

# Some Considerations on the Legal Regime of the Arctic

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## 1. SOVEREIGNTY AND THE INCIDENCE OF THE LAW OF THE SEA ON TITLE TO AREAS AND RESOURCES

In recent years, the Polar Arctic has gained in interest for fishing and for the exploitation of mineral resources. Equally important is the strategic value that it has attained by virtue of progress in air communications and, more especially, maritime navigation, which is now possible both in difficult conditions on the surface and below the surface. Although the disputes that have arisen in the Arctic are currently well on the way to resolution, this changed context makes it appropriate to re-examine the parameters with respect to which such resolutions have been framed. Apart from its intrinsic interest, such a reexamination appears to be indispensable both as a review of the state of the question and as a necessary basis for analysis of the possible outcomes of outstanding issues, which are also discussed below.

## 1.1. THE ARCHIPELAGO OF SPITSBERGEN (SVALBARD).

The Archipelago of Spitsbergen (in Norwegian) the Svalbard), with a geographical land area of about 61,229 km<sup>2</sup>, is approximately located between latitude 76° 30' North and latitude 81° North. The distance from the Southern Cape at the south of the main island of Spitsbergen to the Northern Cape, the northernmost point of Norwegian *terra firma*, is approximately 350 nautical miles. Almost half way between continental Norway and the archipelago, approximately between latitude 74° 10" North and latitude 74° 20" North, is Bear Island (Beeren-Eiland). At a distance of about 220 nautical miles from the Northern Cape, it is actually rather nearer the archipelago than the continent, a fact that may well have had a role in its being legally considered, as in the Treaty on Spitsbergen (vide *infra*), as part of the archipelago of Spitsbergen. Fleischer has pointed out that the geographical position of the archipelago lends it not only great political and strategic importance, but also great legal interest. From the strategic point of view, the most important sea-lane between the Soviet Union and the open sea lies between continental Norway and Spitsbergen. It should not be overlooked that, of the Soviet Union's four main outlets to the sea, the other three (via the Baltic Sea, the Black Sea and Vladivostok) suffer bottlenecks; hence the importance of the "Svalbard passage" for the Soviet Union (1).

The archipelago of Spitsbergen long lacked legal status, to the extent that in an exchange of letters among Sweden, Norway and Russia in 1872 it was recognized as *terra nullius* (which did not, however, prevent the existence of private rights, which were recognized in Art. 6 of the Treaty on Spitsbergen). At the beginning of the 17th century, the Arctic in general was the scene of dispute among English, Dutch, Danish and Hamburguese fishermen, and in 1871-2 and 1907-8 Norway tried in vain to raise the question of its status – and more particularly the status of Spitsbergen in official international circles. In 1914 the problem of Spitsbergen was discussed at the Oslo Conference, where a draft convention was worked out by Norway, Sweden and Russia, the parties with the greatest interest in this region. The matter was taken up again after World War I at the Versailles Peace Conference, and was concluded at Paris

(1) FLEISCHER, G.A.: "The question of earlier Treaty rights applied to new maritime zones; Spitsbergen and the Law of the Sea", *Iranian Review of International Relations*. vol.11-12, Spring 1978, p.246.

on February 9th 1920 in the Treaty on Spitsbergen (2). This Treaty was concluded by the United States of America, the United Kingdom of Great Britain and Ireland, Denmark, France, Italy, Japan, Norway, the Netherlands and Sweden, but Art. 10 Para. 7 states that "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". Russia being a State directly interested in the exploitation of Spitsbergen, its interests were taken into account in Art. 10 Para. 1 of the Treaty: "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". In Art. 10 Para. 2 the Danish government lent its good offices for the presentation of claims by Russian nationals and companies. The Soviet government nevertheless declared that it was not bound by a treaty it had had no part in drafting. The Soviet government's position was in fact linked to the problem of its recognition; when in February 1924 it was recognized *de iure* by the United Kingdom government, it declared that it would recognize Norwegian sovereignty over Spitsbergen if it itself was immediately recognized by Oslo. Once recognized *de iure* by the Norwegian government, it did indeed recognize Norwegian sovereignty over the archipelago, including Bear Island, in a note dated February 1 6th 1 924. It was in 1934, after the *de iure* recognition of the Soviet government by the United States, that the Soviet Union was officially invited to adhere to the Treaty. Its unreserved ratification by the Soviet Union took place on May 7th 1935. This strengthened the special status established for the archipelago of Spitsbergen, which with the coming into force of the Treaty on August 14th 1925 had been incorporated by Norway as a new

(2) The Spitsbergen Treaty can be consulted in, among other sources, THEUTENBERG, B.J.: *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions*, Dublin, 1984, pp.237-239.; VAN DER ESSEN, A.: "L'Economie des régimes polaires. Realisations et perspectives", *Cronique de Politique Etrangère*, vol.XXV, nom.4, Juillet 1972, pp.478-484; *League of Nations Treaty Series 1920-1921*, vol.II, 1, p.8; *Recueil des Traités de la Norvège*, vol.II, p.988; *Overenskomst med fremmede Norge*, vol. II, p. 988; *Overenskomst med fremmede stater*, 1925, p. 551; *Norges Lov 1685-1973*. The English and French texts are both authoritative. In Castilian, the Treaty may be consulted in *La Gaceta de Madrid*, núm. 103, 13 de abril de 1929, págs. 228-230. For an account of the changing situation of the archipelago between the 16th century and 1920, see DOLLOT, R.: "Le Droit International des espaces polaires", *Recueil des Cours*, t. 75, 1949, II, pp. 144-155.

province. At present some forty States are bound by the Treaty (3).

According to Art. 1, the contracting parties undertake to recognize, subject to the stipulations of the Treaty, "the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or BeerenEiland, 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 HopenEiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto". The limitations to which the Treaty subjects the full and absolute sovereignty of Norway over the Archipelago include the provision that "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", though "Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect, to the advantage of any one of them" (Art. 2). Similarly (Art. 3, Paras. 1-3), 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 enterprise whatever.

