SPITZBERGEN: JURISDICTIONAL FRICTION OVER UNEXPLOITED OIL RESERVES

J. PETER A. BERNHARDT*

The Archipelago of Spitzbergen lies approximately 355 miles to the north of the northernmost point of Norway, and is surrounded by the Arctic Ocean, the Greenland Sea, and the Barents Sea. It is subject to the vicissitudes of the Arctic polar ice cap which retreats northward during a short summer season to permit travel by steamer to the several settlements in the Archipelago.

Until 1920, the Archipelago had remained *terra nullius.* In that year as a concomitant of the Versailles Peace Settlement discussions following the First World War, the Allies and other States concluded a treaty: the Treaty on the Status of Spitzbergen signed at Paris on February 9, 1920.[1] In this Treaty Norwegian sovereignty was recognized over Spitzbergen subject to the reservation of certain rights, privileges, powers, and immunities inuring to the benefit of the signatories. Foremost among these rights was the guarantee of access to the Archipelago on a basis of absolute equality with Norway for the purpose of carrying on maritime, industrial, mining, and commercial operations.[2] A further stipulation provided that Norway could levy a one-percent duty on all minerals exported from the Archipelago.[3] Suffice it to say, neither the signatories nor Norway envisaged the discovery of commercially exploitable reserves of oil and natural gas under the shallow continental shelf of Spitzbergen more than fifty years later.

* Attorney, United States Department of Commerce, Office of the General Counsel, National Oceanic and Atmospheric Administration, Law of the Sea Division, Washington, D.C. B.A., Dartmouth College; Certificate in International Law, London School of Economics and Political Science; J.D., University of Virginia School of Law. Adviser, U.S. Delegation to U.N. Seabeds Delegation. Member of the District of Columbia Bar.

All translations were provided by the author.

1. Treaty Concerning the Archipelago of Spitzbergen, Feb. 9, 1920, 43 Stat. 1892, T.S. 686, 2 L.N.T.S. 8 [hereinafter cited as Spitzbergen Treaty]. The official English text of the treaty is reproduced in Appendix, *infra.*

2. *Id.*, art. 3.

3. *Id.*, art. 8.

As a result of the latter phenomenon, it is not surprising that much uncertainty arises if one attempts to resolve the rights of the United States under the Treaty to explore for and to exploit oil and natural gas deposits on the Spitzbergen continental shelf, for the terms of the Treaty, now one half a century old, were drawn one quarter of a century before the Truman Proclamation was enunciated.[4]

I. THE TREATY ON THE STATUS OF SPITZBERGEN: THE ISSUES STATED

The Treaty is an unusual one in that, although the original signatories were fully independent and sovereign States *(viz.*, Norway, on the one side, and the United States, the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, India, Denmark, France, Italy, Japan, the Netherlands, and Sweden on the other), the Archipelago of Spitzbergen, whose sovereignty was the subject of conflicting claims at the time of the Treaty, was not a sovereign territory of Norway nor of any other country. It is the nature of this recognition of Norwegian sovereignty over Spitzbergen which raises the question of Spitzbergen's juridical relationship *vis-à-vis* Norway and the original parties. An examination of the language of the applicable Treaty articles and identification of the principal problems of interpretation presented in the Treaty is illustrative.

Article 1 defines the area in which the rights granted to the High Contracting Parties shall be exercised, and over which Norwegian sovereignty shall be recognized. The parties to the Treaty refer to themselves as the "High Contracting Parties." They see themselves as entering into a contractual relationship, albeit the contract is an international agreement among sovereign States. This, then, implies that the law of contract as recognized by civilized nations as well as the public international law of peace is applicable in any interpretation of the terms of the Treaty.

The High Contracting Parties agree to recognize the "full and absolute sovereignty of Norway over Spitzbergen," subject

4. It is the belief of this author that the intent of the parties as expressed by the language of an agreement, however old it may be, should be reconstructed by a strict examination and interpretation of that language as used by the parties at the time, and that that intent, once reconstructed, should govern the relationships established by the agreement in question. It is felt that any other more liberal or contemporary method of interpretation is without factual foundation or justification.

only to the "stipulations of the present Treaty."[5] Nowhere in article 1 do the words "territorial waters," "territorial seas," or any reference to the waters surrounding the Archipelago of Spitzbergen appear. The High Contracting Parties fail to reserve any rights to themselves or otherwise detract from the recognition of Norway's "full and absolute sovereignty" over Spitzbergen, save as reserved to themselves by the "stipulations of the present Treaty."[6] It is also significant that the High Contracting Parties do not *grant* sovereignty to Norway; rather they *recognize* her sovereignty over Spitzbergen. Regardless of the status of the Archipelago of Spitzbergen as *terra nullius* before the 1920 Treaty, it would appear that however inchoate Norway's claim to Spitzbergen might have been, the High Contracting Parties regarded her claim to be superior to their own, and legally established what had earlier been the actual, if not recognized *status quo ante.* Finally, note that article 1 lays emphasis on terrestial, not maritime areas.

As article 1 defines the area in which the rights enjoyed by the High Contracting Parties shall be enjoyed (*viz.*, articles 2, 3, 4, 5, 7, 8, 9, and 10) and the areas in which the High Contracting Parties agree to recognize Norwegian sovereignty, it is significant that the Treaty does not mention territorial waters, territorial seas, or maritime boundaries. The omission of such language in article 1 may be interpreted in two ways.

First, the parties did not recognize Norwegian sovereignty over the water around the Spitzbergen Archipelago, thus reserving to themselves as *res communis omnium* the water up to the low water mark around "all islands great or small or rocks" appertaining thereto. Under this possibility, the Treaty *itself* would not be the source of any rights of the High Contracting Parties to the waters around Spitzbergen. The waters off Spitzbergen simply would not be included in the area defined in article 1; rather, any rights the parties would enjoy to the waters off Spitzbergen would be based on prior claims or rights they had enjoyed. These rights in the water, if any, would arise from Spitzbergen's status before 1920 as *terra nullius.* As previously noted, since the High Contracting Parties *recognized* Norway's sovereignty over Spitzbergen (and thereby her greater claim to Spitzbergen) such a

5. Spitzbergen Treaty, *supra* note 1, art. 1.
6. *Id.*

theory of implied rights reserved by the High Contracting Parties appears unlikely.

A second possible interpretation would be that a recognition by the High Contracting Parties of "full and absolute sovereignty" to Norway over Spitzbergen subject to the stipulations contained in the Treaty, would of necessity entail a recognition of sovereignty over the territorial waters surrounding the Archipelago. That is, "the so-called territorial waters are as much a part of the realm of the littoral State as its land."[7] By analogy, if the Treaty is in the nature of a quitclaim deed or contract, any rights of the grantor not specifically reserved by him in the contract or conveyance vest in the grantee.[8] However, since the High Contracting Parties *recognized* Norwegian sovereignty, the territorial waters would be included in the area described by article 1.

Under the first possibility, the High Contracting Parties could surrender no greater rights or powers to Norway than they themselves actually possessed on February 9, 1920. Secretary of State Lansing stated with reference to Spitzbergen:

> No nation ever considered it worth its while to occupy them [the islands comprising Spitzbergen] or to assert sovereignty over them. . . . Thus the archipelago remained unoccupied, and it became generally recognized that Spitzbergen was *terra nullius*, a 'no man's land.' Doubtless in recent years more than one government would have been willing to have annexed the territory in view of its possible mineral wealth, but having so long acquiesced in the declaration that it was *terra nullius* none has had the hardihood to claim sovereignty over the archipelago.[9]

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7. 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 11 (1965).

8. The part or thing excepted, it is said, must be described with such certainty that it may be identified, and an exception has not infrequently been held to be void for lack of such certainty.

4 H. TIFFANY, REAL PROPERTY § 975 (3d ed. 1939).

In case of doubt, it is said, the conveyance is to be construed most strongly as against the grantor, or in favor of the grantee. . . . Applying this rule, an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor.

4 H. TIFFANY, REAL PROPERTY § 978 (3d ed. 1939).

A grantor in his deed is presumed to have made all the reservations he intended to make and he is not permitted to derogate from his grant by showing that some reservation was intended, but not expressed.

Cutwright v. Richey, 208 Okla. 413, 257 P.2d 286 (1953).

9. Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763, 764 (1917). Hackworth states:

On July 9, 1914, the Secretary of State instructed the American

As Spitzbergen was regarded as *terra nullius* by the High Contracting Parties, they could not have reserved to themselves any rights to the territorial waters of Spitzbergen for they had no such rights to reserve. The logic, if any, of this train of thought cannot be further extended without rendering meaningless the High Contracting Parties' recognition of "full and absolute sovereignty" of Norway. The very existence of the Treaty of 1920 indicates that both sides believed that a valid *quid pro quo* had transpired. However, given the failure to mention the territorial sea in article 1, a meaningful query would be whether the High Contracting Parties specifically intended article 1 to be limited to the Spitzbergen islands and not the seas.

With regard to this construction of article 1, any recognition by the High Contracting Parties of full and absolute sovereignty of Norway includes, as its correlative, sovereignty over the territorial sea. In 1920 sovereignty was limited to one marine league (four nautical miles) for all Scandinavian countries. Such a construction is complicated in that article 1 serves two purposes. First, article 1 provides an express limitation of territory in which the rights of the High Contracting Parties established in articles 2-10 of the Treaty operate. Second, article 1 describes the extent of territory over which the High Contracting Parties agree to recognize Norwegian sovereignty. Imprecise drafting leaves this duality unresolved and necessitates resort to the *travaux préparatoires.*

Perhaps the most important language contained in article 1 is that which sets forth the comprehensive delimitations of the Archipelago. In no other article of the Treaty do the High Contracting Parties recognize Norway's sovereignty over any additional areas, nor are any further rights bestowed. The limits of the area defined are 10° and 35° longitude East of Greenwich and 74° and 81° latitude North. Read with the provisions of article 3,[10] this delimitation fails to include the continental shelf.[11]

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delegates to make it clear to the representatives at the Conference that the United States did not desire any part in the control of the government to be organized in Spitzbergen or to assume any responsibility therefor.

1 M. HACKWORTH, DIGEST OF INTERNATAONAL LAW 466 (1940).

10. *See* Spitzbergen Treaty, *supra* note 1, art. 3 and Appendix, *infra.*

11. By this unequivocal method, the author concludes that not only did the High Contracting Parties not intend to include the continental shelf within the prepositional phrases "both on land and in the territorial waters" in article 3, but, even if they did so intend, they would be estopped from so assert-

Article 3,[12] while raising questions, also appears to answer one. The immediate question of whether "the territories specified in Article 1" include the territorial sea appears resolved, at least so far as to "maritime, industrial, mining or commercial enterprises" for paragraph two of article 3 includes in the long phrase, defining the above enterprise, the words "both on land and in the territorial waters."[13]

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ing. It is evident that no continental shelf will ever take the form of a square or any other geometric form, at the 200 meter isobath or at any other. The High Contracting Parties, in signing the Treaty, indicated in article 1 that they envisaged mineral rights reservations on the islands of the Spitzbergen Archipelago with access and admittance rights within the territorial waters, and not any contemplated rights to minerals on the continental shelf beyond the territorial sea. This delimitation indicates that the reservation for mining or commercial enterprises "both on land and in the territorial waters" contained in article 3 does not include the continental shelf in that definition.

The continental shelf is most conservatively (and perhaps in this particular instance most liberally) construed to mean:

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of the co-ordinates of islands.

Convention on the Continental Shelf, *done*, Apr. 29, 1958, — Stat. —, T.I.A.S. No. 5578, 499 U.N.T.S. 312, art. 1 [hereinafter cited as Continental Shelf Convention]. Boxing the compass around the Archipelago with reference to article 1 and the 200 meter isobath gives most interesting results. To the north at 124° 00′ .00″E, the 200 meter isobath lies thirty-seven miles to the north of 81° 00′ .00″N; to the east, along 79° 00′ .00″N, the 200 meter isobath lies 137 miles to the east of L35° 00′ .00″E; to the south, along L19° 00′ .00″E, the 200 meter isobath lies eight miles to the south of 74° 00′ .00″N; to the west, on 79° 22′ .00″N, the 200 meter isobath lies eighteen miles west of L 16° 00′ .00″E.

12. *See* Spitzbergen Treaty, *supra* note 1, art. 3 and Appendix, *infra*.

13. *Id.* This apparently facilie resolution of the question is complicated when article 3 is examined in its entirety. Doubtless it is the governing article of the Treaty regarding mining and commercial enterprises. It is curious that, while the High Contracting Parties clearly incorporated the prepositional phrase in the first paragraph of article two (the first paragraph of the article being the natural place for the establishment of any territorial regime in which the rights, privileges, powers, and immunities granted in the article are to operate), they did see fit to incorporate it in the first paragraph of article 3. This omission was not due to the failure of the first paragraph of article 3 to establish such a territorial regime; rather, the first paragraph of article 3 states:

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

Thus article 1 is referred to in the paragraph, but with the inclusion of "waters, fjords and ports of the territories specified in Article 1. . . ." As article 1

Article 6 is of marginal interest since it governs rights acquired by nationals of the High Contracting Parties prior to February 9, 1920. It states:

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makes no mention of waters, fjords, or ports, such an inclusion here indicates that in a grammatical analysis of the series of prepositional phrases in the first paragraph of article 3 the phrase "to the waters, fjords and ports" is governed by the words immediately preceding the phrase, *i.e.*, "equal liberty of access and entry for any reason or object whatever," whereas "of the territories specified" refers to the final prepositional phrase "in Article 1." Any other interpretation, *e.g.*, reading "to the waters, fjords and ports" to refer forward spatially to "of the territories specified in Article 1" would render nugatory the description of territory defined in article 1. As Judge De Visscher stated in the Advisory Opinion in the International Status of Southwest Africa:

> It is an acknowledged rule of interpretation that treaty claims must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others.

International Status of Southwest Africa Case, [1950] I.C.J. 128.

In similar vein, and given that the emphasis of the first half of the compound sentence in the first paragraph of article 3 is on "access and entry," the adverb "there" in the second half of the compound sentence refers back to its nearest (physical) antecedent, *i.e.*, the "territories specified in Article 1." Therefore the "territories specified in Article 1" are those included in the regime in which the High Contracting Parties "may carry on there without impediment all maritime, industrial, mining, and commercial operations on a footing of absolute equality."

