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Learning from the Svalbard Case

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Svalbard is an Arctic archipelago lying in the Barents Sea, midway between Norway and the North Pole, and includes all the islands situated between coordinates 74° and 81°N, and 10°E and 35°E.

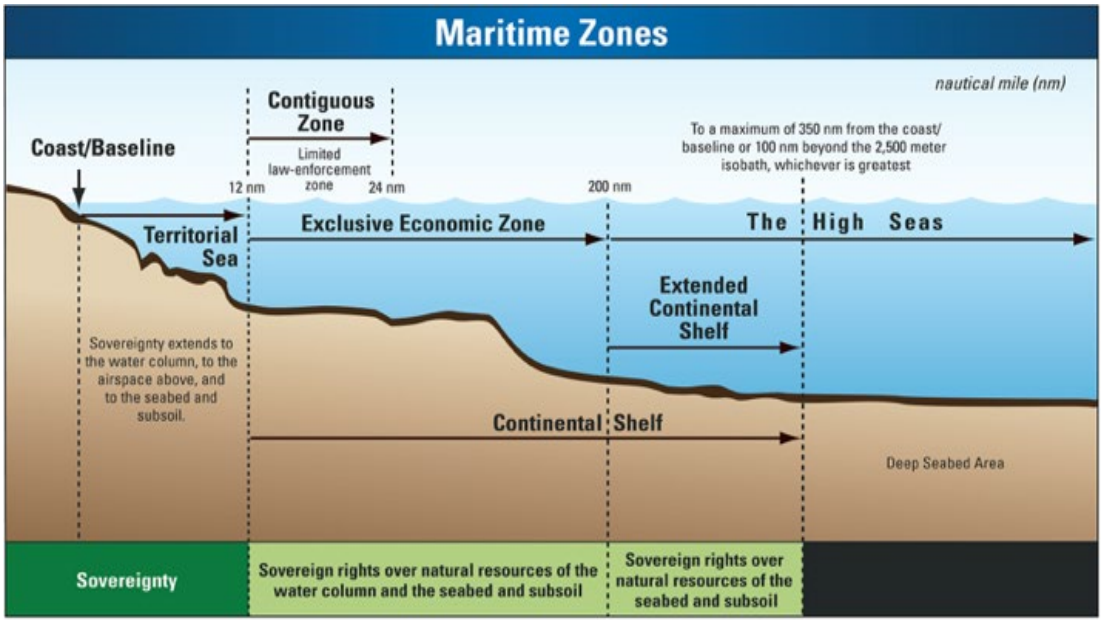
The legal status of Svalbard, which was once considered *terra nullius* - owned by no State- is determined by the Svalbard Treaty, a unique international agreement signed among nine States in Paris on 9 February 1920 and entered into force in 1925.

According to Articles 2, 3, and 7 of the Svalbard Treaty, Norway is given sovereignty over the Svalbard archipelago with the power to maintain the legal and administrative governance. All Treaty parties are also provided with non-discriminatory access to resources, including fisheries and mining, on land and territorial waters of Svalbard. In other words, under Norway's administrative power and control, there is a shared resource sovereignty over the islands.

Last decade, the Svalbard Treaty and its regime for maritime jurisdiction have become a topic of interest and have been publicly questioned by other States, partly due to climate change and the accelerated rate of sea ice retreat in the Arctic Ocean. The region is now accessible for marine transportation and with the advancement of technology, it is relatively easier to access some of its resources.

The Treaty mentions the "territorial waters" of Svalbard as a zone where Norway is entitled to have sovereignty. In other words, the term "territorial waters" is the maritime application of the Svalbard Treaty. However, the concept of maritime delimitation has drastically changed over the years, and the term "territorial waters" requires further interpretation because at the time when the Treaty was signed customary international law would allow States an approximate distance of three to four nautical miles (nm) for territorial waters (a measure based on the *cannon shot rule*, which is roughly the distance equal to the length of a cannon shot). But later, particularly in the 1960s and

'70s, the concept evolved into today's understanding of maritime delimitation cited in the United Nations Convention on the Law of the Sea (UNCLOS).



UNCLOS Parts II to VII provide jurisdictional rights to coastal States through various zone delimitation, including territorial sea, contiguous zone, and exclusive economic zone (EEZ), and high seas.

