement between the discussants.²²⁵ There would be no resolution; the conference set a date for reconvening in February 1915, then adjourned days before the outbreak of World War I. It was the "last occasion on which direct negotiations took place among all of the powers most concerned with resolving the Spitsbergen question."²²⁶

X. THE PARIS PEACE CONFERENCE

A markedly changed political landscape after World War I led to a "breakthrough" following the 1919 Paris Peace Conference: "The Allied Supreme Council granted Norway 'full and unqualified' sovereignty over Svalbard, though with provisions for international activity in the islands, resulting in the 1920 Treaty Concerning the Archipelago of Spitsbergen."²²⁷ This extension of sovereign rights to Norway, albeit qualified to allow signatories the right of economic activity on an entirely equal footing with Norwegian nationals,²²⁸ marked the principal change and was the result of a combination of factors.

Twenty-seven nations attended the Paris Peace Conference but Russia and Germany were not invited. Russia fought with the Allies until 1917, but hastily withdrew from the war to attend to internecine problems caused

221. The third conference took place in June 1914. *See* Nielsen, *supra* note 216, at 232.

222. *See* KEMPEN, *supra* note 100, at 19.

223. *See* Singh & Saguirian, *supra* note 120, at 65.

224. *See* ULFSTEIN, THE SVALBARD TREATY, *supra* note 19, at 41. Ulfstein reduced the main dispute to US and German bids to participate in the governance of the islands and Russia's opposition to both. *Id.* at 40. *See also* Singh & Saguirian, *supra* note 120, at 76 (noting from a review of the draft treaties that the "veil of uncertainty was not thick" surrounding the idea of granting all parties open access).

225. ØSTRENG, *supra* note 115, at 2.

226. Singh & Saguirian, *supra* note 120, at 65.

227. *See* Adam Grydehøj, Anne Grydehøj & Maria Ackrén, The Globalization of the Arctic: Negotiating Sovereignty and Building Communities in Svalbard, Norway, 7(1) ISLAND STUD. J. 99, 101 (2012).

228. *See* ØSTRENG, *supra* note 115, at 26.

by the Bolshevik Revolution. In 1918, the Bolsheviks signed the separate and punishing 1918 Brest-Litovsk peace agreement with the Central Powers.²²⁹ Their repudiation of foreign debt owed to Allied powers and disclosure of secret agreements relating to postwar plans provoked the Allies into adopting a policy of non-recognition against the Soviet state. Germany, as one of the defeated Central Powers (together with Austria-Hungary, Turkey, and Bulgaria), was in no position to negotiate. The product of the peace conference, the Treaty of Versailles, bears this point out. It extracted punitive measures from Germany, forcing it to cede all overseas possessions, ten percent of its pre-war European territory, the coal-rich Saarland, its Baltic Sea port of Danzig (now Gdansk), and to accept armament restrictions, responsibility for initiating and conducting the war, and massive demands for reparations. Neutral countries, such as Belgium, the Netherlands, Sweden, and Norway, technically did not participate at the conference, but could make their voices heard.

A provision in the Brest-Litovsk Treaty contemplated placing Russia and Germany "on an equal footing" in the settlement of the Spitsbergen question and called on Norway to host a continuation of the conference on the subject.²³⁰ The Bolsheviks meant this provision to preserve their historic claim in the archipelago, but that treaty was repudiated by Germany's defeat, and Norway, in view of changed circumstances, had moved beyond the proto-condominium idea suggested by the 1872 diplomatic exchanges and the work product of the three Spitsbergen pre-war conferences. This latter point weighs heavily on Russia's collective legal and political memory,²³¹ and may account for Russian politicians' buyers' remorse (and Rogozin's irredentist lament²³²), when contemplating the Bolsheviks' accession to the 1920 treaty.

Anticipating a reward as a 'neutral ally',²³³ the Norwegian Storting's Foreign Affairs Committee met in closed session shortly before the Paris Peace Conference and set upon a plan to acquire the islands.²³⁴ Norway's

229. The Brest-Litovsk Treaty of March 3, 1918 ended Soviet Russia's participation in World War I. See generally Peace Treaty of Brest Litovsk, available at THE AVALON PROJECT, http://avalon.law.yale.edu/20th_century/bl134.asp#art33a.