The second paragraph of article 3 does seem to resolve the problems evinced in article 1 and the first paragraph of article 3, but, in order to fulfill Judge De Visscher's ruling on complementary provisions, it must be interpreted as a specific provision *enlarging* for the purposes of paragraph two of article 3 only the area specified in article 1. Whereas the High Contracting Parties referred to "waters, fjords and ports" in paragraph one of article 3, in paragraph two of the same article they refer to "on land and in the territorial waters." Moreover, where the High Contracting Parties refer to "maritime, industrial, mining and commercial *operations*" (emphasis added) in paragraph one, they refer to the "exercise and practice of all maritime, industrial, mining or commercial enterprises" in paragraph two. While the lack of parallelism in the same article renders it ambiguous, no meaningful distinction can be drawn between the words "operation" and "enterprise" save that "enterprise" does seem to encompass a greater and more "aggressive" number and type of activities.

Were it not for the French text, the words "exercise and practice" would admit of some difficulty of interpretation. However, the French *alternat* provides that "[i]ls [the High Contracting Parties] seront admis dans les mêmes conditions d'égalité à l'exercise et à l'exploitation de toutes entreprises maritimes . . ." and resolves the doubt as to the meaning of "practice" in the English text.

Without resorting to the *travaux préparatoires* or subsequent practice of the High Contracting Parties to determine what areas are included in the mining and commercial stipulation of the Treaty, it is concluded that from a pure linguistic interpretation of the Treaty *in vacuo*, the territorial sea is included in the territories specified in article 1 insofar as they pertain to maritime, industrial, mining, and commercial operations.

> Subject to the provisions of the present Article, acquired rights of nationals of the High Contracting Parties shall be recognized.
>
> Claims arising from taking possession or from occupation of land before the signature of the present Treaty shall be dealt with in accordance with the Annex hereto, which will have the same force and effect as the present Treaty.[14]

The claims envisaged in article 6 are those "arising from taking possession or from occupation of *land*." Further, as such claims were to be dealt with according to the Annex to the Treaty,[15] it should be noted that paragraph 1 (9) of the Annex refers to the Claims Commissioner granting title to "the land in question in accordance with the laws and regulations in force or to be enforced in the territories specified in Article 1 of the present treaty." The identical language reappears following article 2(11) of the Annex. The Annex in article 1(9) refers to article 8 of the Treaty where applicability is governed by the "terms specified in Article 1" language.

Article 7[16] does little more than reiterate the guarantee of absolute equality in mining and commercial operations (in "Article 1" territory) received by the High Contracting Parties in the first paragraph of article 3. It does, however, enlarge the "mining operations" rights in the first paragraph of article 3 in that "mineral rights" are granted to the High Contracting Parties by Norway.

Article 8[17] is an important article in that it provides both for the establishment of mining regulations "[T]o provide for the territories specified in Article 1," and for that which is of greatest interest to United States corporations—Norway's "[R]ight to levy an export duty in minerals which shall not exceed 1% of the maximum value of the minerals exported up to 100,000 tons . . . ." The area in which this export duty is to be effective is defined in the previous paragraph which states that "taxes, dues and duties levied shall not exceed what is required for the object in view." The "said territories" refers back to the initial paragraph which provides "[F]or the territories specified in Article 1." Thus, by a narrow construction of article 8, even

14. *See* Spitzbergen Treaty, *supra* note 1, art. 6 and Appendix, *infra*.
15. *Id.*, Annex.
16. *Id.*, art. 7.
17. *Id.*, art. 8.

though the High Contracting Parties under article 3 enjoy rights to mining operations in the territorial waters, they would not necessarily enjoy the low export duty on minerals provided in article 8. Moreover, minerals which might be extracted from the territorial sea under article 3 could not possibly fall under the mining regulations contemplated in article 8.[18]

A final point of interest embodied in article 8 is that the nature of minerals as viewed by the High Contracting Parties is revealed. The export duty on minerals "[S]hall not exceed 1% of the maximum value of the minerals exported up to 100,000 *tons.*"[19] It is interesting to note cubic or barrel measures were the measures applicable to natural gas and oil well before the signing of the Treaty.

II. THE MINING REGULATIONS FOR SPITZBERGEN: A HINDERANCE TO INTERPRETATION OF ARTICLE 3

Given the issues raised by article 8, it is now appropriate to examine the Mining Regulations for Spitzbergen of August 7, 1925.[20]

Article 1 of The Mining Regulations states that it shall apply to an area whose description is exactly that as stated in article 1 of the Treaty, except that "the Archipelago of Spitzbergen" as stated in article 1 of the Treaty becomes the "*entire* Archipelago of Spitzbergen"[21] in article 1 of the Mining Code.

Article 2 specifically enlarges the scope of the word "minerals" used in the Treaty:

> The right of searching for and acquiring and exploiting natural deposits of coal, mineral oils and other minerals and rocks which are the object of mining and quarrying. . . .[22]

The question of whether "mineral oils" includes oil and natural gas is left to a later discussion; suffice it here to point out that the term "mineral oils" in the Treaty falls between the words "coal" and "other minerals and rocks which are the object of mining or quarrying," and that in the remaining articles of the

18. That is, the Mining Regulations for Spitzbergen of August 7, 1925.

19. *See* Spitzbergen Treaty, *supra* note 1, art. 8 and Appendix, *infra* [emphasis added].

20. The Mining Code (Mining Regulations) for Spitzbergen, Norwegian Royal Decree, August 7, 1925, [hereinafter cited as Mining Code].

21. *Id.*, art. 1 [emphasis added].

22. *Id.*, art. 2.

Regulations the term "mineral oils" is not again used, rather "minerals or rocks mentioned in Article 2."

Article 7 (1) states:

> The search for natural deposits of the minerals and rocks mentioned in Article 2 may be made on one's own property as well as on that of any other party, and on the State land.[23]

The pronoun "that" is understood to relate back to "property," and the nature of both terms is clarified by the final prepositional phrase in series, "and on the State *land*."

Article 9(1)[24] charges the discoverer with making his claim "by marks in solid rock or, by other lasting and satisfactory means." The discoverer must further "visibly locate a discovery point." Under article 9(2)(d) the discovery notice required shall contain "information of the nature of the discovery under reference to a sample handed over at the same time, of the minerals or rocks found."[25]

Under article 12(2)(c) in which boundary claims are discovered, the Regulations provide that "[d]ispensations from the rectangular form should be given by request of the applicant, when this is dictated by configuration of the coast line or other *natural* boundaries."[26]

Articles 19 *et. seq.* concern the "relation of the proprietor to the *ground*."[27]

Article 20 (1) provides:

> A claim-holder has the right to demand the assignment by the Commissioner of Mines of the ground needed for footpaths, roads, railways, tramways, aerial ropeways, dumps, surface buildings, stores, quays, and other establishments connected with the working of the mines.[28]

It may be inferred that roads, railways, and aerial ropeways would, at least in Spitzbergen, be concerned primarily with the movement of minerals from the mines to the seacoast so that the minerals could be shipped abroad. If maritime claims were within the contemplation of the parties when the Mining Regulations were drawn up, it would not have been necessary to include such a

23. *Id.*, art. 7(1).
24. *Id.*, art. 9(1).
25. *Id.*, art. 9(d).
26. *Id.*, art. 12(c) (emphasis added).
27. *Id.*, art. 19 (emphasis added).
28. *Id.*, art. 20(1).

provision for offshore mines, as shipping was available *in situ*. Of course, it might be argued that this provision was not intended to be a catholic one applicable to all mining, but limited in its scope to terrestrial based activities.

Article 34(1) states in part that:

> Persons and companies who make territorial claims on the basis of acts of appropriation or occupations that have taken place before the signing of the Treaty relating to Spitzbergen. . . .[29]

While the validity of the principle *inclusio [expressio] unius est exclusio alterius* might be in question in these Regulations, research of the history of Spitzbergen has made it clear that at the time of the treaty (9 February 1920) there had been no claim made to Spitzbergen's maritime areas by any of the nationals of the High Contracting Parties. This does not necessarily exclude the possibility of valid non-territorial claims being made after February 9, 1920; it merely points out the evidence of the adjective "territorial."

III. THE TRAVAUX PRÉPARATOIRES: AN ANSWER TO THE ISSUES PRESENTED BY ARTICLES 1 AND 3 OF THE TREATY

After a complete review of the *travaux préparatoires*[30] of the 1920 Treaty on the Status of Spitzbergen, the only issue raised

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29. *Id.* art. 34(1).

30. No rule of international law would seem more firmly established than this rule of the interpretation of treaties in the light of the intent of the negotiators. That intent, naturally, is assumed to be stated in the text of the treaty itself, but it also may be sought elsewhere, either in specific reservations attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification. Hence it is to be expected that in any future divergence of opinions concerning the nature of the obligations assumed under the General Pact for the Renunciation of War recourse must necessarily be had, not only to the official correspondence of the negotiations, but to various offical utterances of such government spokesmen as Sir Austen Chamberlain, M. Briand, Secretary Kellogg, and Senator Borah. Their interpretation of this instrument will be entitled to the closest scrutiny and respect.

Brown, *The Interpretation of the General Pact for the Renunciation of War*, 23 AM. J. INT'L L. 274, 277-78 (1924).

> When there is doubt as to the meaning of a treaty provision it is appropriate to look to the purpose and meaning of the instrument as a whole and to inquire into the intention of the parties as indicated both at the time of and subsequent to the negotiations. For this purpose resort may be had to communications exchanged and statements made by the parties during the course of the negotiations and at the time of signature.

5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 223 (1943).

earlier which can now be resolved on the basis of the Treaty and the *travaux préparatoires* is the nature of Norwegian sovereignty over Spitzbergen as recognized by the High Contracting Parties, and particularly by the United States, in article 1 of the Treaty. Nothing regarding the nature of minerals as contemplated by the parties was mentioned.

As a *quid pro quo* of the Monroe Doctrine, it had been the constant attitude of United States foreign policy makers in the nineteenth and early twentieth centuries not to become involved in European affairs. This attitude has considerable bearing upon the stance taken by the United States during the Spitzbergen question.

The only significant United States company which had interest in Spitzbergen was the Arctic Coal Company, established by Messrs. Frederick Ayer and John M. Longyear, American nationals who first became interested in Spitzbergen coal deposits in 1904. In a letter from Ayre to Secretary of State Hay dated February 20, 1904, the Secretary for the Department stated: "[i]t is this Department's understanding that the Spitzbergen Islands are claimed by Russia."[31]

Ayer and Longyear, acting on this information, requested permission from the Imperial Russian Government to explore for and to exploit minerals in Spitzbergen, and received a reply from the Russian Foreign Office to the effect that, as Russia did not claim the islands, they were regarded as *terra nullius* and as such open to all nations to explore and to exploit at their leisure. Ayer and Longyear therefore claimed certain tracts in Spitzbergen during the summer season of 1905. The proprietors incorporated the business on February 9, 1906 as the Arctic Coal Company, a West Virginia corporation.[32] The next ten years was typified by much correspondence between the Company and the Secretary of State, and from the interests of this sole company arose the "interests" of the United States in Spitzbergen. The Company was sold in 1916 to a Swedish company. At the time of the Versailles Conference in 1919, under whose auspices the Spitzbergen question was resolved, the United States had no actual remaining claims in the Archipelago.

Secretary of State Lansing, in a provocative article,[33] examined

31. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 223 (1943).

32. *Id.*

33. Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763 (1917).

the question which was the subject of several international conferences. The tenor of these conferences was one that envisaged the establishment of an international body (in a sense a prototype of the League mandate system, but without any single sovereign state in control of the mandate) to govern Spitzbergen which would continue to "enjoy" its status as *terra nullius*. The last conference, in June, 1914, was terminated by Sarajevo and its aftermath, and first reconvened at Paris following the First World War. The Spitzbergen Commission was established to handle the question. While not determinative of the legal force of the Treaty itself, Mr. Nielsen (the representative from the United States) reiterated the opinion that Norwegian sovereignty over Spitzbergen should be made absolute. This is a clear index of this country's ambivalent position on Spitzbergen at that time.

Explicit in Nielsen's comments[34] is clearly a disavowal of

34. On July 23, 1919, Nielsen said:

> Norway wants it [Spitzbergen], and it was Mr. Lansing's view that to concede sovereignty to Norway would be a good disposal. . . . All the delegates seem to favor this idea of conceding sovereignty to Norway.
> Mr. White: There is no doubt that we [our plenipotentiaries] favor it.
> Mr. Nielsen: I think, Mr. White, we could insist that the treaty be so framed that it is merely a *recognition* on the part of the five powers of the sovereignty, so we would say that as far as we are concerned we recognize the sovereignty.

U.S. Archives: American Commission to Negotiate Peace (Paris 1918-19) Case 184.00101/121 (emphasis added).

A telegram that went out from the United States' Ambassador to France to the Secretary of State on July 26, 1919 is more indicative:

> In view previous participation our government in solution Spitzbergen —Q. And since our recognition of Norwegian sovereignty must presumably be given in some other way if we do not sign prepared treaty, and since we incur no obligation apart from recognition Norwegian sovereignty, all other obligations being on part Norway, it is suggested our participation as signatory must be desirable.

Id.

At the same time there was a feeling of gratitude for the part Norway played for the Allied cause during the War. Sir Esme Howard, President of the Commission on Baltic Affairs, stated:

> La meilleure solution serait de donner un mandat à la Norvège. Donner ce mandat à la Norvège serait *reconnaître* les tres grands services rendus par elle à l'entente pendant la guerre. L'Angleterre a d'importants intérêts miniers au Spitzberg. Ceux-ci devaient être sauvegardés.

U.S. Archives: American Commission to Negotiate Peace (Paris 1918-19) Case 181.5101/18 (Procès Verbal No. 14, Séance du 7. VII. 19) (emphasis added).

At the commencement of the Spitzberg Commission [and all future quotes are from 181.5101, numbers referring to the sessions], Nielsen noted the disinterest of the U.S. in the question [by the rapporteur]:

> Mr. Nielsen pense qu'en raison de l'intérêt qu'ils ont eu dans la question, les Etats-Unis seraient signatories au Traité, bien que le Spitzberg ne les intéresse plus, ni au point de vue politique ni au même au point

any "rights" the United States might have enjoyed in Spitzbergen prior to 1920. Rights which, as seen in the historical *mis en scène*, were at best sketchy. It would be impossible to argue that the Treaty was a *quid pro quo* or a quitclaim, in which the United States impliedly reserved any rights not specified in the Treaty.[35] There remains one other aspect of the sovereignty question raised in the *travaux préparatoires* which must be explained.

The original preamble to the Treaty stated:

> Désireux, en reconnaissant *définitivement* la souveraineté de la Norvège sur l'archipel du Spitzberg . . . .[36]

The final text, however, omits the adjective "définitive-

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de vue industriel—ceci dit sous reserve d'instructions à recevoir de Washington.