Notwithstanding any rules relating to coasting trade which may

(3) The original signatories also include Australia, India, New Zealand and South Africa. Subsequently associated States are Afghanistan, Albania, Germany, Saudi Arabia, Austria, Belgium, Bulgaria, Chile, China, Czechoslovakia the Dominican Republic, Egypt, Spain, Estonia, Finland, Greece, Hungary, Monaco, Poland, Portugal, Switzerland, the U. S. S. R., Venezuela and Yugoslavia. Spain adhered to the Treaty in November 1925; the date mentioned in *La Gaceta de Madrid* of April 13th 1929 is November 2nd, while that mentioned in the September 10th 1935 issue is November 12th.

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. As Fleischer points out, the Svalbard has been presented as a "mini European Community". In the European Community there is no doubt as to the sovereignty of each State within its borders, but the member States agreed the right of their nationals to pursue economic activities in the territory of any of the States of the Community subject to the same rules and conditions as the nationals of that State (the so-called right of establishment). Like the right of establishment in the European Community, the rights of the nationals of contracting States that are recognized in the Treaty of Spitsbergen imply no immunity from legislation based on Norwegian territorial sovereignty, though such legislation cannot discriminate among the nationals of the Party States (4). Fleischer states that the Treaty is based on two fundamental principles: a) recognition of the full and absolute sovereignty of Norway; and b) the existence of certain restrictions relating to the exercise of this) sovereignty, with a view to providing for the citizens of the other contracting States a regime of equal access to the exploitation of the natural resources. In a sense, one might say that the aim was to maintain the advantages enjoyed under the *terra nullius* regime by the States other than Norway, whilst at the same time placing the islands under sovereignty (5). Thus, as Theutenberg points out, "Svalbard is not a *condominium* area with some kind of divided supremacy. The Treaty does not leave room for any such interpretation. [...] Norway wields sovereignty, with full and unlimited supremacy, and has the right to enforce its laws and regulations, provided this is done in a fair and impartial way, on citizens of the Treaty signatories" (6).

The second paragraph of Art. 5 of the Treaty establishes that "Conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said

(4) FLEISCHER: *Op. cit.*, p.252.

(5) FLEISCHER: "Le régime de exploitation de Spitsberg (Svalbard)", *Annuaire Française de Droit International*, XXIV, 1978, pp.276,277.

(6) THEUTENBERG: *Op. cit.*, p.52. There have nevertheless been other opinions on the nature of the legal regime of the Svalbard. For SOLLIE, the Treaty on Spitsbergen is an act intermediate between the placing of a new territory under the sovereignty of a national State and its treatment as a joint international area, or *terra communis*; Svalbard remains as a kind of *terra communis* where all the parties have equal standing and rights but where their operations and activities must be carried out subject to norms and



territories". In Art. 8, Norway "undertakes to provide for the territories specified in Article 1 mining regulations which [...] 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, [...] 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". Moreover (Para. 4), "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", and any proposals for their modification that may be forthcoming from any of the contracting parties during this three-month period "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". Mining regulations in consonance with Art. 8 of the Treaty were provided by a Royal Resolution of August 7th 1925; prior to their establishment, conversations took place between Norway and the other nations whose interests they would affect, and since there was no dissent from the Norwegian proposal the provisions of Art. 8 concerning the working mechanism of an arbitrating Commission were never put into effect (7). By Art. 8 Para. 3 of the Treaty, "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". In Art. 9, 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 fortification in the said territories, which may never be used for warlike purposes". This Article was not respected during World War II by the belligerents: after occupying Norway, the German forces disembarked in Spitsbergen in 1941, they were expelled by the Allied

regulations established by a State whose sovereignty has been recognized (SOLLIE, F.: "The New Development in the Polar Regions", *The Challenge of New Territories*, Oslo, 1974, p.29).

(7) For the mining regulations, see FLEISCHER: "Le régime...", *cit.*, pp.285-295.

forces at the end of the same year, and counterattacked in 1942, when they seriously damaged the mining machinery. Theutenberg remarks that the Svalbard is "placed under a certain form of demilitarized regime", but that there is "room for various interpretations" of the wording in this respect. Though the Treaty refers to "warlike purposes", it seems pertinent to wonder whether its text is compatible with the establishment of naval bases and the construction of fortifications for *military* purposes; while it would appear to be difficult to achieve undivided opinion on exactly the point at which "military purposes" become "warlike purposes", it is nonetheless true that it is "the exclusive responsibility of the holder of sovereignty to guarantee the security of the area and to defend it in the event of a military attack" (8).

At the time at which the Treaty of Spitsbergen was concluded, a number of circumstances that have since arisen – among them issues deriving from the new Law of the Sea, such as those concerning the continental shelf and the Exclusive Economic Zone – were not foreseeable, and the Treaty accordingly fails to face squarely up to them. In particular, in relation to the limitations placed upon the exercise of Norwegian sovereignty, in 1920 the Law of the Sea recognized no jurisdiction other than what might be exercised over territorial waters, which in the Scandinavian nations were traditionally defined by a four-mile limit (a limit that in 1951 was formally accepted by the United Kingdom before the International Court of Justice in the Anglo-Norwegian fisheries case). The Norwegian Act on Svalbard dated July 17th 1925, which in Section I states that Svalbard forms part of the Kingdom of Norway, nevertheless establishes in Section II that Norwegian legislation does not automatically apply there (Norwegian civil law, penal law and legislation on the administration of justice are to apply save provision to the contrary, but other legislation is to be applied only if such application is explicitly provided for). Asin-Cabrera has emphasized that "the content of this provision had as a result the nonapplication of Norwegian economic and administrative law in the Archipelago, especially

(8) Cfr. THEUTENBERG: *Op. cit.*, p.52. Save for the period of World War II, Art. 9 has undoubtedly contributed to the low level of tension in the area (SOLLIE: "Norway's Continental Shelf and the Boundary Question on the Seabed", *The Challenge...*, *cit.*, pp.111, 112). As one of the most important principles of the Treaty, SKAGESTAD and TRAAVIK mention the complete demilitarization and neutralization of the region (SKAGESTAD, G. and TRAAVIK, K.: "New Problems Old Solutions", *The Challenge...*, p.44). On the history of the interpretation of Art.9, see BRETTON, Ph.: "L'Union Sovietique et la cause de non-militarisation du Spitzberg", *A.F.D.I.*, XI, 1965, pp.122-144.