230. See *id.* art. 33.

231. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 25 (noting the 1872 Agreement with Sweden-Norway secured "materially greater" rights for Russia).

232. See *supra* text accompanying note 14.

233. See generally OLAV RISTE, *THE NEUTRAL ALLY: NORWAY'S RELATIONS WITH BELLIGERENT POWERS IN THE FIRST WORLD WAR* (1965).

234. See ULFSTEIN, *THE SVALBARD TREATY*, *supra* note 19, at 41 (discussing the Storting Committee's closed meeting of November 16, 1918).

particularly able ambassador in Paris, F. Wedel-Jarlsberg,²³⁵ acutely interested in obtaining Spitsbergen to make Norway self-sufficient in coal production,²³⁶ portaged the request to the conference's Council of Heads of Delegations,²³⁷ where it gained traction. The Americans already may have been inclined toward the idea of Norway's ownership; Robert Lansing, by this time promoted to US Secretary of State, had expressed that view privately to Norway's Foreign Minister,²³⁸ as the State Department had no direct American proprietary interest to represent diplomatically when in 1916 all four American mining tracts were sold to a Norwegian banking syndicate.²³⁹

And then there was the question of Norway's war reward. Of all the neutrals, Norway most beneficially qualified its neutrality toward the Allied camp.²⁴⁰ Its pro-Entente sentiment aside, Norway had to manage a delicate geo-strategic situation. Despite Norway's profitable early rewards as a neutral—massive foreign capital accumulation through trade with both belligerent camps²⁴¹—Great Britain exercised a commanding stranglehold over Norway's huge merchant marine fleet, measured in terms of Great Britain's world-wide control over supply lines and access to bunker stations.²⁴² It made good use of this leverage, particularly in the second half of the war, which fiendishly complicated commercial transit through the introduction of unrestricted submarine warfare on January 9, 1917.²⁴³ According to Olav Riste, the unequal belligerent control over Norway's neutrality meant that Germany found advantage in the barest minimum of Norway's economic concessions, "whereas the Entente was only satisfied with a neutrality from which a maximum of benefits could be derived."²⁴⁴ At the war's end, Norway was acknowledged as having provided "good service" to the Allied cause—committing 800 ships and

235. Several scholars credit Wedel-Jarlsberg's diplomatic acumen for Norway's acquisition of sovereignty over Svalbard. See ARLOV, *SHORT HISTORY*, *supra* note 116, at 66; Singh & Saguirian, *supra* note 120, at 86–89.

236. See Singh & Saguirian, *supra* note 120, at 87.

237. See *id.* at 66.

238. See *id.* at 63 (noting U.S. Secretary of State Robert Lansing's telegram of May 6, 1917 to Norway's Foreign Minister Helmer Bryn expressing the view the islands should belong to Norway).

239. See SINGH, *supra* note 162, at 84–89.

240. Olav Riste claims Norway's policy of neutrality was "without question overwhelmingly pro-Entente," noting as well that losses to its merchant fleet amounted to about half of its tonnage at a cost of two thousand merchant mariners.) RISTE, *supra* note 233, at 226.

241. See Jan Normann Knutsen, *Norway in the First World War*, 5 *FOLIA SCANDINAVICA POZNAŃ* 43, 57 (1999).

242. See *id.* at 51.

243. See SMITH, *supra* note 176, at 152–53.

244. RISTE, *supra* note 233, at 227.

1,200 of its merchant mariners in support of British and French interests;²⁴⁵ other estimates were more exacting: Norway “suffered more civilian losses at sea than any other country;” about half the tonnage of its merchant fleet and 2,000 sailors.²⁴⁶ Adopting a more “introspective attitude” and a “more active foreign policy,” Norway “deliberately attempted to profit from the good-will with the victorious Western powers which Norway’s contributions during the war had created. Norwegian sovereignty over Svalbard, enlarging its territory by one-fifth,²⁴⁷ was the most notable achievement of this policy.”²⁴⁸