Id. (Procès-Verbal No. 3 du 24. VII. 19).

During the rest of the meetings, Nielsen, presumably now under instruction since the rapporteur noted no reservations as to further instructions from Washington, pushed for absolute Norwegian sovereignty over Spitzbergen.

On July 25:

"M. Marcretti Ferrante (Italie):

L'expression 'pleine et entière souveraineté' ne me paraît pas exacte car la souveraineté de la Norvège est limitée par l'article 4.

Le President:

On pourrait ajouter 'aux conditions ci-après' mais cette formule avait quelque chose de blessant pour la Norvège, qui prend d'elle-même les engagements que nous-désirons.

Mr. Marcretti Ferrante:

C'est vraiment un cas tout à fait nouveau que celui d'une île donnée sous certaines conditions. Souveraine de l'Archipel, la Norvège serait libre en cas de guerre, de saisir les biens de ses ennemis.

Mr. Nielsen:

Il y a evidemment des droits privés à garantir, mais cette garantie n'empêche pas que la Norvège ait pleine et entière souveraineté au point de vue d'État.

On 1 August, 1919, Nielsen objected to the President's desire that the language *terra nullius* continued to be employed.

Le President insiste sur ce fait qu'il s'agit d'une *terra nullius.*

M. Nielsen (Etats-Unis d'Amérique) objecte que la clause pesera sur la Norvège quand le Spitsberg aura cessé d'etre terra nullius.

On 6 August, 1919, Nielsen again said in similar view:

Estime que la souveraineté de la Norvège étant admise, la reconnaissance de tous les droits doit être faite conformément à la loi qui sera promulguée par la Norvège, sauf en ce qui concerne les droits privilégiés acquis devant la signature du traité.

On 19 August, 1919, Nielsen again said:

Je propose de faire une distinction entre le traitement des nations les plus favorisées et le traitment national, et cela pendant une période déterminée, par exemple pendant la période qui sera nécessaire à l'établissement des personnes qui iront se fixer dans ces îles. On adopterait ensuite un régime de liberté. De cette manière on ne courait pas le risque de paraître imposer des limites à la souveraineté de la Norvège.

35. Such as, the waters surrounding Norway.

36. Desirous, while recognizing *definitely* Norwegian sovereignty over the Archipelago of Spitzbergen . . . (emphasis added).

ment." While this initially lends credence to the argument that something less than "full and absolute sovereignty" was recognized in Norway, the reason for its omission appears to be a historical one.

Sweden had been a lukewarm contender for sovereignty over Spitzbergen. On 23 August, 1919, Count Ehrensvard, representative of Sweden, asked for the deletion of the adjective:

> D'autre part, il demande [the Count] la suppression, dans la préambule, du mot définitivement dans la phrase suivante: (Les Puissances) . . . se déclarent désireuses de reconnâitre *définitivement* la souveraineté de la Norvège . . . . Ce mot laisse supporter que la thèse norvégienne d'après laquelle Louis XIV et le roi Charles XI de Suède ont reconnu la souveraineté danoise, dont les Norvégiens sont les héritiers au Spitzberg, est admise.[37]

On 26 August, 1919, the Commission responded favorably on this basis: "[i]l est décidé comme la demandé le Ministre de Suède, que le mot *définitivement* ne figurera plus dans la préambule du Traité."[38] Therefore, for reasons purely historical, the adjective "définitivement" was removed from the preamble, and done moreover at the instigation of one not even on the Spitzbergen Commission. It is evident that the United States played no role in its deletion.

While the *travaux préparatoires*, as expected, were of no assistance in determining the status of the waters beyond the territorial sea of Norway other than in establishing a superior Norwegian claim to them over any second power. Due to the absolute nature of Norwegian sovereignty just discussed, a change made in article 3 is pertinent.

Originally, article 3 provided that "[i]ls [the High Contracting Parties] seront admis dans les mêmes conditions d'égalité, à l'exercise et à l'exploitation de toutes entreprises maritimes, industrielles, ou commerciales, tant à terre que *dans les*

37. *Id.* (Procès-Verbal No. 13 du 23. VIII. 19).

Moreover, he [the Court] wishes to delete the word "definitely" in the preamble, to wit: (The Powers) . . . wish to recognize *definitely* the sovereignty of Norway . . . . The inclusion of this word would be an admission of the validity of the Norwegian theory, *i.e.*, that Louis XIV and King Charles XI of Sweden recognized Danish sovereignty over Spitzbergen, to which sovereignty Norway later succeeded.

38. *Id.* (Procès-Verbal No. 13 du 23. VIII. 19).

[i]t is decided, as requested by the Swedish Minister, that the word "*definitely*" shall no longer appear in the preamble.

eaux adjacentes."[39] In Annex II to Meeting 9, held 6 August, 1919, the Norwegian delegation, *inter alia,* requested that "eaux adjacentes au dernier alinéa ê tre remplacées par eaux territoriales."[40] There are several viewpoints which, while not definitive, help to resolve this change.

First, and linguistically speaking, "eaux adjacent" has no precise legal significance as does the terminology "territorial waters." Generally speaking, the term "adjacent waters" conveys a more restrictive meaning than "territorial waters," and connotes waters contiguous to the coastline of a State. Webster's defines the adjective as "lying near, close, contiguous; neighboring, bordering etc."[41] As only the high seas are seaward of the territorial sea, and as "high seas" can be thought of only in the most expansive connotation when dealing with international seas and oceans (there being nothing greater), it is hard to conceive "adjacent waters" being more expansive in meaning than the term "territorial seas."

Second, it would be illogical to assume, even *arguendo,* that Norway would prepare a modification in the terms of the treaty inimical to her own interests, especially given the protracted period during which she had claimed sovereignty over Norway. It reasonably follows that the requested modification was to make her sovereignty as complete as possible. Although mentioned only in article 3, apparently Norway wished the more catholic language *not* in order to grant to the High Contracting Parties rights *greater* than they had previously enjoyed to maritime, industrial, mining, and commercial enterprises, but rather to *restrict* their activities in the territorial waters subject to her sovereignty in Spitzbergen. This assured Norway that she would have the powers to enforce the Mining Regulations and subject the nationals of the High Contracting Parties to these Regulations.[42] The silence of the other High Contracting Parties in preparing the modification is a strong indication that the qualification ("in

39. *Id.* (Procès-Verbal No. 3 du 24. VII. 19).

[t]hey [the High Contracting Parties] shall be admitted under the same conditions of quality to the exercise and exploitation of all maritime, industrial, or commercial undertakings, on land as well as *in the adjajent waters* (emphasis added).

40. *Id.* (Procès-Verbal No. 8 du 6. VIII. 19).

adjacent waters in the last indented line be replaced by territorial waters.

41. WEBSTER'S NEW INTERNATIONAL DICTIONARY 32 (2d ed. 1951).

42. She perhaps had in mind the "rum-running" and hovering problems attendant on the ratification of the eighteenth amendment in 1919.

the territorial waters") has reference more to the Mining Regulations to be established by Norway, and the rights of access and entry discussed in the head paragraph of article 3, than to any mining rights incidentally acquired by Norway's fortuitous (and doubtless from her viewpoint unfortunate) observation on article 3 on August 11, 1919.[43]

Parenthetically, the judgment of the International Court of Justice in the North Sea Continental Shelf Cases substantiates the view that Norway, as a sovereign State, enjoyed an inherent right to the soil and subsoil of the waters beyond the territorial sea:

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short it is an inherent right.[44]

The *travaux préparatoires* also did not elaborate upon the nature of the term "minerals" as used by the High Contracting Parties. Although the original draft of article 3 provides "[i]ls [the High Contracting Parties] seront admis dans les mêmes conditions d'égalité, à l'exercise et à l'exploitation de toutes enterprises maritimes, industrielles, ou commerciales, tant à terre que dans les eaux adjacentes,"[45] and the final, besides changing "adjacentes" to "territoriales" as discussed earlier, added "minières" apparently "sur la proposition de la Délégation anglaise, la Commission décide de préciser le texte en ajoutant, aprés le mot 'industrielles,' le mot 'minières.' "[46] No reasoned conclu-

43. Finally, as the other changes contained in Norway's Annex II of August 11, 1919 redound to her benefit, and as the Annex ends with "[e]n général, le Gouvernement Norvégien, qui désire maintenir l'ordre dans l'archipel, suppose que les dispositions du projet n'excluent pas la faculté de faire extrader des criminels du Spitsberg, d'y exercer le droit d'expulsion et d'y mettre en vigueur des préscriptions en vue d'empêcher la formation de trusts." The above deductions thus seem more valid than not.

44. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 22.

45. They [the High Contracting Parties] shall be admitted under the same conditions of equality, to both the exercise and exploitation of all maritime, industrial, or commercial undertakings, both on land and in the territorial waters.

46. The final, besides changing "adjacent" to "territorial" as discussed earlier, added "mineral" apparently

> on the proposition of the English Delegation, the Commission has decided to clarify the text by adding the adjective "mineral" after the adjective "industrial."

sion can be made on the nature of the minerals in question, other than the High Contracting Parties' wish to specify that such minerals were to be included in the rights secured in article 3. As the addition of "minières" was subsequent to the change to "eaux territoriales," its addition must be considered independent of the latter change.

The *travaux préparatoires* do not satisfactorily resolve the question whether oil and natural gas are included among the mineral rights secured to the High Contracting Parties in the 1920 Treaty. Although the United States is primarily interested in oil and natural gas on the continental shelf of Spitzbergen, and although from the *travaux préparatoires* it was probably not the inintention of the High Contracting Parties to acquire mineral rights in the territorial waters (let alone in the continental shelf beyond), the enquiry is important and necessary if the High Contracting Parties do enjoy mineral rights in the territorial sea and continental shelf. Since the language of the Treaty itself or the *travaux préparatoires* sheds little light on this subject, reference must be made to definitions of the normal meaning of "minerals."[47]

A Department of State Study,[48] prepared by L. H. Gray in 1919 for the State Department, gives an excellent view of the position taken on Spitzbergen by the Department.[49]

Although remarks made in the official study of Spitzbergen

47. For "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." Advisory Opinion on Polish Postal Service in Danzig, [1925] P.C.I.J. ser. B, No. 11, at 39-40.

48. U.S. DEP'T OF STATE, SPITZBERGEN AND BEAR ISLAND (1919).

49. The Study, in examining the mineral resources of the Archipelago, states that:

> The economic importance of Spitzbergen . . . and its international importance, for the most part—lies solely in its mineral wealth (especially coal) and in its whaling, fishing, and hunting; . . . .

Id., at 11.

In the detailed examination of the mineral situation as it then existed, the Study made but one reference to oil:

> Oil-bearing rocks occur in the claims of the "Scottish Spitsbergen Syndicate," but have not yet been thoroughly investigated.

Id., at 16.

The Study, in the conclusion of the chapter related to economic resources, states:

> Whatever value the island possesses, therefore, lies in its coal deposits; and even here the outlook is one of hope rather than of certainty.

Id., at 58.

are rather convincing proof that the United States did not understand the term "minerals" to include oil and natural gas, additional views of the term "minerals" contemporary to the period will be examined.

While it is true that the views of English and American authorities are not in themselves conclusive of the meaning of "minerals" in an international agreement, they are relevant in that they give some indication of what the two most highly industrialized States among the High Contracting Parties believed "minerals" to include. The third edition of *Lindley on Mines* gives an excellent period appraisal of that meaning.[50] However,

50. 1 C. LINDLEY, LINDLEY ON MINES 139 (3d ed. 1914) [hereinafter cited as LINDLEY].

The English view, as represented by Bainbridge, was (1900):

> The word 'minerals' in its widest acceptation comprises every inorganic substance forming part of the crust or solid body of the earth other than the layer of soil which sustains vegetable life and other than the subsoil; and the minerals may be surface minerals (such as gravel and clay) or minerals buried more or less deep in subsoil. Also, minerals are not the less minerals because they are gotten by quarrying as distinguished from mining.

Id., at 138-39.

In Hext v. Gill, LR. 7 Ch. App. 699 "[T]he House of Lords announced the rule that a reservation of 'minerals' includes every substance which can be obtained from underneath the surface of the earth for the purpose of profit. . . ." *Id.*, at 139.

Lindley discusses a factual situation similar in certain aspects to that of Spitzbergen:

> The legislature of Pennsylvania had passed an act providing, among other things, for the mortgaging of a 'leasehold of any colliery, mining land, manufacturing, or other premises.' In passing upon the act, the court held that petroleum was a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands, therefore, the act applied to and authorized a mortgage of a leasehold of oil land, although the Act was passed *before petroleum* was discovered . . . .

Id., at 151-52.

> The same court, in a still later case, holds that natural gas is a mineral, although it possesses peculiar attributes, which require the application of precedent arising out of ordinary mineral rights with much more careful consideration, and terms it a mineral *ferae naturae*. That it is classified as a mineral there is no doubt.

Id., at 152.

After examining other conflicting decisions, Lindley summarizes state court practice and concludes:

> While, owing to the circumstances surrounding a particular transaction, and the intention of the parties taken in connection with the context, petroleum may at times be held not to have been comprehended in the term 'mineral' as used in a reservation clause of a conveyance, the decisions of the American courts are practically uniform in holding that petroleum is a mineral. In construing private conveyances it is apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor, if it can be ascertained.

Id., at 153.

in listing the substances classified as minerals by the English courts, Lindley fails to mention oil or natural gas, regardless of the apparent emphasis placed by the English courts on "profitable undertakings."[51] Nevertheless, he does state that "[i]n this enumeration it is hardly necessary to mention gold, silver, the common metals, or coal, as they fall within the earlier definition of the term, and were usually obtained through underground *excavations*."[52] The earlier definition of mineral to which he refers is:

> [A] fossil, or what is dug out of the earth, and which is predominantly metalliferous in character.
>
> . . . .
>
> In this view, it will embrace as well bare granite of the high mountains as the deepest hidden diamonds and metallic ores.[53]

Thus, at the time of the First World War, it is unclear whether oil and natural gas were considered minerals by the English authorities.