regulations on the import and export of goods, the exclusion of Spitsbergen from the domain of Norwegian customs thereby being recognized" (9). Norway nevertheless maintains that its sovereignty cannot be questioned on the basis of extensive interpretations of Arts. 2, 3 and 8 of the Treaty, which apply to the islands and their four-mile territorial sea; and consequently that the continental shelf on which the islands are located is subject to ordinary Norwegian law as established in the Royal Resolution of December 8th 1972 on the continental shelf, and not to the specific regime for Spitsbergen. In maintaining this, it is asserted that the Archipelago has no continental shelf of its own, but lies on the continental shelf of Norway. Fleischer and Van der Essen note that Norway likewise claims that the exclusive economic zone of Spitsbergen is not affected by the Treaty of 1920 (10). For Van der Essen, however, the Norwegian argument is not convincing: "[Norway] ignores the important fact that the Treaty of 1920 does not apply solely to emergent lands and their territorial seas, but to an entire zone comprised between the 74th and 81st parallels North and the 10th and 35th meridians of longitude East, comprising large parts of what in 1920 was high sea. More than 600 km of high sea separate the southern tip of the largest island from the south-eastern corner of the area. Any extension of the coastal State's jurisdiction within this area must necessarily be subject to application of the provisions of the Treaty; it would hardly be reasonable to suppose that the contracting parties enjoy equal treatment as regards the exploitation of minerals, hunting and fishing on the land and in the territorial sea (the Treaty says 'territorial waters', without establishing their limits), which are under the 'full and absolute' sovereignty of Norway, but are not to obtain benefit in the areas where Norway only exercises sovereign rights to certain ends" (11).

(9) ASIN-CABRERA, Ma.A.: *Islas y archipiélagos en las Comunidades Europeas*, Madrid, 1988, p.153; our translation. See also OPSHAL, T.: "Norwegian Dependencies, particularly Spitzbergen and the European Communities", *Legal Problems of an Enlarged European Community*, British Institute Studies in International and Comparative Law, No. 6, London, 1972.

(10) FLEISCHER: "Le régime...", cit., pp. 295, 296. Fleischer asserts that even if Spitsbergen had a continental shelf, it would fall within the scope of Art.1 of the Treaty, which would leave the Norwegian legislator entirely free. For Van der Essen's view, see VAN DER ESSEN: "Les régions arctiques et antarctiques", *Traité du Nouveau Droit de la Mer*, Paris, 1985, p.475. Concerning the process of revision of the Law of the Sea, the following may be consulted (among others). POCH et al.: *La actual revisión del Derecho del mar. Una perspectiva española*. 4 vols., Madrid, 1974. PÉREZ-GONZALEZ, M.: "La ordenación jurídica del mar: factores en presencia", *Temas Marítimos*, Santiago de Compostela, 1981. DUPUY, R.J. and VIGNES, D. (Dirs.): *Traité du Nouveau Droit de la Mer*, Paris, 1985. O'CONNELL, D. P.: *The International Law of the Sea*, 2 vols., Oxford, 1982 (vol. I) and 1984 (vol. II).

(11) VAN DER ESSEN: "Les régions...", cit., p.475; our translation.

Though the final consideration here seem tenable, the matter nevertheless appears to require further consideration. To begin with, Art. 1 of the Treaty on Spitsbergen does not seem to imply any reference at all to the high sea adjacent to the territorial seas of the islands. This conclusion follows both from the text itself, and from the elementary consideration that it would have made no sense for Art. 2 to recognize equal rights of fishing in "territorial waters" that were to be understood as including both the waters within the 4-mile limit and areas of "what in 1920 was high sea", since such an "understanding" would not have been compatible with the legal character of the high sea. Moreover, Van der Essen's reading of Art. 1 does not seem acceptable in the absence of any kind of explicit reference in this Article to the waters of the Archipelago as *such*. It is extremely difficult to see how one might reconcile an extensive interpretation of "territorial waters" with the wording of Art. 2 in terms of "the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters", waters that must certainly have been understood as the territorial sea at a time, 1920, in which the law of the sea obeyed a "regime based fundamentally on zones of territorial seas and high seas configured in such wise that the extent of the territorial seas fell in with the maritime interests of the major powers" (12). There would appear to be no doubt about it: "The Treaty is applicable to the islands within the area defined in article 1, the so-called Svalbard net, as well as to the territorial sea of the islands, which is 4 nautical miles" (13).

Notwithstanding the above considerations, the problem should, I feel, be studied in more detail before final conclusions are reached. It is relevant to recall the position regarding Spitsbergen, its continental shelf and its exclusive economic zone that was maintained by Fleischer, according to whom it is necessary to take into account both the specific legal regime established for the Archipelago in the Treaty of 1920 and also the Law of the Sea in general as it may apply to the particular situation of Spitsbergen (14). Like Fleischer, I feel that the text of the Convention on the Law of the Sea contains no impediment to the establishment of an exclusive economic zone

(12) MARTINEZ-PUÑAL: *Los derechos de los Estados sin litoral v en situacion geográfica desventajosa en la Zona Economica Exclusiva - Participación en la explotación de los recursos vivos*, Santiago de Compostela, 1988, p.19. See also PASTOR-RIDRUEJO, J. A.: *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 3rd ed., Madrid, 1981, p.461; and Id.: "Consideraciones sobre la III Conferencia de las Naciones Unidas sobre el Derecho del Mar", *Anuario de Derecho Internacional*, vol. III, 1976, pp. 281, 282.

(13) THEUTENBERG: *Op. cit.*, p.52.

(14) FLEISCHER: "The question...", cit., p.254.

for Spitsbergen, and that there is likewise no provision in the Treaty of Spitsbergen that denies Norway the extension of its maritime jurisdiction in accordance with general international law. It was on similar grounds that, in the Act of December 17th 1976, Norway established an exclusive economic zone of 200 miles off both continental Norway and Spitsbergen, though the Royal Decree of the same date that put the Act into force restricted the exclusive economic zone to the mainland; later (on June 3rd 1977, with effect from June 15th of that year), another Decree was promulgated that applied the Act of 1976 to Spitsbergen, though rather than an exclusive economic zone it established only a fisheries conservation zone with no discrimination and in which the regulations were to be applied to all parties on an equal footing (15). Thus the Norwegian government judges it to be lawful to create an economic zone around Spitsbergen, and though it has not in fact done so it is pertinent to investigate whether, should it do so, it would be possible for the contracting Parties of the Treaty on Spitsbergen to invoke their rights, as agreed in the Treaty, to carry on certain activities upon an equal footing. To this end it is illuminating to discuss separately the legality of similar claims with respect to, on the one hand, the continental shelf and, on the other, the exclusive economic zone.