Spitsbergen’s legal status did not preoccupy the Allied powers, but it was a central foreign policy focus for Norway.²⁴⁹ French Premier Georges Clémenceau, the host of the Paris Peace Conference, may have been inclined toward Norway’s position due to well establish French animus towards Germany, suspicions regarding Bolshevik Russia, and a desire to provide a reward to Norway in lieu of exciting Norwegian compensation claims for war-time losses to its merchant marine.²⁵⁰ A Spitsbergen Commission consisting of representatives from the US, France, UK, and Italy was appointed in July 1919 following the Versailles Treaty. Norwegian diplomats also were actively working behind the scene. In 1919, Norwegian Foreign Minister Ihlen twice secured from Denmark its pledge recognizing Norway’s sovereignty over Spitsbergen in exchange for Norway’s recognition of Denmark’s claim of sovereignty over Greenland;²⁵¹ the binding effect of Ihlen’s later unilateral declaration respecting Danish sovereignty was contested by Norway but upheld by the PCIJ in its famous decision on the *Legal Status of Easter Greenland* case.²⁵²

The Soviets, desperate to secure international legal personality, dropped their opposition to the treaty, which it had protested on several

245. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 22 (citing August 1919 correspondence of British Foreign Secretary Balfour (“good service”) and merchant marine statistics).

246. Knutsen, *supra* note 241, at 57 (1999); RISTE, *supra* note 233, at 226.

247. See ARLOV, SHORT HISTORY, *supra* note 116, at 68.

248. Knutsen, *supra* note 241, at 57.

249. See Singh & Saguirian, *supra* note 120, at 79 (noting Norway viewed resolution of the Spitsbergen question as a high priority, but it was not a high priority for France, Great Britain, Italy, or the U.S.).

250. See *id.* at 83.

251. See VYLEGZHANIN & ZILANOV, *supra* note 12, at 21.

252. See *Legal Status of Eastern Greenland (Nor. v. Den.)*, [1933] P.C.I.J. Ser. A/B., No. 53, 71 (ending Norway’s illegal occupation of East Greenland).

occasions,²⁵³ and in 1924 agreed to recognize Norway's sovereignty over Svalbard in exchange for Norway's recognition of the USSR.²⁵⁴

XI. CONCLUSION

Deep-seated resentment about the 'condition of weakness'²⁵⁵ surrounding Russia's accession to the Svalbard Treaty frames perspectives of Russian foreign policy leaders from Molotov to Rogozin. Failing to secure its historical interests in a provision of the punishing, subsequently rescinded, Brest-Litovsk Pact has saddled Russia with a residual status as a coparcener over territory historically and psychologically regarded as belonging to it. The Soviets' official news agency, *Tass*, once referred to Bear Island as a "*de facto* Russian island."²⁵⁶ Its location at the gateway to the Kola Peninsula, home to Russia's Northern Fleet, makes it strategically significant, as is Svalbard's general geographic station in the military-strategic landscape of the High North.²⁵⁷ Sharing the island and indeed the archipelago with numerous NATO allies has generated deep suspicion in Russian political and military circles: "Russians have repeatedly pointed to a number of 'dual purpose' installations on Svalbard, mainly monitoring and surveillance systems, which could allegedly be used by the U.S. and NATO for military purposes,"²⁵⁸ notwithstanding the Svalbard Treaty's non-militarization provision. The former Vice President of the European Parliament's Northern Dimension policy labels the current dispute over Svalbard's waters a "stalemate."²⁵⁹ But the political and legal Norwegian-Russian backdrops, in addition to economic considerations, indicate this stalemate is potentially far more volatile than static.

The dynamic, inter-temporal, interpretation of the Svalbard Treaty, with its preamble specifying the creation of an "equitable regime" to "assure . . . development and peaceful utilization," has not been secured. Norway opposes this interpretation but its stratagem of avoiding outright confrontation while incrementally attempting to secure managerial control,

253. See ARLOV, *SHORT HISTORY*, *supra* note 116, at 71; VYLEGZHANIN & ZILANOV, *supra* note 12, at 23–24.

254. VYLEGZHANIN & ZILANOV, *supra* note 12, at 23.

255. See *id.* at 81.

256. *On the Question of Spitsbergen*, TASS, Jan. 15, 1947, reprinted in VYLEGZHANIN & ZILANOV, *supra* note 12, Annex 12, at 136.