Turning to the relevant American thought on the subject, the consensus endorsed oil and natural gas to be minerals, although there was a dissenting view. As early as *Funk v. Haldeman*,[54] the Supreme Court of Pennsylvania treated petroleum oil as a mineral, stating that "until our scientific knowledge on the subject is increased, that is the light in which the courts will be likely to regard this valuable production of the earth."[55]

However, the same court two decades later, in *Dunham v. Kirkpatrick*,[56] in construing a deed containing a reservation of "all minerals," held that "while it was true that petroleum was a mineral, yet in popular estimation it was not so regarded; and following the rule of construction invoked in *Gibson v. Tyson*, the court concluded, that *in contemplation of the parties to the instrument* petroleum was not within the reservation."[57]

Since 1897, there has been little doubt on the federal level that petroleum is a mineral. "Under an act of Congress, passed February 11, 1897, petroleum is declared to be a mineral within the meaning of the federal mining laws, setting at rest a

51. *Id.*, at 144-48.
52. *Id.*, at 145 (emphasis added).
53. *Id.*, at 137.
54. 53 Pa. 224, 248 (1866).
55. LINDLEY, *supra* note 50, at 150.
56. 101 Pa. 36, 47 Am. Rep. 696 (1882).
57. LINDLEY, *supra* note 50, at 151 (emphasis added).

possible doubt on this question raised by a decision of the then Secretary of the Interior, Hoke Smith, who ruled that lands containing petroleum were not mineral lands within the meaning of these laws."[58]

IV. AN EXAMINATION OF THE SPITZBERGEN MINING REGULATIONS

Article 9(2)(d) is one of a series of provisions establishing the requirements necessary to acquire a search license from the Commissioner of Mines for Svalbard to explore for and to exploit minerals.[59] This seemingly innocuous article is an extremely significant one in the determination of the nature of minerals. It could have provided an effective means by which Norway could have delayed, if not prevented, exploitation of oil and natural gas within as well as outside the territorial sea of Spitzbergen. Yet Norway's action estopped her from any legal rights inuring to her from a strict interpretation of article 9(2)(d).

It is clear that it is impossible to "hand over" a "sample," within the meaning of article 9(2)(d), of either oil or natural gas before acquiring a search license. Prospecting a claim for oil and natural gas requires considerable expenditure of both time and equipment before a sample of either can be procured. Seen in this light, the term "minerals" as used in the Treaty and in the Mining Regulations could not encompass either oil or natural gas. It should be noted that no protests or queries were lodged in this regard by any of the High Contracting Parties at the time the Mining Regulations were enacted. The only inclusion of the term "mineral oils" which appears either in the Treaty or in the Mining Regulations appears in article 2(1) of the Mining Regulations. This term can only mean oil extracted from other minerals; oil from oilbearing slate, not oil in its natural state. The materials from the Archives reveal that there was interest in slate-bearing oil, and tests were made in Germany before the First War indicating that the oil content of the slate in question was higher than "normally" found in slate strata.[60]

58. *Id.*, at 154.

59. It provided that "[i]nformation of the nature of the discovery under reference to a sample, handed over at the same time, of the minerals or rocks found is required before a search license is granted." Mining Code, note 21 *supra*, art. 9(2)(d).

60. U.S. Archives; Spitzbergen Case 857H.6362.1.

The question still unanswered is: from what authority did the companies presently exploring for oil receive their search licenses? Was the license granted pursuant to the terms of the Mining Regulations? If done under the authority of the Mining Regulations, Norway is estopped from claiming on the basis of article 9(2)(d) in that petroleum oil and natural gas do not come within the minerals mentioned in article 2(1) of the Regulations. If, however, Norway proceeded to grant rights to oil and natural gas outside the terms of the Mining Regulations, she can rely on article 9(2)(d) and maintain the exclusion of oil and natural gas from the 1925 regime.[61]

It is commonly accepted that an oral declaration by a responsible official of the Government of a State acting within his sphere of delegated capacity can bind his Government.[62] Norway here, of course, went much further and issued a valid mining license. Airgram-162 of 1962 goes on to relate the observations

61. An examination of message traffic from the Embassy in Oslo during the past ten years indicates that the observations concerning Article 9(2)(d) were correct.

CALTEX, the first major company to explore for oil in Spitzbergen, was granted a search license for its activities. In the 162d airgram telegram from the U.S. Embassy, Oslo to the U.S. Dep't of State dated September 27, 1962, the Embassy relates for the first time the observations of an economic geologist:

> [a]lthough [he] is only too happy to have Caltex get the claims, he thinks that the mining law was not fulfilled to the letter in the requirement that a proven presence of a resource is a requisite to the granting of a claim. In the Caltex case . . . [a] Norwegian mining inspector at Spitzbergen, apparently issued the concession without such proven findings, and the Ministry of Industry, after a very stiff internal disagreement, upheld the decision.

62. In the Eastern Greenland case the Permanent Court of International Justice said of an oral statement by M. Ihlen, the Norwegian Minister for Foreign Affairs, to the Danish Minister:

> Nevertheless, the point which must now be considered is whether the Ihlen declaration—even if not constituting a definitive recognition of Danish sovereignty—did not constitute an engagement obliging Norway to refrain from occupying any part of Greenland.
>
> . . . The declaration which the Minister of Foreign Affairs gave on July 22nd, 1919 was definitely affirmative: 'I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question.'
>
> The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53. (It is curious that M. Ihlen's Declaration, now famous, was in part prompted by a *quid pro quo* with Norway providing that if Denmark would not interfere with Norway's claim to Spitzbergen, Norway would refrain from objecting to Denmark's claim over Greenland.)

of A. Westerholm, the leader of the Caltex Oil Exploration Expedition in Spitzbergen: "Caltex, of course, cannot produce samples of oil, but according to Westerholm, has submitted detailed geologic evidence in lieu thereof, and this, after some quandary and delays, has been accepted by the Ministry."[63]

In Airgram-522 of 12 July, 1964, the American Embassy states:

> In regard to oil drilling, the Treaty only makes slight mention of oil and there are no mining regulations that specify how drilling will take place.[64]

The problem was fully manifested on September 5, 1965, largely due to the prominence it enjoyed in the national election campaign in Norway in the same year. The cable relates that Industry Minister Kjell Holler was responsible for the granting of the concession. Although not submitted to the Cabinet of Ministers, as Ministry of the Interior for Norway, Holler was the ultimate superior of the Mining Commissioner for Svalbard and as such eminently qualified to bind his Government to any decision reached regarding search licenses to oil and natural gas in Spitzbergen. The cable also states that "[t]he Government [of Norway] in defending itself has consistently taken the position that, notwithstanding the poor manner in which the case was handled, the Caltex concession agreement was and is a good one from the Norwegian point of view." Thus, even the Norwegian Government is precluded from vitiating Holler's act, since it actually publicly endorsed it; and whether Norway acted for financial reasons is of course immaterial. Internationally she is bound to her act as manifested in the oil and gas search licenses she issues for exploration in Norway. It remains to examine such a license.

An economic geologist provides us with a revealing remark:

> Essentially, he thought that there was no foundation for the Caltex concession issue. Some way had to be found to break through the mining laws which were blocking progress in developing Svalbard. To do sampling strictly in accordance with the law would have required five years of drilling. He felt that, however, there had to be correct geological sam-

63. 162d airgram telegram from U.S. Embassy, Oslo, to the U.S. Dep't of State (1962).

64. 522d airgram telegram from U.S. Embassy, Oslo, to the U.S. Dep't of State (1964).

> pling, and this had been done before the concession was granted.[65]

In discussing the licenses, the Norwegian Government established a commission to examine the regulations under which both foreign and Norwegian companies could seek mining rights on Svalbard, as well as the problems that had arisen as a result of the interpretation of the Mining Regulations within the government itself. The Commission published their results in the Fleischer Report on October 1, 1965.[66]

Such documents make it unequivocally clear that Norway is estopped from claiming that she understands the term "minerals," as used in the Mining Regulations of 1925 to be other than inclusive of oil and natural gas.

One further point is pertinent in connection with the estoppel argument. Article 2(3) of the Mining Regulations states:

> Any dispute as to whether a mineral or rock is of such nature as mentioned in item (1), shall be finally settled by the Ministry concerned on report of the Commissioner of Mines.

A conceiveable, but unlikely, argument which Norway might raise would be that since the letter of June 3, 1966[67] provides that

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65. 185th airgram telegram from U.S. Embassy, Oslo, to the U.S. Dep't of State (1965).

66. The following represents selections from a resume on that report contained in the 279th airgram telegram from U.S. Embassy, Oslo of October 21, 1965:

> The report points out that under Article 9(2)(d) of the Svalbard Mining Law, concessions to mine "coal, petroleum and other minerals and ore" can only be granted on the basis of the submission of samples to *the Svalbard Mining Commissioner.* [emphasis added]. The Fleischer Report then goes on to state that in the case of the Caltex oil drilling concession it was admitted by the Ministry of Industry that it was obviously impossible to furnish samples of oil at the time the application for the concession was made. On the other hand, the report emphasized that Caltex did present data on prospecting and seismographic studies showing that geologic indications of oil existed on Svalbard. While a Ministry of Industry official states in this connection that 'the data submitted by Caltex were more comprehensive and more convincing than most samples that are ordinarily submitted' the application was sent to the Ministry of Justice for the purpose of getting an informal interpretation of this point. The Ministry of Justice conceded in its informal reply that the drilling for oil such as envisaged by Caltex and the employment of expensive oil rigs did not appear to be contemplated when the Svalbard Mining Law was passed in 1925. However, in view of the fact that the Mining Law was based on an international treaty (the Paris Convention of 1920), it was necessary, advised the Justice Ministry, that the Foreign Ministry be requested to consider the entire matter.

67. An official translation of a letter of June 3, 1966, from the Royal Norwegian Ministry of Industry and Handicraft to the Mining Inspector for Sval-

"the Mining Inspector should submit all matters concerning applications on the basis of geological indications to this advisory organ (one of the Norwegian Ministry of Interior)," the decision on oil and natural gas was not finally settled by the Commissioner of Mines as required by the Mining Regulations. To this argument, specious though it may be, the counterargument should be based on articles 1-3 of the Mining Regulations.[68]

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bard stated, *inter alia*:

> We refer to previous correspondence.
>
> This Ministry assumes that it should be possible to grant oil claims in Svalbard *under the Mining Ordinance of August 7, 1925.*
>
> I) On the basis of a report accompanied by an oil sample
>
> II) On the basis of a report accompanied by geological material which satisfies the following requirements:
>
> The intention is to establish an organ composed of two experts who will assist the Mining Inspector in handling the various matters relating to applications and claims for oil.
>
> This organ will have an exclusively consultative function, but the Mining Inspector should submit all matters concerning applications on the basis of geological indications to this advisory organ, unless the application obviously must be rejected. This Ministry intends to appoint the said advisory organ as soon as possible.

Amongst other issues, the last paragraph answers the first question raised by this letter, *i.e.*, whether or not criteria I and II in the letter were in the conjunctive or disjunctive. As the last paragraph provides for applications made "on the basis of geological indications," they are in the disjunctive.

This letter was afterwards referred to by the Mining Director for Svalbard to a U.S. Corporation which applied for a search license for oil and gas, the Greenland Exploration Management Company, Inc. It is quoted in its entirety:

> We refer to your letter of 18 August 1971 with enclosures and submit herewith Search License issued 1 September 1971. With regard to the granting of Production Concessions based on geological indications of oil, we refer to letter of 3 June 1966 in which the Department of Industry has established the criteria which must be satisfied by registration of 'stake points' for geological indications of oil. Further, we make note of the rule of the *Mining Code* that it is not legal to conduct search within 3rd parties' concession without securing permission from that party. [Emphasis added].
>
> With regards,
> Tormod Johnsen
> Commissioner of Mines

Included with this letter and of even date was the following search license:

> Greenland Exploration Management Company, Inc. . . . is hereby granted admission to conduct exploration for period of 2 years from this date for natural resources *as named in the Mining Code for Svalbard*, namely, coal, hydrocarbons and other minerals and ores. [Emphasis added].
>
> The license is given with those rights, with that limitation and with those liabilities as have been established in the above-mentioned Mining Code.
>
> The Search License is valid for: All of Svalbard.
>
> Longyearbyen den 1. September 1971
> Tormod Johnsen

See U.S. Dep't of State, Office of the Legal Advisor, 40A, INCO 16-1C.

68. Article 5 states in part:

> 1. The powers which according to the Mining Ordinance are conferred upon the Commissioner of Mines, may by the Ministry concerned, to such extent as needed, be delegated to inferior officers of the mining service.

It must be noted, with regard to the entire discussion on the meaning of the term "minerals," that the decision does not necessarily carry over to the waters and submerged lands outside the territorial sea of Norway, even if the latter were construed to be within Article 1 of the Treaty.

V. DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NORWAY AND SPITZBERGEN

A. A Factual Comparison of the North Sea and Barents Sea Questions

Before further examining whether the High Contracting Parties enjoy rights under Treaty article 3 to minerals lying seaward of the territorial sea of Spitzbergen in and on its continental shelf, one must first examine the fundamental question whether Spitzbergen indeed has a continental shelf.

Norway has made it clear on several occasions that Spitzbergen does not have a continental shelf and that she (Norway) views the continental shelf under the Barents Sea to be a continuation of the Norwegian continental shelf extending northward from Scandinavia. In other words, that it is an integral part of the Fennoscandian shield. This is of course a convenient means for Norway to avoid entirely the issues presented by the 1920 treaty. If Spitzbergen has no continental shelf, mineral rights enjoyed by the High Contracting Parties under the Treaty would be limited in their seaward extent to four miles beyond the base lines established by Norwegian Royal Decree of September 25, 1970; that is, the seaward boundary of the Spitzbergen territorial sea.

There are certain definite criteria established by the International Court of Justice in the *North Sea Continental Shelf Cases*[69] which are helpful in resolving the issues in this section. At the outset, it should be noted that there are several fundamental differences between the factual circumstances of the *North Sea Cases* and that posed by Spitzbergen. The validity of any anal-

2. The decisions of such officers may be submitted to the Commissioner of Mines for reconsideration and the decisions of the Commissioner of Mines likewise to the Ministry provided the decisions have not been given during a claim survey in which case the procedure of § 13 applies.

3. The decisions of other inferior administrative authorities, with reference to the Mining Code, also may be submitted to higher authority for reconsideration.

69. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3.

ogy drawn from the decision must be circumscribed by a recognition of and appreciation for these several factual differences.