Fleischer first approached the question of whether the rights afforded to other States under the Treaty on Spitsbergen are applicable to the continental shelf. He points out that general law on the continental shelf or exclusive economic zone contains no specific provision concerning obligations contracted prior to the emergence of such law. He therefore turns to the Treaty on Spitsbergen, maintaining that its chief provision is Art. 1, which recognizes the sovereignty of Norway, whereas Arts. 2, 3 and 8 must be considered as specific exceptions that cannot be given an extensive interpretation. These limitations of sovereignty should thus be understood in a restrictive sense: any issue not covered by any specific article on the rights of foreign nationals is subject to Art. 1, which recognizes the sovereignty of Norway, without any specific limitation.

Applying the above reasoning to the question of the continental shelf, Fleischer concludes that the rights agreed in the Treaty on Spitsbergen are applicable to territorial seas extending for four miles from straight baselines, and that the continental shelf is subject, as

(15) In spite of which, the Soviet Union has argued that this zone contravenes the Treaty of 1920 (FLEISCHER: "The Northern Waters and the New Maritime Zones", *German Yearbook of International Law*, vol. 22, 1979, p.110).

was mentioned above, to the ordinary legislation on the continental shelf (in particular the Resolution of December 8th 1972) and not to a specific regime for Spitsbergen involving the provision of rights for the other Parties to the Treaty. He argues that the Treaty on Spitsbergen contains nothing that places any obligation upon Norway with respect to the continental shelf, and supports the view that it is incorrect to speak of a "Spitsbergen shelf"; the continental shelf of the islands being a prolongation of continental Norway, "their" shelf is part of the continental shelf of Norway, and is hence subject to the general rules for continental shelves (16). This reasoning accepts that there is "one homogeneous shelf, extending from the Norwegian mainland right up to the Arctic deep sea north of Svalbard, over which region Norway would have [...] exclusive rights to control all forms of activity", though 'exceptions have to be made for the shelf lying within the Svalbard Islands' territorial seas, to which area the Spitzbergen Treaty is applicable" (17).

Analogous problems arise concerning the establishment around Svalbard of zones such as the exclusive economic zone. With regard to the exclusive economic zone, Fleischer applies reasoning similar to that wielded in the case of the continental shelf, stressing the fact that the exclusive economic zone is a new concept in international law, one that is distinct from that of the territorial sea, and that there are no grounds upon which the Treaty's specific restrictions to Norwegian sovereignty over the territorial seas may be given an extensive interpretation that allows their application to sovereign rights deriving from recent developments in the handling of mari-

(16) FLEISCHER: "The question...", *cit.*, pp. 255-259. Fleischer expounds similar arguments in *International Law and Its Application in the Arctic*, Conference Hosted by the Norwegian Petroleum Association, 1980? p. 9 of the text sent me by the author; and in "The New Regime of Maritime Fisheries", *R. des C.*, t. 209, 1988, II, pp. 216-220.

(17) Cfr. THEUTENBERG: *op. cit.*, p.52. Norway's rights are defended by SOLLIE: "New Territories and New Problems in Norwegian Foreign Security Policy", *The Challenge...*, *cit.*, pp.107-109. Some comment is necessary regarding the idea that the continental shelf of the islands is a prolongation of mainland Norway. Without wishing to deny this fact, I suggest that it should be viewed in a broader context: "The continental shelf around the Svalbard archipelago is very extensive; indeed, *most of it* may be considered as a mere extension of Norway's mainland shelf. On the west side, the Svalbard shelf stretches as far as the Lena Trough which separates it from Greenland and, on the east side, it extends to form part of the same continental shelf which surrounds Franz-Josef Land, an archipelago belonging to the U.S.S.R. The continental slope and rise are also extensive, particularly to where they reach into the Barents Abyssal Plain" (PHARAND, D.: *The Law of the Sea of the Arctic, with Special Reference to Canada*, Ottawa, 1973, pp. 259, 260; the italics are mine). Concerning the Russian position on the continental shelf of Spitsbergen, see OSTRENG, W.: "The Continental Shelf - Issues in the 'Eastern' Arctic Ocean. Implications of UNCLOS III, with special reference to the Informal Composite Negotiations Text (ICNT)", in *Law of the Sea: Neglected Issues*, Proceedings of the Law of the Sea Institute Twelfth Annual Conference at The Hague October 23-26 1978, Hawaii, 1979, pp.172-181.

time matters by general international law (18). Accordingly, Fleischer maintains that the establishment of a non-discriminatory fisheries protection zone by Norway must be looked upon as a self-imposed limitation motivated by practical rather than legal considerations (19).

Against Fleischer's arguments, it must be said that – as Van der Essen pointed out – it is hard to accept that the contracting Parties should enjoy equal rights of hunting and fishing on land and in the territorial sea, but not on the continental shelf and in the exclusive economic zone. The Treaty on Spitsbergen arose from the contracting Parties' willingness to establish an *equitable* regime in the region; Fleischer's theses lead towards tensions that would make suit of the achievement of the useful effect of the Treaty of 1920. If the teleological intent of the Treaty on Spitsbergen is dismissed, leaving room only for the most rigid of interpretations, the historical reasons for the Treaty are implicitly questioned (20). Analysis in this direction might well bring up points that would enrich debate on the desirability of modifying the Treaty on Spitsbergen, and if so in what terms.

In the light of the foregoing, I would wholeheartedly endorse Theutenberg's conclusion that it is difficult to interpret old treaties such as the Treaty on Spitsbergen in terms of new circumstances such as legal recognition of the continental shelf or the exclusive economic zone, for the opinion of the signatories is relevant for interpretation when a new "structure" must be considered for the region in question. In particular, I have already mentioned the Soviet stance against the fishing zone around Svalbard (see footnote 15); Sweden, on the other hand, considered the continental shelf of the archipelago as under Norwegian sovereignty on the occasion of the scientific expedition to the Svalbard by the Swedish state icebreaker Ymer in 1980 (the Ymer-80 expedition). Theutenberg reflects that

(18) FLEISCHER: "The question...", *cit.*, pp.259,260; "International...", *cit.*, pp.9,10 and 14; *Id.* "The New..." *cit.*, pp. 216-220.