257. See Zysk, *supra* note 18, at 80.

258. *Id.* at 83.

259. Diana Wallis, *Introduction*, in *THE SPITSBERGEN TREATY: MULTILATERAL GOVERNANCE IN THE ARCTIC 6* (Diana Wallis & Steward Arnold eds., 2011).

first in the FPZ, and now, in oil exploration blocks of Svalbard's contested continental shelf, has of late generated a great deal of unwanted attention. The geographical reach of the Svalbard Treaty and its problematic pairing of Norway's full and absolute sovereignty with states parties' equal enjoyment once again are focal points of attention. Norway's goal of limiting the treaty's application to the strict textual terms of the 1920 treaty now runs counter to the weight of political opinion, particularly the opinions of interested and capable states operating in the High Arctic.

And yet these two countries—Norway and Russia—have created a nuanced course of dealing: Rachel Tiller and Elizabeth Nyman have noted that Russia has been content to cede to Norway *de facto* control over fisheries management because it is able to maintain that this control is illegal without having to face the consequences of a total lack of management that the realization of its objections would produce.²⁶⁰ Moreover, the *status quo* has produced “a relatively stable regime based on unofficial cooperation and understanding” between Norway and Russia notwithstanding the ostensible objections each profess in their opposing management regimes.²⁶¹ “Both are able to share the resources without much interference or complaint from third parties.”²⁶² For this reason, they have successfully maintained the delicate “balancing act of official diplomatic protest and unofficial cooperation and acceptance.”²⁶³ Lotta Numminen agrees that Norway has been able to manage resources in the FPZ while avoiding major conflicts but she, like Tiller and Nyman,²⁶⁴ predicts trouble ahead, particularly “if Norway is to open the Svalbard continental shelf for oil and gas exploration.”²⁶⁵

Alyson Bailes argues that the Svalbard Treaty is outdated, a victim of the passage of time and unanticipated developments now producing ambiguities in its application.²⁶⁶ Similar claims have been sounded about UNCLOS' perceived shortcomings and the need for a region-specific

260. See Tiller & Nyman, *supra* note 69, at 147.

261. *Id.*

262. *Id.*

263. *Id.*

264. See *id.* at 147 (noting Norway and Russia currently are eating their cake and having it too, “but probably not forever.”).

265. Numminen, *supra* note 32, at 14.

266. See Alyson Bailes, *Spitsbergen in a Sea of Change in The Spitsbergen Treaty*, in *THE SPITSBERGEN TREATY: MULTILATERAL GOVERNANCE IN THE ARCTIC* 34, 35–36 (Diana Wallis & Steward Arnold eds., 2011).

Arctic treaty.²⁶⁷ Indeed, the contraposition of Norway's claim of ownership over resources extending from Svalbard's coast and other states' rejoinders that they must be shared, creates ambiguities that play into some states' interest to negotiate anew. But Bailes makes a good point: Settlement of sovereignty and ownership issues will not obviate the need for good governance of the Arctic. If the Arctic is trending toward treatment as a global commons, it will be "hard to reject global involvement" over matters of sustainable fishing, fisheries protection, nuclear pollution, and accidents.²⁶⁸

But is the Arctic trending toward treatment as a global commons? Canada and Russia make mirror-image sovereign claims concerning vast waterways atop their respective land masses (the Northwest Passage and the Northern Sea Route, which forms a substantial part of the Northeast Passage);²⁶⁹ a "flurry of territorial claims on the Arctic seabed" have been presented to the United Nations Commission on the Limits of the Continental Shelf, which if perfected will substantially reduce what formerly was regarded the Common Heritage of Mankind;²⁷⁰ in 2008, five circumpolar states issued the Ilulissat Declaration,²⁷¹ which asserts their "unique position" to safeguard issues affecting the Arctic environment. Three other Arctic stakeholders—Iceland, Sweden, and Finland—were excluded from that meeting, and a 2010 follow up meeting in Chelsea, Quebec, sparking a movement to globalize Arctic issues in the newly-formed Arctic Assembly.²⁷²

A closer look at Svalbard's history indicates that the treatment of the archipelago as a global commons does not precisely summarize the intentions of those capable states that share a propinquity to the Arctic. A revised Svalbard treaty with this intention in mind, however noble, does not seem likely absent the political will of interested parties. Instead, from an historical perspective, ambiguities have allowed a small number of

267. See Christopher R. Rossi, *The Club within the Club: The Challenge of a Soft Law Framework in a Global Arctic Context*, 5 THE POLAR JOURNAL 8, 19 (2015) (noting perceived shortcomings in UNCLOS and calls for a new Arctic treaty).