(1) The waters of the North Sea are shallow, the whole seabed consisting of a continental shelf at a depth of less than 200 meters except for the formation known as the Norwegian Trough, a belt of water 200-650 meters deep, fringing the southern and southwestern coasts of Norway to a width averaging about 80-100 kilometers. In addition, there is a small localized depression in the center of the North Sea continental shelf, the Devil's Hole, which is 780 feet deep. While the slope of the continental shelf between Spitzbergen and Norway occurs well to the west of the westernmost terrestrial meridian passing through either Spitzbergen or Norway, the continental shelf itself is in many areas much deeper than 200 meters. Thus, the Court in its judgment did not have to address itself to the separate issues posed by a continental shelf in excess of 200 meters, or to the duality of definition contained in article 1 of the Convention on the Continental Shelf of April 29, 1958.[70]

In this regard, however, the Court mentions the significance of the Norwegian Trough:

> Without attempting to pronounce on the status of that feature [the Trough], the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations, as described in paragraph 4, to appertain to Norway up to the median lines shown on Map 1. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.[71]

With regard to the Trough issue, the Court did not possess the requisite jurisdiction to determine the legal issues. Rather, it merely notes that the parties agreed that a median line was to be the boundary of the shelf between Norway and the United Kingdom. Since that boundary was not an issue before the Court, and was not contested by the Parties, the Court did not pass judgment on that agreement.

70. Continental Shelf Convention, *supra* note 15.
71. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, at 32.

This North Sea boundary segment can be taken in substantiation of several different viewpoints which will probably be raised in any subsequent agreement or judicial settlement of the Spitzbergen question. From Norway's viewpoint, the median line west of the Trough is advantageous in that the presence of erosion (Barents Trough) on the Barents Sea continental shelf between Spitzbergen and Norway does not *ipso facto* determine the "nattural" boundary between the continental shelves of Spitzbergen and Norway. In other words, Norway is not precluded from asserting that the mainland continental shelf is continuous and unbroken, running straight up to the territorial sea of Spitzbergen. On the other hand, the treatment of the Trough by the I.C.J. and the parties could lend support to the position advanced by the High Contracting Parties, *viz.*, that insofar as *opposite* States *vis-à-vis* adjacent States are concerned, continental shelf areas should be delimited in accordance with equidistance principles as expressed by median lines. This would give Norway and Spitzbergen a separate continental shelf. However, as the observation regarding the Norwegian Trough by the I.C.J. cannot qualify even as *obiter dicta,* great significance cannot be attached to the Norwegian-United Kingdom boundary.

(2) In the second instance, the judgment proper was based on adjacent and not opposite States.[72] While principles of equidistance apply equally to equidistant lines between adjacent States and lateral median lines between opposite States, the I.C.J. went to some length to distinguish the legal weight accorded to each.

Article 6 of the Continental Shelf Convention treats adjacent and opposite coasts separately.[73]

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72. The United Kingdom is the only "opposite" state that could have been involved; however, she was not a party before the court.

73. Continental Shelf Convention, *supra* note 15, art. 6. 1:

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Article 6 § (2) states:

> Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant

As both Spitzbergen and Norway are opposite each other, little discussion is necessary on the manner in which the Court arrived at its decision that "the use of the equidistance method of delimitation [is] not obligatory as between the Parties" and that "there [is] no other single method of delimitation the use of which is in all circumstances obligatory," for this decision is predicated on equidistance lines between adjacent States and not lateral median lines between opposite States. The Court rejected the former as the primary contention governing shelf delimination questions because the equidistance method "despite its known advantages, leads unquestionably to inequity, ..."[74]

However, the Court did distinguish between equidistance lines and median lines. In referring to the International Law Commission, the Court stated that:

> Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line, and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved . . . . This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problems—a conclusion which also finds some confirmation in the difference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention . . . as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.[75]

In similar vein, the Court later stated:

> Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given

from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

74. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 49.

75. *Id.*, at 36-37.

> (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries.[76]

While this is certainly not positive endorsal of median lines as the criterion governing such delimitations, it at least indicates that the Court does not find median lines between opposite states inherently inequitable. It should be noted that in the discussions of both principles, and in the language employed in article 6 of the Continental Shelf Convention,[77] the Court and the Convention refer to the "territories of two or more *States*" when talking of adjacency. This is perfectly natural since the Convention and the Court (in the *North Sea Continental Shelf Cases*) were dealing with sovereign territorial States as respective parties, and the anomalous situation of Spitzbergen was not envisaged. Norway could therefore muster the argument that since Spitzbergen is not a State in the legal sense of the word and certainly not a separate sovereign State *vis-à-vis* Norway, neither the Convention nor the Court's judgment is applicable in the Spitzbergen situation. However, as indicated below, the Court placed major emphasis on the geographic-geologic nature of the continental shelf as a prolongation of the land to which the shelf was most naturally adjacent. The emphasis is more on the physical fact of the presence of opposing land masses and not on abstract legal concepts of Statehood or sovereignty. In this light, such an initial objection by Norway would find little merit were the case submitted to the I.C.J. for deliberation.

(3) If one casts Norway in Germany's role in the *North Sea Continental Shelf* judgment, he would find that Germany was neither a signatory nor an adherent to the Continental Shelf Convention, whereas Norway became an adherent in December, 1971. Therefore, while article 6 of the Convention was not binding on Germany in a contractual sense, it is binding on Norway. Much of the Court's examination on this point can therefore be disregarded. So far as the other criteria established by the court in delimitation problems connected with article 6 are concerned, Norway should be held to a stricter observance than was Germany.

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76. *Id.*, at 45.
77. *See* note 73 *supra.*

B. Delimitation Criteria which the Court Found Inapplicable in the North Sea Continental Shelf Case

Before examining what criteria the Court held to be applicable in delimiting the North Sea continental shelf, the following are those which the Court did *not* find applicable:

1) the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains to be the most fundamental of all the rules of law relating to the continental shelf;[78]

2) the equidistance principle was not regarded as a rule of customary international law on the basis of either *a priori* logical necessity or through positive law processes;[79]

3) the equidistance principle could not be considered as an emerging rule of customary international law;[80]

4) the equidistance principle could not be regarded as declaratory of previously existing or emergent rule of customary law;[81]

5) the equidistance principle could not be regarded as having achieved the status of a rule of customary international law binding on all States since the Convention, *i.e.*, it could not be regarded as having become *opinio juris* since the Convention.[82]

The Netherlands and Denmark both conceded at the outset that Germany was not contractually bound to the Convention.[83] However, the two countries attempted to establish that "by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being applicable to the delimitation of continental shelf areas."[84]

The Court did not find any substance in these contentions, and the same should hold for Norway's conduct. Although she

78. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 37.
79. *Id.*, at 37.
80. *Id.*, at 39.
81. *Id.*, at 41.
82. *Id.*
83. "It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it."
Id., at 25.
84. *Id.*

has many times maintained that the Continental Shelf Convention was customary law,[85] the Court held that estoppel could arise in the case of Germany only "[b]y reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime [*i.e.*, the Continental Shelf Convention], but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice."[86]

Norway has never granted any licenses under the Mining Regulations for Spitzbergen beyond the four mile territorial sea, nor has she intimated that she so intended. It is, therefore, improbable that valid grounds for estoppel could arise.

C. Delimitation Criteria which the Court Found in the North Sea Continental Shelf Cases

Criterion 1: Equitable Principles.—Article 6(1) of the Convention on the Continental Shelf states:

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.[87]

With due regard for the phrase "two or more States," the Court placed primary emphasis in any shelf delimitation issue on the need for agreement between the governments of the two opposite States.[88] This stress on agreement and on agreement

85. *E.g.*, Department of State Airgram 050810 of 201514Z Mar. 73.

86. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 26.

87. Continental Shelf Convention, *supra* note 15, art. 6. 1.

88. The Court stated in its judgment while discussing the validity of the equidistance principle:

> In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement.

North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 42.

And in the same regard:

> It emerges from the history of the development of the legal regime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions

based on equitable principles recalls the language of the Truman Proclamation, which stated that continental shelf boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles."[89] The Court, alluding to the Proclamation, the requirement for agreement, and equitable principles, stated:

> These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.[90]

It is clear that were the Court to examine the Spitzbergen question, it would first insist on meaningful and sincere negotiation between Norway and the High Contracting Parties as a prerequisite to resolving the question. What is not clear is of what the substantive discussions in such a negotiation would consist. While appreciative of the fact that it would be inappropriate, if not actually impossible, to formulate such substantive issues, it is necessary to mention one of them.

As indicated, equitable principles would necessarily loom large in the discussions. Article 6, indicates that if there are any "special circumstances" involved, they must be examined in determining the shelf boundary. While the Court did not find the concave configuration of Germany's North Sea coast to be a "special circumstance" within the meaning of article 6, there is little doubt that the unusual regime established in Spitzbergen consequent to the 1920 Treaty on the Status of Spitzbergen and the many questions which that Treaty raises would so qualify. What remains is to determine *which* aspects of the 1920 Treaty would receive priority.

Given the emphasis the Court places on the importance of equitable principles, the situation which prevailed in Spitzbergen leading up to the Treaty should be the important, if not para-

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> which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.

Id., at 46.

89. United States Presidential Proclamation 2667, Sept. 28, 1945: Natural Resources of the Subsoil and Seabed of the Continental Shelf, 10 Fed. Reg. 12303, 59, Stat. 884 [hereinafter cited as Truman Proclamation].

90. North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 33.

mount, factor in resolving the envisaged negotiation along equitable principles. There are two approaches which immediately come to mind.

First, and perhaps most conventional, the earlier discussion of the *travaux préparatoires* to the Treaty would be indicative of the equities involved. As pointed out earlier, each of the High Contracting Parties, and the United States in particular, raised no objection (with the possible exception of Sweden) that Norway enjoyed the paramount claim to sovereignty over the Archipelago. This was not merely because of her part in helping the Allied Cause during the First War, but more significantly, because of the historical role Norway took in the discovery, development, and supplying of Spitzbergen.

The United States Department of State, it will be remembered, believed as late as 1904 that Spitzbergen belonged to Russia. It was only in 1906 that any American national or corporation (the Arctic Coal Company) made a claim in Spitzbergen. The Company was the sole American company ever to have any claim, mineral or otherwise, to the Archipelago, and it was sold in 1916 to a Swedish concern. Therefore, at the time of the Spitzbergen Commission Conference which drew up the agreement that was to become the 1920 Treaty on the Status of Spitzbergen, the United States had no interest in the Archipelago. The statements of the United States' representative, Mr. Nielson, during the Conference indicate without any doubt that the United States had no real interest in the Archipelago save that the rights of existing claimants be honored. The interests of the United States at the time of the Treaty were so nondescript as to be non-existent.[91]

Under the second approach, it might be considered an equitable solution of a special situation to allow only those States among the *original* High Contracting Parties who had mineral claims in

91. Evidence of this dilemma is apparent from the following telegram that was sent from the United States' Ambassador to France to the Secretary of State on July 26, 1919:

> In view previous participation our government in solution Spitzbergen Q. [*i.e.*, before the First War when the Arctic Coal Company was still in American hands], and *since our recognition of Norwegian sovereignty must presumably be given in some other way if we do not sign prepared treaty* and since we incur no obligation apart from recognition Norwegian sovereignty, all other obligations being on part Norway, it is *suggested* our participation as signatory *may be* desirable.

U.S. Archives: Versailles Peace Conference Case, American Commission to Negotiate Peace (Paris 1918-19) Case 184.00101/121 (emphasis added).

Spitzbergen extant at the time of the Treaty to enjoy rights to minerals in the soil and subsoil of the continental shelf off Spitzbergen beyond the territorial sea, if indeed it is resolved that the High Contracting Parties enjoy such mineral rights. In any case, it would be inequitable to grant mineral rights in the continental shelf of Spitzbergen to any subsequent adherents (as distinguished from original signatories) to the 1920 Treaty. Since the major powers with any real interest had already recognized Norwegian sovereignty over Spitzbergen, subsequent recognition by adherents would, practically speaking, not alter appreciably Norway's sovereignty over the Archipelago. While a treaty in itself does not bind non-parties, the majority of the adherents were countries that never had any real claim to Spitzbergen. If they had such a claim, they would have (with the possible exception of Russia, at that time the R.S.F.S.R.) undoubtedly been among the original signatories, or at least would have participated in the 1919 Spitzbergen Commission. Their withholding of recognition from what had actually become a *fait accompli* would have little significance. Moreover, Norway would have far greater claim to sovereignty over Spitzbergen than any of the adherents based on historical conduct alone, apart from any recognition resulting from the 1920 Treaty.

In conclusion, from an equitable standpoint the United States would be highly unlikely to prevail in any discussion with Norway under the guidelines the Court enunciated in the *North Sea Continental Shelf Cases.*

Criterion 2: Natural Prolongation of the Land.—The Court found, of all criteria it examined, that the consequences of the continental shelf being a "natural prolongation of the land" should be the primary one in any continental shelf delimitation. This language was also conspicuous in the Truman Proclamation.[92]

In a direct application of this principle to Spitzbergen and the Barents Sea subterranean shelf, the natural boundary between Northern Norway and the Spitzbergen Archipelago (including Bear Island) becomes the Barents Trough. Taken at an isobath of 400 meters, it clearly forms a natural division between the Norwegian and Spitzbergen shelves. The 200 meter isobath to the south of Bear Island, (the southern 200 meter isobath of the Spitzbergen banks, where the present exploration for continental

92. *See* Truman Proclamation, *supra* note 90.

shelf oil is being conducted) is located 44 miles to the south on a rhumb line connecting the closest points of mainland Norway and Bear Island. Twenty miles further along this line brings one to the 400 meter isobath. It is clear that this 20 mile area between the 200 and 400 meter isobath south of Bear Island marks the end of the "most natural extension of the land territory of [the] coastal State" (Spitzbergen), for ten miles further along the same line, we enter an isobath circle whose center is 590 meters in depth. One must travel approximately sixty-eight nautical miles along this same rhumb line, from the 400 meter isobath south of Bear Island, before reaching the 400 meter isobath on the Norwegian side of the Barents Trough. One travels south more than one hundred miles along the same rhumb line before reaching the 200 meter isobath, which is only seven miles along off the coast of Norway. In comparison, one can travel well over two hundred miles in a northerly direction from the two hundred meter isobath to the south of Bear Island, to Edge Island, and never travel beyond the two hundred meter isobath.

The result is that Spitzbergen clearly has a natural shelf of its own within the meaning of the Court's judgment in the *North Sea Continental Shelf Cases.*[93]

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93. The Court said:

> More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist as an extension of it in an exercise of sovereign rights for the purposes of exploring the seabed and exploiting its natural resources.

North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, at 22.

It is only in this area of the Court's decision that any language can be found which can directly be used in substantiation that Spitzbergen does have a continental shelf of its own, and that Norway cannot claim that her continental shelf extends northward to include the continental shelf around Spitzbergen. In another part of the judgment the Court stated:

> More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se*

In substantiation of the above views, the Court, in the North Sea Continental Shelf judgment, stated:

> The continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.[94]

It is further stated:

> The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact belong.[95]

Additional geologic substantiation of both the natural prolongation and the unity of deposit theories is found in a study made by the Greenland Management Company, Inc.[96] The study was made to indicate oil potential in Spitzbergen and its continental shelf. While being tempted to read between the lines that this study was in part made with an eye to the *North Sea* judgment, one can but mention the obvious fact that one cannot alter the sedimentary and metamorphic geological features on which the study is based.