(19) *Ibid.*: pp. 260, 261.

(20) It is perhaps pertinent to point out, as Skagestad and Traavik have done, that the Treaty on Spitsbergen is an example of the regulation of a region's status, as regards sovereignty and jurisdiction, by a process of international negotiation, and should be looked on as a form of international cooperation. If this solution was seen as natural, it was because of the historical situation and the prevailing political premises. In particular, a) economic activity in the Svalbard had increased before the question of sovereignty was clarified; b) no nation had uncontested grounds for unilateral occupation of the archipelago; c) there were political and security reasons against a unilateral solution, since the archipelago was regarded as having strategic importance by several powers, none of which by itself exercised sufficient predominance in the region as to impose such a solution (SKAGESTAD, K. and TRAAVIK-, K.: "New Problems – Old Solutions", *The Challenge...*, *cit.*, p.45).

Those who had previously experienced the liberty and accessibility of the Arctic, in the legal sense, found it hard to understand how new legal rules could have transformed the conditions of access and research to such a great extent. Here again an example of the revolution in the law of the sea was shown. The scientific activities of the Ymer expedition had to be discussed in advance with states in whose areas and on whose continental shelf the scientific activities were to take place. For example, current international law made it necessary to obtain permission to extract samples from the continental shelf of a foreign state. [...] The necessary permission was obtained without difficulty from Norway and Denmark. The project was a joint Swedish-Norwegian-Danish scientific project which also included participants from other countries. (21)

It must be emphasized that Norway's stance has not gone uncontested. According to Theutenberg:

The Soviet Union claims that the Svalbard Treaty should also be valid for the Svalbard shelf, i.e. a border line should be drawn between Svalbard's "legal shelf" and the Norwegian mainland shelf. The signatory powers, backed by the definition of the Treaty, should be allowed to exercise activities like oil prospecting and drilling on the Svalbard shelf. The United States and Great Britain also have reservations against the Norwegian interpretation and seem to advocate some kind of "international line" on the basis of the provisions of the Treaty. [...] one can perhaps divine the wish behind the Soviet stand to preserve a vital area under an international, treaty-bound regime, and thereby prevent the area from entirely falling under one single holder of sovereignty. (22)

The lack of concord on the current legal status of the Spitsbergen region naturally reflects not only interest in the mode of application of the new Law of the Sea, but also the present and future value of the territories in dispute. Once more, we see that it is not easy for the parties involved to overlook the strategic value of Spitsbergen,

(21) THEUTENBERG: *op. cit.*, pp.54,56. Unlike Norway and Denmark, the U.S.S.R. did not grant permission for the extraction of samples from its continental shelf. With regard to the *principle of consent* by the coastal State in questions of scientific marine research, see PÉREZ-GONZALEZ: "La investigación científica marina y el nuevo Derecho del Mar", *Anuario de Derecho Marítimo*, vol.V, pp.62-70 and pp.45-96 *passim*.

(22) *Ibid.*: pp. 53, 54. The Soviet Union has also shown a wish to extend the territorial seas of the islands of the archipelago out to 12 miles so as to enlarge the area open to possible exploitation of resources (YOUNG, O.R. and OSHERENKO, C.: "Arctic Resources Conflict: Sources and Conflict", *United States Arctic Interests – The 1980s and 1990s*, New York, 1984, p.261).



which was convincingly proven during World War II, when the passage of convoys through the sea roads to Murmansk made a vital contribution to the Soviet response to German aggression. Today, the sea route from the naval base of the Kola peninsula out to the high seas is seen as of similar importance. These considerations make the region around Spitsbergen increasingly critical in a context in which the balance of power is closely related to the possession of submarines carrying nuclear weapons (23). It is also true that since 1934 the Soviet Union has become increasingly engaged in economic activity in the area, notably coal mining; of the 3,300 or so residents of the Spitsbergen islands, only some 1,200 are Norwegian and almost twice that number – 2,100 – are Russians (24). The significant legal, strategic and economic interests of the Soviet Union in the Svalbard lead it from time to time to propose new arrangements aimed at the creation of some kind of *condominium* with Norway (25), a proposal I find no grounds for.

## 1.2. THE BARENTS SEA

To some extent related to the Spitsbergen issue is the problem of dividing the Barents Sea between Norway and Russia. The Barents Sea lies off the coasts of northern mainland Norway, western Spitsbergen and northern European Russia. The question of the partition of the continental shelf and the delimitation of exclusive economic zones in this area has not been settled in spite of the negotiations that have taken place for this purpose, and Arts. 74 and 83 of the Convention on the Law of the Sea are of no specific help in this

(23) FLEISCHER: "Le régime...", *cit.*, pp.275,276. *Ibid.*: "The Northern...", *cit.*, p. 102.

(24) Spitzbergen (Svalbard): *General Information*, 2nd Conference of European Island Regions, Ponta Delgada, São Miguel, Açores, 27-29 March 1984, Doc.CPL/am/Illes/Inf.(84)7.

(25) THEUTENBERG: *op. cit.*, p.54. Though all the signatory States have the right to maintain permanent establishments on the islands, only Norway and the Soviet Union have made use of this right. In 1944, the sovereignty of Norway was unsuccessfully challenged by the U. S. S. R., which desired joint administration by Norway and itself and the cession of Bear Island to the U. S. S. R. Possession of this island would give the Soviet Union better control over possible access by N.A.T.O. forces to the important Soviet base at Kola. The U. S. S. R. has long sought to increase its land rights over the islands, demanding to take part in certain activities and maintaining at its coal mines a population larger than the resident Norwegian community (YOUNG and OSHERENKO: *op. cit.*, p.261). Concerning the Russian position on Spitsbergen, see WESTERMEYER, W.E.: *The Politics of Mineral Resource Development in Antarctica Alternative Regimes for the Future*, Boulder Co., 1984, pp. 69-71.