268. Bailes, *supra* note 266, at 35–36.

269. See Michael Byers, *Toward a Canada-Russia Axis in the Arctic*, GLOBAL BRIEF, Feb. 6, 2012, globalbrief.ca/blog/2012/02/06/toward-a-canada-russia-axis-in-the-arctic/.

270. Scott J. Shackelford, *Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 130 (2009).

271. The Ilulissat Declaration, Arctic Ocean Conference, May 28, 2008, http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf (involving Canada, Denmark, Norway, Russia, and the US).

272. See Iceland President Olafur Grímsson, Address at National Press Club, Apr. 15, 2013, http://press.org/sites/default/files/20130415_grimsson.pdf.

interested states access to Svalbard's living and mineral resources while maintaining loosely constructed definitions of *terra nullius*—definitions that facilitate resource extraction while precluding claims of state-sponsored ownership. A fundamental consequence (as opposed to purpose) of the legal regime has been to facilitate territorializing temptations under a 'soft law' (ambiguous) arrangement while maintaining a 'hard law' treaty artifice. As paradoxical as the Svalbard Treaty's 'full and absolute sovereignty' and 'equal enjoyment and access' provisions seem, it has kept the peace and facilitated resource extraction through an unusual variant of the notion of divisible sovereignty. Corporate agents, dating certainly to the whaling epoch of the seventeenth century, were able to secure resources in line with state objectives. During the mining epoch and moving forward into the period of Norway's articulation of its FPZ, overt confrontations largely have been avoided, although infringements are closely recorded rather than uniformly enforced. The fundamental objective of a Robert Lansing-type understanding of *terra nullius* was to promote parochial and extant economic interests involving resource extraction, which, accounted for a peculiar type of claim jumping: Claimants took hold of territory in the archipelago before overarching interests of any sovereign or condominium arrangement could. The proto-condominium arrangements discussed in the 1870s and immediately preceding World War I attempted to conform the concept of condominium to parochial interests—and not the other way around—principally because no individual state was capable enough to secure or perfect its own economic security interest. To secure resources *appertaining to* the interests of capable states without engendering political risks associated with outright annexation, early twentieth century powers engaged in a dalliance with the idea of condominium—not for purposes of creating a global commons—but for purposes of securing temporary interests of the limited number of states by precluding access by others. The concept of *terra nullius* was constructed to afford virtually assigned ownership while skirting perceptions of state-based ownership by occupation.

The Svalbard Treaty may have created a sovereign arrangement that no state party to the agreement can perfect, presenting, as Robert Lansing once wrote, a unique international problem. Commingling full and absolute sovereignty with a notion of divisible sovereignty in forms of equal enjoyment and access, is in fact an imperfect negation of territorial temptation. It provides a suitable alternative to the exercise of *dominium* by creating a virtual or artificial *terra nullius* that allows for resource exploitation and management so long as the geospatial regime remains

incapable of appropriation by any one state. Norway seeks at this juncture to end the virtual legal reality relating to Svalbard's contested continental shelf. Whether Norway will be able to portage its sovereign interests to this geographical region (which certainly will call into question Norway's Royal Decree pertaining to the FPZ as well), through its restrictive interpretation of the reach of the Svalbard Treaty, remains to be seen. The political climate suggests Norway has overplayed its hand; that it will—for the time being—diplomatically and indefinitely delay acceptance of bids to open up resource exploration. But what is clear from the long human history of Svalbard is that the territorial temptation to secure its resources lurks ever so close to the resource-rich offerings of its continental shelf and EEZ, despite the shared sovereignty arrangement presented by the legal regime of the Svalbard Treaty.