Generally speaking, the study indicates that Spitzbergen was never part of Scandinavia or Europe. Rather, Spitzbergen formed the northeastern part of Greenland, which, together with Ellemere Island in the northwestern sector of Baffin Bay, were a unit before Spitzbergen split off from Greenland along the Nansen Fracture zone in the northeastern sector of the Greenland Sea. The import of this is that Norway, in light of the *North*

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title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. *From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State,* even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; . . . .

Id., at 31 (emphasis added).

94. *Id.*, at 47.

95. *Id.*, at 51.

96. *See* note 67 *supra.*

Sea Continental Shelf Judgment, can not claim that her continental shelf extends to Spitzbergen, and that Spitzbergen has no independent continental shelf of her own.[97]

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97. Quoting from the study, "Geology and Petroleum Potential," of the Greenland Exploration Management Company, Inc., in order to give scientific evidence of this phenomenon:

Tectonics

A review must be made of the regional and even of global tectonics around the Svalbard area to fully appreciate the petroleum potential. The enclosed figures show the present (Figure 1) and Gemco's concept of the pre-drift configuration (Figure 2) of the cratonic masses bordering the Scandic Sea. The 'Scandic Sea' describes here the region between the Western front and Eastern margin of Caledonian folding, and is the sea that opened up into the combined seas of the Greenland Sea, the Norwegian Sea and the Barents Sea. It will be noted that we hypothesize an intimate connection between Svalbard and Ellesmere Island at the northern tip of Greenland. It is further postulated that no drift, but only local tectonic movements took place in the Barents Sea region, the shallow sea floor of which extends the Fennoscandian Shield to Svalbard.

The northwestward drift of Greenland between 80 and 40 million years ago is hypothesized to have taken place along practically straight lines bounded to the north by the Nansen Fracture Zone. This fracture zone separated Svalbard from Peary Land in what now is Northeastern Greenland. Simultaneously, as the Baffin Bay opened up a practically straight southwesterly translation took place of the Ellesmere Island and separated Ellesmere Island from Northwestern Greenland and further increased the distance between Ellesmere Island and Svalbard.

Positive evidence that Svalbard was once a part of Northeastern Greenland is derived from the geology of the two areas. The Palaeozoic beds on Svalbard all seem to have been deposited from west to east from a land area west of Svalbard. This land area could have only been Northeast Greenland in view of our present knowledge. A scarpment is running parallel with the western coast of Svalbard and an abyssal depth is reached immediately west thereof. Since no subsidence of such a magnitude can be imagined, a drifting continental mass must have been located immediately west of Svalbard in Lower and Middle Devonian times.

Orogeny

Geological substantiation in support of the hypothesis that Ellesmere Island formed the Northwestern part of Greenland and butted up against Svalbard is found by comparing the North Greenland fold-in with the folding on Ellesmere Island. In North Greenland the Older Palaeozoic series can be followed from the south into the folding chain where the youngest layers are dated in the Siluric. Younger sequences are missing.

On Ellesmere Island we find Devonian marine deposits in the folding chain and no discordance between the layering from the Siluric to the Devonian. Consequently, we are led to believe that the folding on Ellesmere Island originally was parallel to instead of being a continuation of the North Greenland folding. It later subsided, allowing the Devonian marine deposits similar to those found on Svalbard.

The result of the original Svalbard/Greenland position is that the Svalbard could instead be younger and direct extensions of the folding on Ellesmere Island and running parallel to the North Greenland folding, and perpendicular to the Caledonian folding in Eastern Greenland.

The North Greenland folding is believed to have taken place in at least three separate periods generally called Hercynian, the latest of which took place in Lower Carbon. Most of the geological evidence on Svalbard would place the north-south axis folding in Devonian times and thus making it part of the early Hercynian orogeny.

The hypothesis is further supported by the fact that the North

Criterion 3: Natural Unity of Deposits.—If this index is not sufficient to establish the existence of a Spitzbergen continental shelf, the Court gives one other which further substantiates this conclusion:

> [i]n balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again *to the idea of the unity of any deposits.*[98]

This principle militates in favor of Spitzbergen, for as far as exploration to date has revealed, the oil and natural gas deposits lie exclusively to the north of the Barents Trough, and nothing has been found to the south.

There are two other authorities that lend further credence to the validity of this criterion. In the Truman Proclamation of 1945, President Truman based the United States' claim to the continental shelf, *inter alia,* on the fact that the continental shelf resources. "[F]requently form a seaward extension of a pool or

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Greenland folded mountains are characterized by increased metamorphosis towards the north, but fall short of gneiss and [sic] granite. The missing and most strongly metamorphosed part of North Greenland could be the Hekla Hoek series on Svalbard. An area of strong folding would have created a weak part of the pre-drift craton and the ensuing fracture zone would run along that weak line and from the northern edge for Greenland's later drift.

With regard to the above excerpt from the study note that under the section "Tectonics" at the end of the first paragraph, the following was included: "it is further postulated that no drift, but only local tectonic movements took place in the Barents Sea region, the shallow sea floor of which extends the Fennoscandian Shield to Svalbard." This refers to the fact that much earlier than the continental drift occurred, the depression represented by the Barents Trough was not a depression but rather a continuous area connecting both sides of the Trough in a continuous plan. However, about 400 or 500 million years ago, the present trough came into being, the result of tectonic orogeny. The present Trough represents as great a geologic phenomenon as does a fracture zone or a continental drift episode. The present trough, filled with many layers of sedimentary deposits on top of the original stratigraphy, therefore represents as natural a division between the opposing sides as could be entertained from a geologic standpoint. Moreover, the stratigraphic layers on the islands of the Spitzbergen Archipelago are part of the same formations which dip down under the territorial sea of Spitzbergen and continue through what may be referred to as the Spitzbergen continental shelf. This continuity, on which the Court places so much emphasis, represents a feature known as "dip" geologically speaking. Apparently, these factors outweigh the initial (*i.e.*, 500 million years ago) horizontal continuity of the Barents sea basin, and militate in favor of the recognition of a separate Spitzbergen continental shelf.

98. North Sea Continental Shelf Cases (Judgment) [1969] I.C.J. 3, 51-52 (emphasis added).

deposit lying within the territory . . . ."[99] The Court, in its judgment in the *Anglo-Norwegian Fisheries Case,* in determining the delimitation of the territorial sea of Norway, stated:

> [S]ome reference must be made to the close dependence of the territorial sea upon the land domain.
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> . . . .
>
> The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters.[100]

While the Court in this context was addressing itself more to the socio-economic aspects of being "linked to the land domain," especially with regard to fishing, inherent not only in this section of the Court's judgment but also in the entire opinion was the geographical-geological relationship of the islands to mainland Norway. Applied to Spitzbergen even from this primary socio-economic view, it is evident that any exploration or exploitation of minerals outside the territorial sea of Spitzbergen would have to be sustained from the islands of the Archipelago, mainland Norway being, as indicated, more than 350 miles to the south. It seems to follow from this criterion enunciated by the Court and the Truman Proclamation that there are two separate and distinct banks, the one appertaining to Spitzbergen, the other to Norway.

Criterion 4: The Need for Concurrent Criteria.—In spite of the above indicia and the conclusions drawn therefrom, an examination of the actual delimitation of the two shelves on the above principles can well lead to that very state of inequity which the Court so scrupulously attempted to avoid. Throughout the Judgment, the Court stresses the need for a plurality of criteria to reach any equitable delimitation.[101]

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99. *See* Truman Proclamation, *supra* note 90.

100. Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 133.

101. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ one method for the purposes of given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

North Sea Continental Shelf Cases (Judgment), [1969] I.C.J. 3, 49.

It has however been maintained that no one method of delimita-

Purely on the basis of natural prolongation and its concomitant aspects, geology and geography, the edges of the Berents Trough would mark the limits of the Norwegian and Spitzbergen continental shelves. If this criterion taken *in vacuo* were to be the determinant, it would mean that the Spitzbergen continental shelf would include the only areas in the Berents Sea known to contain significant deposits of oil and natural gas. Confining the shelf to the two hundred meter isobath would of course not accomplish anything constructive in resolving the problem. As depths greater than 200 meters are attained within the Norwegian territorial sea along the entire northern coast of the State, little equity would be inherent in such a solution. Certainly, if the entire shelf issue, as indicated by the Court, should start out by meaningful negotiation between Norway and the High Contracting Parties, reliance on this criterion alone would hardly encourage success in the discussions.

With regard to the application of median lines to the Norwegian and Spitzbergen continental shelves, it is instructive that in the Agreement on the Delimitation of the Continental Shelf between Denmark and Norway, signed at Oslo, on 8 December, 1965, Denmark and Norway agreed that in as far as the exploration and utilization of natural resources are concerned:

> The boundary between that portion of the continental shelf over which sovereignty is exercised by Denmark and Norway, respectively, shall be the median line which at every point is situated at an equal distance from the nearest point on the base lines from which the width of the outer territorial waters of the Contracting Parties is measured.[102]

While this Agreement is of course not binding on Norway in any subsequent agreement or negotiation concerning the delimitation of the Norwegian and Spitzbergen continental shelves, it is noteworthy that she has in the past recognized the equidistance principle as an equitable and viable means of delimiting the respective shelves of opposing States.

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tion can prevent such [inequitable] results and that all can lead to relative injustices. . . . It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal.

Id., at 50.

The import of this language to Spitzbergen becomes all the more apparent when the results of applying the criteria of natural prolongation, geology, geography, socio-economic links, and unity of deposits are evidenced.

102. Agreement on the Delimitation of the Continental Shelf between Denmark and Norway, December 8, 1965, U.N.T.S. No. 9052.

In a similar vein, although not a signatory to the 1958 Convention on the Continental Shelf, Norway did accede to the Convention in December, 1971. At the time of her accession, Norway made a revealing statement with regard to the nature of her accession;[103] however, she did not find acceptable a reservation made by France stating that:

> In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be involved against it:
>
> —if such boundary is calculated from baselines established after 29 April, 1958;
>
> —if it extends beyond the 200 meter isobath;
>
> —if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.

While this statement likewise could not be used against Norway, equitable estoppel could not be asserted against her in any action (or inaction) taken by her to date in relation to Spitzbergen (or to her own northern continental shelf). This is clear since both her protest of the reservation of France, and her own lack of reservation regarding article 6 of the 1958 Continental Shelf Convention would indicate her acceptance of the article, not merely of the provision for agreement, but of the principle of median lines. In the Spitzbergen-Norwegian delimitation question, the applicable median line, were one to be used, would certainly be one (a) calculated from baselines established after April 29, 1958 (it will be remembered the baselines for the territorial sea of Spitzbergen were established in 1970); (b) extending beyond the 200 meter isobath; (c) falling within areas in which there are "special circumstances" within the meaning of article 6 (that is, the regime established by the Treaty on the Status of Spitzbergen of February 8, 1920). If the issue were raised against Norway, she no doubt would maintain that the reservation was directed solely against France only insofar as the latter's

103. Note from the legal counsel of the U.N. dated October 4, 1971, (ref. C.N. 152, 1971 TREATIES-12):

> In depositing their instrument of accession regarding the said Convention, the Government of Norway declares that they do not find acceptable the reservations made by the Government of the French Republic to Article 5, Paragraph 1, and to Article 6, §§ 1 and 2.

exclusion of the enumerated waters around the French coast, *viz.*, "The Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast." It and the 1965 Agreement between Denmark and Norway are indications of Norway's acceptance (albeit in another set of factual circumstances) of the equity of median lines as a criterion in continental shelf delimitations.

It is beneficial, for the purpose of hypothesizing on the delimitation issue, to view the problem without reference to the 1920 Treaty. Leaving it temporarily aside, focusing solely on the various criteria considered by the court, and given the geologic aspects earlier considered, the logical solution would be for a median line to be drawn between the opposing four hundred meter isobath contours on either side of the Barents Trough. This would not only uphold the natural prolongation and unity of deposit criteria, but would be more equitable than relying solely on a lateral median line between Bear Island and Nordkapp (the northernmost point of the Norwegian coast). This solution would, as indicated, artificially truncate the Norwegian Continental Shelf before it reached the furthest extent of its natural prolongation and dipped into the Barents Trough.

The other side of the "Barents Trough" median line would be the Spitzbergen Continental Shelf. With regard once again to the 1920 Treaty, and, in the light of the application of Lord Asquith's Award in *In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*[104] to mineral rights to the continental shelf under the 1920 Treaty, since the High Contracting Parties do not enjoy mineral rights to the Spitzbergen Continental Shelf, Norway would not be in a position to complain of the inequity of such a delimitation. Practically speaking, she would be sovereign over both shelves on either side of the Barents Trough median line, and the problem would be moot. It is only in the case that Lord Asquith's opinion were not taken to apply to the situation that the problem would be exacerbated; except for the reasons developed in this paper, this would not be the case. But if it were, the metes just described should not be in any way invalidated, for they precede not from a legal viewpoint within the frame of the Treaty, but on the basis of the physical attributes of the Barents Sea floor. Any inequalities resultant therefrom

104. 1 INT'L & COMP. L.Q. 247 (1952).

should be the matter of negotiations between Norway and the High Contracting Parties.

VI. DELIMITATION OF THE SPITZBERGEN CONTINENTAL SHELF TO THE EAST AND WEST OF THE ARCHIPELAGO

Charts of the Arctic Ocean Floor reveal that the type of submarine terrain discussed above is in no way like the submarine terrain at issue in the delimitation of the Continental Shelf between Spitzbergen and Greenland (Peary Land and King Frederik VIII Land). Whereas the Barents Trough represents a geosyncline formed by tectonic orogeny, the Nansen Fracture Zone represents a continuing volcanic upheaval and splitting (but not a folding) along what today is considered to be the very margin of opposing continental plates under the continental drift theory. Whereas the Barents Trough reaches a maximum depth of six hundred feet, the Nansen Fracture Zone reaches in many places depths in excess of eleven thousand feet. The volcanic Arctic Mid-Oceanic Ridge is a continuing phenomenon extending from Iceland to the Sadko Trough in the Laptev Sea off Northern Siberia, which, when connected (and any logical conceptualization of it would so do) with the Reykjanes Ridge on the south side of Iceland and the Mid-Atlantic Ridge, forms a clear divide between the two hemispheres from pole to pole.