matter (26). Both Norway and the Soviet Union are parties to the Geneva Convention on the Continental Shelf, Art. 6 of which establishes that, in the absence of special circumstances or other solutions arrived at by the interested parties, the median line principle should be adhered to. The median line principle, or principle of equidistance, is current in Norwegian law by virtue of an Act of June 21st 1963 and a Royal Resolution of May 31st 1963. Soviet law too has incorporated this principle, in Section 2 a Decree of February 6th 1968 that closely follows the wording of the Geneva text, including the reference to "special circumstances". In the present dispute, the interested parties do not agree on the way in which the rule concerning the median line and special circumstances should be applied. Norway's position is that equidistance is the appropriate criterion, whereas the Soviet Union invokes special circumstances in favour of division along the sector line (fundamentally, the meridian running from the former western frontier of the Soviet Union up to the North Pole), the zone to the east of which was claimed in a Decree of 1926 (27). In detail, the sector line starts at the Soviet border as it was before the annexation of Petsamo, heads due north along longitude 32° 04' 35" East as far as the 74th parallel (the southern boundary established in Art. 1 of the Treaty on Spitsbergen), turns due east along the parallel as far as longitude 35° East, turns north again along the eastern boundary established in the Treaty until reaching the northern boundary, parallel 81° North, turns west along this parallel, and upon reaching longitude 32° 04' 35" East again continues along the meridian to the Pole. There thus exists a disputed area claimed by both Norway and the U.S.S.R.

The "special circumstances" invoked by the Soviet Union as grounds for partition along the sector line are of an extremely broad nature. As Shusterich has stressed, they appear to be related less to the more usual argument of an "unusual coastal configuration" than to the special strategic needs of the State and the large concentrations of population in the region adjacent to the Barents Sea (28). The latter consideration is one of the "special circumstances" that Theutenberg labelled "general considerations" in the sense that "they

(26) THEUTENBERG: *op. cit.*, p. 50.

(27) VAN DER ESSEN: "Les régions...", *cit.*, p.476. FLEISCHER: "International...", *cit.*, p. 11.

(28) SHUSTERICH, K.M.: "International Jurisdictional Issues in the Arctic Ocean", *United States Arctic Interests - The 1980s and 1990s*, New York, 1984, pp. 259, 260. This article has also been published in *O.D.I.L.*, vol.14, No.3, 1984, pp. 235-272.

are not specifically characteristic of the Arctic, but may be applied to any region whatsoever". He also drew attention to another category of "special circumstances", those constituting "what could be termed as Arctic legal arguments [...] based on the physical and climatic peculiarities of the region." It has been argued that the existence of the sector principle is itself such a circumstance, since because of the polar nature of the region it arose naturally in early territorial claims on the Arctic (29).

The question of the partition of the continental shelf in the Barents Sea between Norway and the Soviet Union was first brought up by the Norwegian government in 1967. Negotiations have continued intermittently since 1974, but an immediate solution does not seem imminent. The Soviet Union's position reflects crucial interests: acceptance of division along the sector line would give the U.S.S.R. jurisdiction over many thousands of square kilometres of a sea that has rich fishing banks (30), a bed that is potentially rich in energy resources, and – perhaps of greatest importance – a strategically vital location (31).

It should be pointed out that the Soviet Union has never maintained that the sector principle is applicable to the Arctic deep water basin, which it has in many respects treated pragmatically as open sea from the legal point of view (32).

The terms in which the Barents Sea case has been conducted can be seen as a sign of the presence of the new Law of the Sea on the delimitation of exclusive economic zones and the partition of the continental shelf between States situated opposite or adjacent to each other; for although the median line principle is well established in International Law, the Convention on the Law of the Sea does not mention this principle explicitly in dealing with the delimitation of the exclusive economic zone (Art. 74) and the con-

(29) THEUTENBERG : *op. cit.*, p. 51.

(30) In June 1983, on the occasion of Soviet test drilling, the rich living resources of these waters led the Norwegian press to call for environmental protection measures in the area (THEUTENBERG: *op. cit.*, p. 57).

(31) TRAAVIK, K. and OSTRENG, W.: "The Arctic Ocean and the Law of the Sea", *The Challenge...*, p. 59. Shusterich reckons that the disputed area covers 132,000 km<sup>2</sup> of continental shelf, whose fishing and possible deposits of hydrocarbons and other minerals are the bone of contention (SHUSTERICH: *op. cit.*, p. 258). Theutenberg writes of "about 155,000 km<sup>2</sup> i.e. an area larger than the Norwegian North Sea continental shelf (approx. 144,000 km<sup>2</sup>) and somewhat less than one-half of Norway's land area" (THEUTENBERG: *op. cit.*, p. 50). Concerning the dispute in general, see OSTRENG, *op. cit.*, pp. 166-172; and PHARAND, "The Legal regime of the Arctic: some outstanding issues", *International Journal*, XXXIX, 1984, pp. 749-752.

(32) THEUTENBERG: *op. cit.*, p. 40.

tinental shelf (Art. 83). At most, an implicit reference may be perceived in the wording of the first paragraphs of these two Articles: "The delimitation of the [exclusive economic zone (Art. 74) or continental shelf (Art. 83)] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". The key notion in the new law of the sea appears to be that of equity. Further in the spirit of the Convention on the Law of the Sea (specifically, Art. 74 Para. 3), joint fisheries jurisdiction by Norway and the U.S.S.R. has been established, as a provisional practical measure pending resolution of the demarcation dispute and without prejudice to its final solution (33), over a large region (the so-called Grey Zone) comprising areas to the west of the sector line, to the east of the median line and between the two (34); this agreement and an annexed protocol was arrived at in an exchange of letters concluding on January 11th 1978, and is subject to annual renewal (35). It establishes a quota for third party States, who carry out fishing activities under joint Soviet Norwegian licence. As a closing remark it may be mentioned that although the United States has adopted no official stance regarding this jurisdictional dispute, it seems clear that for military or even economic reasons it is likely to view the Norwegian position more favourably than the Soviet arguments (36).

### 1.3. GREENLAND.

Except for Australia, Greenland is the largest island in the world. Located between latitudes 50° 46' and 83° 39' North and longitudes 10° 33' and 73° West, it has an area of 2,175,000 km<sup>2</sup>, five sixths of which is covered by the immense Islandis glacier. Its population of some 60,000 inhabitants is concentrated in the narrow coastal strip of variable breadth that remains ice-free.

(33) VAN DER ESSEN: "Les régions...", *cit.*, p.477. LAURSEN, F.: "Security Aspects of Danish and Norwegian Law of the Sea", *Ocean Development and International Law*, vol.18, No.2, 1987, pp.218-220. HEY, E.: *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, Dordrecht, 1989, pp. 169-171.

(34) FLEISCHER: "The Northern...", *cit.*, p.113.