Coastal State sovereign rights over these maritime zones are exclusive and do not require any use or occupation, or even any express legal declaration. However, as an option, UNCLOS additionally provides States a right to claim extended (outer) continental shelf (up to 350 nm) through the high seas. This is only possible if the claimed outer continental shelf is the extension of the continental crust of your continental shelf and the process to determine this zone is handled through a UN agency, the Commission on the Limits on Continental Shelf (CLCS).

It is important to note that each maritime zones provided with UNCLOS have corresponding rights and duties attached to it. For example, a coastal State can exercise sovereign economic rights in the water, the seabed, and the subsoil of its continental shelf in regard to economic exploitation and exploration of the area. This means that States can explore and exploit natural resources, manage fish stocks, use the wind and current for energy, and build artificial islands and installations.

Therefore, the central question in the Svalbard case is whether the Treaty applies beyond the territorial sea, and specifically provides equal rights for all Treaty parties to enjoy economic benefits. For this, an interpretation of the term "territorial waters" is needed to elucidate the objective and authenticated meaning of the term when the parties signed the Treaty.

While Norway states that Treaty should be interpreted literally and restrictively, therefore, does not allow extension of the zone and provides Norway power to limit the rights of any third party to the area from the territorial waters to EEZ, other signatory States, particularly Russia, claim that the Treaty should be interpreted with today's understanding of maritime delimitation and give permission to equal distribution of the resources beyond territorial waters. According to Russia, the current arrangement discriminates against other signatory States and only helps Norway to carry out its economic activities in the area.

Over the years, Norway has taken several steps to claim jurisdiction over the waters of Svalbard and mainland Norway. For example, fifty years after the signing of the Svalbard Treaty in 1970, Norway officially established the territorial waters of Svalbard to be four miles. Additionally, in 1976, with the Royal Decree of 17 December 1976, Norway established an exclusive economic zone (200 nm) for its mainland. A year later in 1977, Norway established a 200-mile Fisheries Protection Zone (FPZ) around Svalbard Islands. In doing so, Norway argued that Svalbard's FPZ was established with the UNCLOS regime in 1977 for the purpose of sustainable fisheries management, and is not connected to the Svalbard Treaty. In 1994, Norway allocated quotas on cod catches for all States, other than Russia and Norway, both of which have a history of fishing in the area. And finally in 2006 Norway settled a dispute with Denmark regarding the delimitation of the continental shelf between Svalbard and Greenland.

Similarly, Norway also has the authority to designate the entire land area of Svalbard and its waters within the territorial limit as protected areas in order to preserve the environment in Svalbard, and in particular to protect wilderness, landscape elements, flora, fauna, and cultural heritage. This authority is granted by the Act on Protection of the Environment in Svalbard (No. 79 of 2001) and it has its root to Svalbard Treaty. These new measures in

the environmental standards establish restrictions on where tourism activities, including cruise industry, can occur and place additional demands on tour operators.

Overall, from the perspective of today's law of the sea concept and the historical developments in the maritime domain of Svalbard, particularly with the FPZ, it is clear that the Archipelago has a continental shelf of its own, but Norway did not declare its EEZ and has not opened up any areas for economic activities in the Svalbard continental shelf, therefore, preventing any State from accessing the resources.

To illustrate the Norwegian position on this issue, we can examine the latest Norwegian Supreme Court decision delivered on March 20, 2023. The case concerned about the validity of a decision that denied a foreign fishing company a license to catch snow crab on the Norwegian continental shelf of Svalbard. The main issue was the applicability of the provisions set forth in Svalbard Treaty Article 2 -equality rule- on the continental shelf of Svalbard. The Supreme Court unanimously decided that the Article 2 applies to Svalbard's internal waters and maritime territory, which stretches 12 nautical miles from the baselines, but not on the continental shelf of Svalbard.

Overall, Svalbard present a unique case for international politics and law. Its unique nature is also the reason why dispute resolution is not as easy as it seems in Svalbard and its surrounding waters. Therefore, it appears that this dispute will continue with no sign of resolution in the near future.

For more on this, read…

The legal regime of the maritime zones around Svalbard (An analysis in light of recent developments in international law), University of Oslo, Available at https://www.duo.uio.no/bitstream/handle/10852/87820/1/221.pdf

Dyndal G L, 'The Political Challenge to Petroleum Activity around Svalbard' (2014) 159 The RUSI Journal 82

Jensen Ø, 'The Svalbard Treaty and Norwegian Sovereignty' (2020) 11 Arctic Review on Law and Politics 82 https://arcticreview.no/index.php/arctic/article/view/2348/4673