In this Spitzbergen-Greenland delimitation, the primary question is the effect of the mid-ocean trench on the delineation proceeding. The problem of the duality of the definition of the continental shelf inherent in article 1 of the Convention on the Continental Shelf has already been discussed. Before resorting to the median line for delimitation, several remarks made by the Fourth Committee of the United Nations Conference on the Law of the Sea concerning the Norwegian Trough are pertinent. Before citing them, several factual distinctions must be made. The Norwegian Trough can hardly be compared in a geological sense to the Arctic Mid-Oceanic Ridge (Nansen Cordillera), of which the Nansen Fracture Zone is a part. The Norwegian Trough is clearly a part of the European Continental Shelf under the North Sea and represents (as does the Barents Trough) a gentle folding of the submarine surface into a geosyncline. The Nansen Cordillera is the umbilical chord of the European and American continental land masses. The greatest

depth attained in the Norwegian Trough is 1,330 feet; in the Nansen Cordillera, a depth of 14,800 feet is obtained in the Pole Abyssal Plain to the east of the Lomonosov Ridge. This is not surprising for the Nansen Cordillera and Nansen Fracture Zone bottom in the deep ocean floor; the Norwegian Trough, but on the European Continental Shelf.

The import of the remarks by the Fourth Committee on the Continental Shelf must therefore be viewed with proper regard for the factual dichotomy just described.

On 13 March, 1958, during the General Debate on Article 67, Mr. Gomez Robeldo (Mexico) stated:

> The text of article 67 should include a reference to special cases—mentioned in paragraph 8 of the International Law Commission's commentary—of areas of the continental shelf separated from it by channels deeper than 200 metres, but such special cases should not be dealt with as exceptions to the general rule. It would be better to add to article 67 a paragraph to the effect that the outer limit of the continental shelf would not be affected when it included areas divided from it by channels of a greater depth than that laid down in the first paragraph of the article. If other delegations supported that view, he would submit an amendment to that effect.[105]

On 24 March, Miss Gutteridge (United Kingdom), in referring to the same problem, stated (*selon le rapporteur*):

> [T]hat the joint proposal, which contained no definition of the continental shelf, sought in paragraph 1 to make clear that the provisions applied to the seabed and subsoil of all submarine areas adjacent to the mainland or island coasts. On the latter question, her delegation reserved its position until the Commission came to deal with Article 72, because the present article was not concerned with the drawing of median and lateral lines. In cases where—as off the west coast of Norway—there was a deep channel immediately off the coast, the provisions would apply in the same way as to a continental shelf in the geological sense of the term.[106]

On 25 March, 1958, Mr. Stabell (Norway) said (*selon le Rapporteur*):

> [H]e thanked the representative of the United Kingdom for

105. U.N. DOC. A/CONF. 13/42, at 15 (1958).
106. *Id.*, at 41.

> her statement (17th meeting) about the configuration of the seabed off the Norwegian coast, expressing a view which was in conformity with that of scientific experts. It confirmed his delegation's view that the Norwegian trough was a part of the continental shelf, and did not exclude Norway from the seabed beyond it.[107]

Examining these statements individually for points useful in the Spitzbergen-Greenland delimitation question, it should be noted that in Mr. Robeldo's remark, he refers neither to trenches nor to troughs, but merely to " . . . areas of the continental shelf separated from it by *channels* deeper than 200 metres." While the Norwegian Trough could easily be classified as a channel, the Nansen Cordillera and Fracture Zone could in no way be so considered. Not only is the Zone far deeper than any channel; it is the result of geologic volcanic activity and not of erosion, underwater currents, or mere folding.

With regard to Miss Gutteridge's remark, which mentions the Norwegian Trough, apparently it was the understanding of the United Kingdom (as subsequently evident in the Anglo-Norwegian Agreement in the *North Sea Continental Shelf Cases Judgment*) that "deep channels immediately off the coast" of a State would not *ipso facto* artificially terminate what would otherwise be a continuation of that State's continental shelf. Not surprisingly, this understanding was endorsed by Mr. Stabell (Norway), as "it confirmed his delegation's view that the Norwegian Trough was a part of the continental shelf, and did not exclude Norway from this seabed beyond it." In addition, the United Kingdom's joint proposal, while failing to provide a definition of the continental shelf, did provide that "[t]he coastal State exercises over the submarine areas referred to in Article 67, up to a depth of water of 550 metres, sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and subsoil of such areas."[108] Such a depth limitation of course excludes the possible inclusion of the Nansen Fracture Zone in the same category as the Norwegian Trough.

It is unnecessary to examine these remarks and the lack of protest thereto voiced by the other members of the Fourth Committee from the viewpoint of the binding nature of such

107. *Id.*, at 48.

108. U.N. DOC. A/CONF. 13/C.4/L.44, art. 68.

remarks, as the manner in which each is phrased indicates that whatever they meant by using the term "channel," "deep channel," and "trough" in conjunction with an embracing continental shelf, they did not envisage as being included within their remarks a submarine cordillera or trench bottoming on the ocean floor. In no way could the Nansen Cordillera (especially, the Greenland Basin), which at its most narrow point (the Yermak Plateau and Nordostrundingen) is 120 miles wide and at its most wide point Mackenzie Cone in the Beaufort Sea and Svataya Anna Cone off Franz Josef Land) is 1750 miles wide be considered either a "deep channel immediately off the Coast" or a "part of the continental shelf," nor could the opposing sides (shelves) of Greenland and Spitzbergen be termed "areas of the [same] continental shelf separated from it by channels deeper than 200 metres." Having determined that the above remarks are not applicable to the particular problem, a resort to the Convention on the Continental Shelf is necessary.

As article 1 in its duality defines the continental shelf to be the "[s]eabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea . . . to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas," it is not beyond the realm of reason or the present law to contemplate the respective shelves of Greenland and Spitzbergen to include parts of the ocean floor of the Greenland Basin and the Nansen Fracture Zone. Therefore, while there would be precedent for Norway's "jumping" a channel or a trough (as was done in the case of the Norwegian Trough and the Santa Barbara Channel), there is no justification in the case of the Nansen Fracture Zone.

Turning once again to article 6(1) for guidance, and to the Judgment of the International Court of Justice in the *North Sea Continental Shelf Cases,* the boundary should most opportunely be determined by agreement between the parties. Failing this, and the lack of recognized "special circumstances," the boundary is to be the median line. In the absence of any agreement by the parties, it may be concluded that the boundary between the Greenland and Spitzbergen continental shelves is the median line between the two lands. This median line, drawn on equidistance principles, happens to fall quite generally along the continental slope of the Greenland shelf, and Nor-

way's partage encompasses practically the entire Greenland Basin and Nansen Fracture Zone.

In light of the above, an agreement could perforce be reached between Denmark and Norway, which, if the Greenland Basin is to be included as part of the respective shelves, would arrive at some more equitable partage of that portion of the ocean floor. Geomorphologically speaking, if advancing technology precludes the possibility of confining the continental shelf to be the most seaward extent of the rise and slope of the continental shelf, the stress laid by the Court in its Judgment on natural prolongation should result in the Nansen Fracture Zone itself becoming the demarcation line between the continental "shelves" of Spitzbergen and Greenland. As the Fracture zone (if the continental drift theory is entitled to credence) is the original and ultimate extent of the continental plates (although by envisaging it as an "extent" means one is, geomorphologically, reasoning backwards), there is no more natural or logical "shelf" or plate demarcation line than this fracture zone. This, however, predicates upon a "prevision so extravagant," at least from an international legal point of view, that only scant reliance should be placed on this otherwise valid principle by its proponents; and in the vacuum of non-agreement by the parties, the only impartial and equitable determination of the boundary of the respective shelves of Greenland and Spitzbergen can be a median line.

The delimitation between Spitzbergen and Russia (*viz.*, her territories Novaya Zemlya and Franz Josef Land) is, generally speaking, *tabula rasa.* There is no geosyncline, nor is there a submarine cordillera or fracture zone to demarcate the continental shelf between Spitzbergen and both Franz Josef Land and Novaya Zemlya. The eastern portion of the Barents Sea is generally between 300 and 400 meters deep with irregular isobaths and certain prominent plateaus, e.g., that between Spitzbergen and Franz Josef Land, lying between 78° 00'.00" N and 80° 00' .00"N. As the natural prolongation and unity of deposit criteria prove of little value, and as the distance between Kritoya and Ostrov Viktoria (the closest opposing islands of Spitzbergen and Franz Josef Land) is less than 40 miles, the sole remaining equitable method of demarcation is that of a lateral median line which can be taken to be the demarcation between the respective territories.

One final point in conjunction with the delimitation between

Spitzbergen, Franz Josef Land, and Novaya Zemlya; on all Russian charts of the region, there appears a purple hatched line representing the so-called Russian "Arctic Sector claim" on the western extremity of the Russian sphere. The only other State to make sector claims was Canada, who first developed the theory.[109]

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109. Briefly stated, the "sector principle" on which the claims are based is that all lands discovered or undiscovered, within a spherical triangle formed by the North Pole and the easterly and westerly limits of a country's Arctic Ocean coast, belong to the coastal State concerned or that this State should have at least a preferential right to acquisition.

The Soviet sector claim, apparently inspired by the Canadian claim, was put forward in 1926. It asserts Soviet sovereignty over all lands and islands discovered or to be discovered in the sector from L32° 04'35" E to L168° 49'30" W, except that acknowledged to be foreign territory (Spitzbergen). In writing on the decree of 1926, Soviet jurists have gone beyond a mere claim to land, claiming as "open polar seas" (that is, seas having a status "nearly identical with that of territorial waters") all water areas within the Soviet sector. In the opinion of the Soviet jurists, this gives the U.S.S.R. exclusive right to the airspace above such seas. Whether the writings of these jurists should be viewed as private opinions or as quasi-official statements of Soviet policy is uncertain. Consequently, what the Soviets actually include in the claim for their sector is not known. In the late 1920's Norway protested the Soviet sector claim because it negated the Norwegian claim to Franz Josef Land. The protest was not advanced vigorously, however, and it is now clear that Norway's claim to Franz Josef Land has been abandoned.

The United States and Norway have not made Arctic sector claims and do not recognize such claims or the sector principle. However, the United States has never formally protested the sector claims, either those of Russia or of Canada. However, it is noteworthy that Russia did not protest on any of the several occasions in the 1950's when United States' manned ice-floe stations circled into the Soviet sector.

While the author can find no basis in international law for such claims, he merely mentions the existence of such a claim for the sake of completeness. In any case, he does not believe that the existence of the claim in any way can effect the validity of a lateral median line demarcation between the Russian and the Spitzbergen continental shelves.

However, a median line between the Archipelago and Norway produces even more inequitable results: the Norwegian continental shelf would artificially be truncated, would not reach the natural edge of the Barents Trough, and would defeat even the natural prolongation principle stressed by the Court.

Casting for a possible equitable alternative to which Norway might be receptive although it would in itself be somewhat removed from the natural prolongation principle, a lateral median line between Spitzbergen and Norway which for the purposes of construction ignores the quite accidental geological presence of Bear Island, stranded between Spitzbergen and Norway, yields interesting results. Such a median line, while inherently attractive in that equidistance principles, somewhat more equitably arrived at, are employed, allots to Norway but a relatively insignificant section of the Spitzbergen Banks.

VII. AWARD OF LORD ASQUITH OF BISHOPSTONE IN THE MATTER OF AN ARBITRATION BETWEEN PETROLEUM DEVELOPMENT (TRUCIAL COAST) LTD. AND THE SHEIKH OF ABU DHABI: AN ANSWER TO THE SPITZBERGEN PROBLEM

In an articulate and extremely well-reasoned arbital award, Lord Asquith resolved the question which is quite similar to the ultimate query of this paper: whether United States' nationals under the 1920 Treaty on the Status of Spitzbergen enjoy mineral rights to oil and natural gas deposits located under the continental shelf of Spitzbergen. Lord Asquith's award is probably the only international judicial pronouncement on the issue which has attempted to answer the issues raised in this article. While Lord Radcliffe's award in the Qatar Arbitration did precede that of Lord Asquith's, it is of marginal use because Lord Radcliffe failed to expound the principles and reasoning on which he based his conclusions.

Briefly stated, the ruler of Abu Dhabi, Sheikh Shakhbut, granted an exclusive concession to Petroleum Development (Trucial Coast) Ltd. in 1939 to drill for and win mineral oil "in the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area."[110] In 1949, and subsequent to the continental shelf proclamation of Abu Dhabi, the Sheikh granted a further concession to a company other than Petroleum Development (Trucial Coast) Ltd., the plaintiffs, to drill for and to win mineral oil on the continental shelf of Abu Dhabi beyond the territorial sea. The plaintiffs claimed that under the concession such rights already vested in them due to the Continental Shelf Doctrine. Lord Asquith held that they did not.

Lord Asquith initially "brushed aside" the "complicating factors" of the doctrine of the Continental Shelf and negotiations (*travaux préparatoires*), and considered the "bare language of the Agreement itself."[111] The critical articles in issue were articles 2 and 3.[112]

110. Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi (United Kingdom v. Abu Dhabi) 1 INT'L & COMP. L.Q. 247, 249 (1952).

111. *Id.*, at 252.

112. Article 2(a) The area included in this Agreement is the whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area. And if in the future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area shall coincide with the limits specified in this definition.

It is readily apparent that the language employed in the Agreement is clearer and less troublesome than in the 1920 Treaty. It mentions the right to "search for discover drill for and produce mineral oils and their derivatives and allied substances." However, the same problem of areal definition occurs in the Agreement, as in the Treaty, and in remarkably similar form. Article 1 of the Treaty establishes the area in which the Treaty would be effective, and article 2 in the Agreement does the same. Article 3, in both instruments, in providing for the mineral rights accorded the Parties, refers respectively to "the territories specified in Article 1" and "within the area," the "area" in the latter instance being that of article 2. Whereas article 2 of the Agreement mentions "the whole of the lands belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to that area," and article 1 of the Treaty fails to mention "sea waters," the omission is overcome by the inclusion of the dual prepositional phrases "both on land and in the territorial waters" in article 3 of the Treaty. Both instruments are "balanced" in this regard.

Lord Asquith makes a penetrating observation in his examination of the first coordinating conjunction "and" in the predicate nominative "the whole territory subject to the rule of the Ruler of Abu Dhabi and its dependencies and all its islands and territorial waters." (article 2(a)).[113]

(b) If in the future a Neutral Area should be established adjacent to the lands of Abu Dhabi and the rights of rule over such Neutral Area be shared between the Rule of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include what mineral oil rights he has in that area.