(35) Its text may be consulted in *Overenskomster...*, 1978, p. 436.

(36) SHUSTERICH: "International...", *cit.*, p.258.

Under Scandinavian occupation since the 10th century, since the 18th century southwest Greenland has been occupied by Denmark, the first administrative regulations dating from 1781. Between 1916 and 1920 Denmark persuaded the major powers to recognize its sovereignty over the whole island (37). In 1922, however, Norway established a station in the "forgotten" northeast of the island, and in a Royal Decree of July 10th 1931 proclaimed Norwegian occupation of and sovereignty over eastern Greenland. Two days later (July 12th 1931), the Danish government filed a plea requesting the Permanent International Court of Justice to declare Norway's action to be illegitimate, invalid and a violation of the existing legal situation. Denmark claimed that, under Art. 4 of the Kiel Peace Treaty of January 14th 1814, its rights extended to the whole of Greenland and that its authority had in effect been maintained there. Norway replied that Denmark exercised no effective control over eastern Greenland, which had thereby become *terra nullius* susceptible of occupation. In its 12-to-2 majority verdict of April 5th 1933, the Court decided in favour of Denmark. The sentence deemed that *animus possessionis* and *corpus possessionis* in the chief places of the territory constituted valid claim to title over a territory if the natural conditions of such territory made it impossible to exercise effective control at each point within it; it also remarked that "Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority [...]. It is impossible to read the records of the decisions in the cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of

(37) For example, the rights of Denmark were recognized by the United States, in a treaty dated August 4th 1916, in return for the cession of the Danish Antilles. France, Italy and Japan agreed without reserve, while the United Kingdom, desirous of safeguarding the rights of Canada, agreed with the condition that it should be consulted by Denmark prior to any alienation of the territories in question.

claims to sovereignty over areas in thinly populated or unsettled countries" (38).

Kish has suggested that the Court's willingness to accept a slight degree of effective control as a valid basis for claim to sovereignty over a territory with difficult natural conditions must have been influenced by the consideration that all other Arctic land territories were in any case subject to territorial sovereignty; and that this consideration would not be applicable to the non-terrestrial Arctic or the Antarctic, for which the scant possibility of effective control would imply a correspondingly small possibility of valid claim to sovereignty (39).

The sentence issued by the International Court of Justice on April 5th 1933 recognized the exclusive rights of Denmark over the whole of Greenland, it being held that since the geographical nature of the northern lands did not allow satisfaction of the normal criteria of effective occupation, simple control in the form of the effective authority exercised in the southwest should be considered sufficient grounds for sovereignty over the whole island (40). This sentence settled the last challenge to national sovereignty over an Arctic territory (though as we have seen, there remain certain outstanding border disputes, especially in relation to the new law of the sea). However, despite unanimous recognition of Danish sovereignty, the status of Greenland was complicated by the German invasion of Denmark during World War II (on April 9th 1940). In view of this invasion, which threatened Greenland and Iceland (Iceland was a Danish colony until 1918 – with a certain degree of autonomy since 1874 – and continued under the Danish Crown, albeit as a sovereign State, until June 7th 1944), the United States could not remain indifferent,

(38) *Legal Status of Eastern Greenland Judgement*, 5 April 1933 (PCIJ Series AB/43, p.22). Pastor-Ridruejo points out that "We are really faced with a case of extreme modulation of effectivity by relativity in the exercise of State functions. To this must be added the recognition, or at least, the absence of protest of third parties" (PASTO-RIDRUEJO: *Curso...*, cit., p. 461; our translation).

(39) KISH, J.: *The Law of International Spaces*, Leiden, 1973, pp. 74, 75. Concerning the acquisition of sovereignty in the Arctic, see CAFLISCH, L.: "Le regime juridique de l'Arctique", *Les régions polaires et les chercheurs suisses*, 1988, p.52.

(40) In 1953, Greenland was formally brought under Danish law. On January 17th 1978, the population of the island approved by referendum the coming into force of a Statute of Autonomy on May 1st of that year. On February 23rd 1982, after another referendum, Greenland withdrew from the European Community, into which it had been brought by the entry of Denmark on January 1st 1973. A Treaty modifying the Constitutive Treaties of the European Communities with regard to Greenland was signed in Brussels on March 13th 1984 and came into force on January 1st 1985. See ASINCABRERA: "Groenlandia: el resultado de un referendum", *Revista de Instituciones Europeas*, vol.9, N.º 3, September/December 1982, pp. 843-845; and *Islas...*, cit., pp. 216-232.



for Iceland and Greenland played, in the west, the same strategic role as Spitsbergen in the east. Negotiations between the U. S. State Department and the representative of Denmark in Washington led to an exchange of notes (April 7-9th 1941) in which the United States, while recognizing Danish sovereignty over Greenland, pointed out that it was impossible for Denmark to exercise such sovereignty over its territory; with references to the Monroe Doctrine and the acts of La Habana (July 30th 1940), in which the defence of regions of the Western Hemisphere belonging to European powers was anticipated in the interests of U. S. security, a number of measures were agreed that amounted to the organization of a defensive system (airforce bases, meteorological stations, port installations, etc.). These measures were incorporated in the Agreement of April 9th 1944 that originated the U.S. presence in Greenland (41).

Though there remain outstanding issues in the Greenland area with regard to the law of the sea, they do not seem to be critical at this time. In 1973, almost uneventful agreement was reached by Canada and Denmark, roughly on the basis of the median line principle, on the partition of the continental shelf between Greenland and Canada. Perhaps the chief feature of this agreement for this discussion is the treatment of Hans Island, an uninhabited island less than a mile long lying exactly astride the median line between Greenland and Ellesmere Island in the Nares Strait (latitude 80° 49' N). This small area has been left blank in the list of geographical coordinates contained in the Agreement; the agreed frontier halts at the southern Hans Island low water mark and resumes at the northern low water mark (42). To the east of Greenland, the boundary between the continental shelves of Greenland and the Svalbard can probably be considered as defined naturally by the Nansen Fracture Zone, with the Yermak shelf constituting the limit of the Svalbard shelf jurisdiction (43). Denmark established an exclusive economic zone for Greenland on June 1st 1980 (a relatively late date; most Arctic States proclaimed their zones in 1977). Fishing limits between Greenland and Iceland have been fixed on the basis of the median line principle (44).