(c) The Company shall not undertake any works in areas used and set apart for places of worship or sacred building or burial grounds.

Article 3. The Ruler by this Agreement grants to the Company the sole rights, for a period of 75 solar years from the date of signature, to search for, discover, drill for, and produce mineral oils and their derivatives and allied substances within the area, and the sole right to the ownership of all substances produced, and free disposal thereof both inside and outside the territory: provided that the export of oil shall be from the territory of the Concession direct without passing across any adjacent territory.

And it is understood that this Agreement is a grant of rights over Oil and cannot be considered an Occupation in any manner whatsoever.

Id., at 249.

113. What does the word "and" mean in this connection? In its most natural sense it surely means "plus." It introduces an addendum to something which has gone before. (I discuss an alternative meaning suggested for it below). But if it simply means "plus," then the expression 'the whole of the lands which belong to the rule of the Ruler' cannot be read literally; for read literally that phrase would include in any case the islands, and probably the territorial waters, and it would not be necessary or sensible to make these items addenda. On this

Applying this to the pertinent parts of the language of article 1 of the Treaty of 1920, *viz*:

> [T]he Archipelago of Spitzbergen, comprising, with Bear Island or Beeren Island, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitzbergen, North-East Land, Barents Island, Ege Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto . . .

and treating the words "together with" as did Lord Asquith with "and," Lord Asquith's logic is in the Treaty context equally applicable. The last phrase of article 1 of the Treaty indicates clearly that *all* the lands of the Treaty (certainly with regard to continental shelf lands) were not included in "the Archipelago of Spitzbergen," for if such had been the case, the last phrase in article 1 would be superfluous.[114]

Applying this to article 1 of the Treaty of Spitzbergen, the

> meaning of 'and,' *the 'land' must be limited to the mainland* (no doubt excluding inland or landlocked waters in an incented coast). What, on this basis, does the second addendum mean, *viz.*, 'the sea waters which belong to that area?' Placing oneself in the year 1939 and banishing from one's mind the subsequent emergence of the doctrine of the 'Shelf' and everything to do with the negotiations, I should have thought this expression could only have been intended to mean the territorial maritime belt in the Persian Gulf, which is a three-mile belt; together with its bed and subsoil, since oil is not won from salt water. In what other sense at that time could sea waters be said to 'belong' to a littoral power or to the 'rule of the Ruler?' In point of fact, that is the meaning the claimant company was asserting for the expression as late as March, 1949, ten whole years after the contract (see letter page 86A of the Correspondence).
>
> Even if 'and' had a different signification, not cumulative but epexegetic, such as 'and mark you, in case you are in doubt, I include in the 'lands' the islands and sea waters which belong to the area,' I should still hold, in the absence of what I have termed the complicating factors, that the Concession covered the sea-bed and subsoil of the territorial belt. Nothing less. The only question would be whether it covered more [emphasis added].

Id., at 252.

114. In this regard, Hackworth states:

> All words of the treaty are, if reasonably possible, to be given a meaning, and rules of construction may not be resorted to in order to render them meaningless.

5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 106 (1943).

In an instruction of August 1, 1929, from the Department to the Legation in Bulgaria, the Department said:

> It is certainly a rule in construing treaties, as well as all laws, to give a sensible meaning to all their provisions if that be practicable. Treaty stipulations will not be regarded as a nullity unless the language clearly makes them so. It will not be presumed that the framers of a treaty have done a vain thing.

Id.

only entirely logical and coherent interpretation of the article is in a manner consistent with Lord Asquith's observations. The interpretation is what should by now be obvious: the High Contracting Parties did not intend to reserve to themselves mineral rights in submerged lands beyond the four mile territorial sea of Spitzbergen.

Before examining further Lord Asquith's views on the inclusion *vel non* of the continental shelf in the 1939 concession, the 1920 Treaty concerning Spitzbergen should be interpreted in a 1920 context in an attempt to reconstruct what was the intention of the parties at that time. Although there are doubtless those of other persuasions who believe that a Treaty should be treated as a "living instrument," and that its meaning should change with the times, this author believes that an instrument conceived for a specific purpose and not generally philosophical in nature should, where its language evinces uncertainty, be reconstructed with due regard for the intent of the parties.[115]

In addressing himself to the problem raised by the continental shelf, Lord Asquith found that not only was the concept of the continental shelf not an established rule of international law at the time of his award (1951), but that it was clearly inapplicable and incapable of affecting the construction of the contract of 1939. In response to the attempt by the plaintiffs to enlarge the meaning of "lands" in "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi" or in "the sea waters which belong to that area" in article 2(a), he states:

The argument falls to the ground if I am right in rejecting

115. Lord Asquith is apparently of the same view when he writes:

> [A]lthough it is clear that marine areas were at this stage quite outside the contemplation of the parties. . . .

1 INT'L & COMP. L.Q. 247, 259 (1952).

> Negatively (still leaving aside what I have called the complicating factors) I should certainly in 1939 have read the expression 'the sea waters which belong to that area' not only as including, but as *limited* to, the territorial belt and its sub-soil. At that time neither contracting party had ever heard of the doctrine of the Continental Shelf, which as a legal doctrine did not then exist. No thought of it entered their heads. None such entered that of the most sophisticated jurisconsult, let alone the 'understanding' perhaps strong, but 'simple and unschooled', of Trucial Sheikhs.
>
> Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even admitted to the canon of international law.

Id., at 253.

> the premise on which it rests, namely, that the doctrine of the Shelf has become and, indeed, was already in 1939, part of the *corpus* of international law.[116]

In conclusion, he states:

> [I]t follows, if I am right, that the claimants succeed as to the subsoil of the territorial waters (including the territorial waters of islands) and that the Sheikh succeeds as to the subsoil of the shelf; by which I mean in this connection the submarine area contiguous with Abu Dhabi outside the territorial zone; *viz.*, the former is included in the Concession and the latter is not; and I award and declare to that effect.[117]

Before leaving Abu Dhabi, an excerpt from an editorial comment on Lord Asquith's award by Richard Young points to a fact which should have occurred to the reader and to the original High Contracting Parties:

> The crux of the matter in this regard was that the words used in the 1939 agreement, as those words were commonly understood at the time, were not apt to convey any interest in submarine areas outside of territorial waters. Had such language been used, it would presumably have been binding on the parties in the arbitration proceeding, regardless of the existence or nonexistence in international law of a rule with respect to the continental shelf.[118]

Although Lord Radcliffe, in *Petroleum Development (Qatar) Ltd. v. Ruler of Qatar*[119] did not, as earlier indicated, include the reasons for his ruling in his award, his decision based on a similar set of facts as in Abu Dhabi is pertinent. The First Article of the Oil Agreement with the plaintiffs provided for "the sole right throughout the Principality of Qatar to explore, to prospect, to drill for and to extract and to ship and to export, and the right to refine and sell petroleum and natural gases, ozokerite, asphalt and everything which is extracted therefrom."[120] The Second Article provided, *inter alia,* that the Company could "operate in any part of the State of Qatar. . . . The State of Qatar means the whole area over which the Sheikh rules. . . ."[121]

Lord Radcliffe, as the Third Arbitrator, held:

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116. *Id.*, at 260.
117. *Id.*
118. 46 AM. J. INT'L L. 512, 514 (1952).
119. 18 H. LAUTERPACHT, INTERNATIONAL LAW REPORTS 161 (1957).
120. *Id.*
121. *Id.*

(e) The Third Arbitrator and the Sheikh's Arbitrator decide that the Concession does not include the sea-bed or subsoil or any part thereof beneath the high seas of the Persian Gulf contiguous with such territorial waters, which sea-bed and subsoil are more particularly mentioned in the aforesaid Proclamation of 8th June, 1949, and they so award.[122]

The *rationes decidendi* of Lords Asquith and Radcliffe leave us with but one result: that under article 3 of the Treaty the United States and the other High Contracting Parties to the Treaty on the Status of Spitzbergen of 9 February, 1920 have never enjoyed rights to oil and natural gas deposits in the continental shelf of Spitzbergen.

VIII. CONCLUDING COMMENT

The conclusions reached in this article are not the only ones which can be drawn from the matrix of fact and circumstance which Secretary of State Lansing called "A Unique International Problem" as early as 1917. The conclusions are at least substantiated by the mining history prior to the Treaty on the Status of Spitzbergen, subsequent practices attendant to it, and by the decisions of the International Court of Justice.

While it is true that the future may reveal that Spitzbergen Banks contain great unexploited reserves of oil, at the moment few American corporations are actively engaged in petroleum exploration in this area. There are other interests relating to United States-foreign relations, defense, and strategic geographical locations which may prove to be far more important than the ability to acquire oil and natural gas more cheaply than the historic and geographic equities would dictate.

Hopefully, the identification of issues in this article will prove of some value and that the author has succeeded in making Secretary Lansing's unique international problem perhaps a bit less so.

122. *Id.*, at 163.

APPENDIX:

TREATY CONCERNING THE ARCHIPELAGO OF SPITZBERGEN†

Article 1.

The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.

Article 2.

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

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

Occupiers of land whose rights have been recognized in accordance with the terms of Articles 6 and 7 will enjoy the exclusive right of hunting on their own land: (1) in the neighbourhood of their habitations, houses, stores, factories and installations, constructed for the purpose of developing their property, under conditions laid down by the local police regulations; (2) within

† Feb. 9, 1920, 43 Stat. 1892, T.S. 686, 2 L.N.T.S. 8. Signatories included Norway, United States, Australia, New Zealand, Union of South Africa, United Kingdom, Canada, India, Denmark, France, Italy, Japan, the Netherlands, and Sweden.

There are three accepted spellings for the name of the Archipelago: Svalbard, Spitsbergen, and Spitzbergen.

a radius of 10 kilometres round the head-quarters of their place of business or works; and in both cases, subject always to the observance of regulations made by the Norwegian Government in accordance with the conditions laid down in the present Article.

Article 3.

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

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

Notwithstanding any rules relating to coasting trade which may be in force in Norway, ships of the High Contracting Parties going to or coming from the territories specified in Article 1 shall have the right to put into Norwegian ports on their outward or homeward voyage for the purpose of taking on board or disembarking passengers or cargo going to or coming from the said territories, or for any other purpose.

It is agreed that in every respect and especially with regard to exports, imports and transit traffic, the nationals of all the High Contracting Parties, their ships and goods shall not be subject to any charges or restrictions whatever which are not borne by the nationals, ships or goods which enjoy in Norway the treatment of the most favoured nation; Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not treated more favourably in any respect.

No charge or restriction shall be imposed on the exportation of any goods to the territories of any of the Contracting Powers other or more onerous than on the exportation of similar goods to the territory of any other Contracting Power (including Norway) or to any other destination.

Article 4.

All public wireless telegraphy stations established or to be established by or with the authorisation of, the Norwegian Government within the territories referred to in Article 1 shall always be open on a footing of absolute equality to communications from ships of all flags and from nationals of the High Contracting Parties, under the conditions laid down in the Wireless Telegraphy Convention of July 5th, 1912, or in the subsequent International Convention which may be concluded to replace it.

Subject to international obligations arising out of a state of war, owners of landed property shall always be at liberty to establish and use for their own purposes wireless telegraphy installations, which shall be free to communicate on private business with fixed or moving wireless stations, including those on board ships and aircraft.

Article 5.

The High Contracting Parties recognise the utility of establishing an international meteorological station in the territories specified in Article 1, the organisation of which shall form the subject of a subsequent Convention.

Conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories.

Article 6.

Subject to the provisions of the present Article, acquired rights of nationals of the High Contracting Parties shall be recognised.

Claims arising from taking possession or from occupation of land before the signature of the present Treaty shall be dealt with in accordance with the Annex hereto, which will have the same force and effect as the present Treaty.

Article 7.

With regard to methods of acquistion, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant to all nationals of the High Contracting Parties treatment based on complete equality and in conformity with the stipulations of the present Treaty.

Expropriation may be resorted to only on grounds of public utility and on payment of proper compensation.

Article 8.

Norway undertakes to provide for the territories specified in Article 1 mining regulations which, especially from the point of view of imposts, taxes or charges of any kind, and of general or particular labour conditions, shall exclude all privileges, monopolies or favours for the benefit of the State or of the nationals of any one of the High Contracting Parties, including Norway, and shall guarantee to the paid staff of all categories the remuneration and protection necessary for their physical, moral and intellectual welfare.

Taxes, dues and duties levied shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.

So far, particularly, as the exportation of minerals is concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1% of the maximum value of the minerals exported up to 100,000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained.

Three months before the date fixed for their coming into force, the draft mining regulations shall be communicated by the Norwegian Government to the other Contracting Powers. If during this period one or more of the said Powers propose to modify these regulations before they are applied, such proposals shall be communicated by the Norwegian Government to the other Contracting Powers in order that they may be submitted to examination and the decision of a Commission composed of one representative of each of the said Powers. This Commission shall meet at the invitation of the Norwegian Government and shall come to a decision within a period of three months from the date of its first meeting. Its decisions shall be taken by a majority.

Article 9.

Subject to the rights and duties resulting from the admission of Norway to the League of Nations, Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 and not to construct any fortifica-

tion in the said territories, which may never be used for warlike purposes.

Article 10.

Until the recognition by the High Contracting Parties of a Russian Government shall permit Russia to adhere to the present Treaty, Russian nationals and companies shall enjoy the same rights as nationals of the High Contracting Parties.

Claims in the territories specified in Article 1 which they may have to put forward shall be presented under the conditions laid down in the present Treaty (Article 6 and Annex) through the intermediary of the Danish Government, who declare their willingness to lend their good offices for this purpose.

The PRESENT TREATY, of which the French and English texts are both authentic, shall be ratified.

Ratifications shall be deposited at Paris as soon as possible.

Powers of which the seat of the Government is outside Europe may confine their action to informing the Government of the French Republic, through their diplomatic representative at Paris, that their ratification has been given, and in this case they shall transmit the instrument as soon as possible.

The present Treaty will come into force, in so far as the stipulations of Article 8 are concerned, from the date of its ratification by all the signatory Powers; and in all other respects on the same date as the mining regulations provided for in that Article.

Third Powers will be invited by the Government of the French Republic to adhere to the present Treaty duly ratified. This adhesion shall be effected by a communication addressed to the French Government, which will undertake to notify the other Contracting Parties.

In witness whereof the above named Plenipotentiairies [sic] have signed the present Treaty.

Done at Paris, the ninth day of February, 1920, in duplicate, one copy to be transmitted to the Government of His Majesty the King of Norway, and one deposited in the archives of the French Republic; authenticated copies will be transmitted to the other Signatory Powers.