(41) DOLLON: *op. cit.*, pp.156-164.

(42) SHUSTERICH: "International...", *cit.*, pp.252,253. PHARAND: "The Legal...", *cit.*, p. 76. The Agreement between Canada and Denmark can be consulted in *Canada Treaty Series*, 1984, N.° 9.

(43) PHARAND: "The Legal Regime of the Arctic: some standing issues", *International Journal*, XXIX, Autumn 1984, p. 752.

(44) VAN DER ESSEN: "Les régions...", *cit.*, p.476.

#### 1.4. ELLESMERE ISLAND.

In 1920 the Canadian government urged the Danish government to limit hunting by Greenland Eskimos on Ellesmere Island (196,236 km<sup>2</sup>). Denmark replied that it shared the opinion of the Danish explorer Rasmussen that the island was an unoccupied territory. The United Kingdom presented a note to Denmark in Canada's name, and Denmark made no more of the matter, probably because the United Kingdom's recognition of Danish sovereignty over Greenland persuaded the Danish government to abandon claims to Ellesmere (45).

In the Danish-Canadian agreement on the partition of the continental shelf between Ellesmere Island and Greenland, the partition line begins at 82° 13' North 60° West, and continues in accordance with the median line principle, except where the special configuration of the coastline or the presence or size of certain islands have made it appropriate to deviate from the median line. It is to be expected that Denmark and Canada will adopt a similar approach to the partition of the rest of the shelf in the Lincoln Sea. It is possible that the partition in this area has been postponed simply pending further information on the geology of the Lomonosov Ridge; confirmation that it is continental shelf would lead to the median line principle giving rise to a demarcation line roughly prolonging the midline of the Ridge (46).

#### 1.5. JAN MAYEN ISLAND.

The delimitation of a fishing zone around the island of Jan Mayen (373 km<sup>2</sup>), which forms part of the Kingdom of Norway according to Section 1 of a Norwegian Act of February 27th 1930, has been the subject of dispute between Norway and Iceland. In February 1979, Norway announced its intention of enforcing an exclusive economic zone around the island. This proposal was objected to by Iceland (which is about 293 nautical miles from Jan Mayen)

(45) PHARAND: "La souveraineté du Canada dans l'Arctique", *Revue Québécoise de Droit International*, 1986, p.290.

(46) *Idem.*: "The legal regime...", *cit.*, pp. 752, 753.

on grounds that in 1982 were to become Art. 121 Para. 3 of the Convention on the Law of the Sea: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" (47). Negotiations between the governments of the two nations led to the signing, on May 28th 1980, of an agreement that recognized the 200-mile zone around Jan Mayen wherever this zone does not overlap the 200-mile zone around Iceland, which is respected. The agreement also created a Joint Fisheries Commission for the establishment of fishing quotas in the area; this Commission was constituted on the day following the signing of the Agreement (48).

Partition of the continental shelf between Jan Mayen and Iceland was encharged by Art. 9 of the Agreement to a Conciliation Commission. The recommendations of this Commission were based on a wide range of considerations including the strong economic interest of Iceland in the area, geographical and geological factors and other special circumstances, and led to the signing, on October 22nd 1981, of a Convention between Norway and Iceland, Art. 1 of which establishes that in the region between Iceland and Jan Mayen the frontier of their shelf jurisdictions coincides with that of their exclusive economic zones. At the same time, the Convention provides for joint management of the shelf resources of Jan Mayen in an area of 45,475 km<sup>2</sup> (49).

(47) VAN DER ESSEN: "Les régions...", *cit.*, pp. 476-478. It may be pointed out, as Theutenberg has done, that Art.121 Para. 3 mentions only rocks, not islands or islets. Does this mean that islands or islets of some size are not covered by Art.121 (which is entitled "Regime of islands")? The answer appears to be difficult. In State practice there are examples of very small islands that are taken into account as points of departure from which to measure the continental shelf or exclusive economic zone (THEUTENBERG: *op. cit.*, pp. 46, 47). Evensen has stressed that Jan Mayen has no permanent population, since one could hardly count as such the thirty or so state employees in charge of the radio and meteorological stations and the Loran and Consol navigation stations (EVENSEN: "La délimitation du plateau continental entre la Norvège et Islande dans le secteur de Jan Mayen", *A.F.D.I.*, XXVII, 1981, p.711). Concerning the characteristics of Jan Mayen, see also VAN DYKE, J.N., MORGAN, J. R. and CURISH, J.: "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?", *San Diego Law Review*, vol. 25, N.° 3, 1988, p. 460.

(48) On the content of the Agreement of May 28th 1980, see EVENSEN, *op. cit.*, pp. 718-723, and HEY, *op. cit.*, pp. 165-168. The text may be consulted in *Overerlskomster...*, 1980, p. 912.

(49) VAN DER ESSEN: "Les régions...", *cit.*, pp.476-478. RICHARDSON, E.: "Jan Mayen in Perspective", *American Journal of International Law*, vol.82, N.° 3, 1988, pp. 443-448. According to Laursen, the reasons given by the Commission for its proposal include the utter dependence of Iceland on imports of petroleum derivatives, the poor potential of the Icelandic continental shelf as a source of petroleum and the high risks associated with the development of the Jan Mayen Ridge, which may contain petroleum (LAURSEN: *op. cit.*, pp. 222-224). The Convention of October 22nd 1981 may be consulted in EVENSEN, *op. cit.*, pp. 736-738, and in *International Legal Materials*, XXI, November 1982, pp.1222-1226.

The delimitation of the fishing zone and continental shelf around Jan Mayen is also the subject of a suit filed with the International Court of Justice by Denmark against Norway. In this case the specific area in dispute is that separating Jan Mayen from the eastern coast of Greenland (50).

#### 1.6. THE BEAUFORT SEA.

The hydrocarbon potential of the Beaufort Sea has been known since the discovery of the Prudhoe Bay deposits in 1968. Since then, further prospection and exploitation has been halted by a demarcation dispute between the United States and Canada concerning an area of 6,180 square nautical miles in the Diapir Basin. In this dispute, the United States favours the equidistance principle, which in view of the convexity of the adjacent North American coastline would give it a greater share of the exploitable regions of the continental shelf; Canada, on the other hand, invokes the sector principle in advocating a demarcation line based on the 141st meridian west of Greenwich. Though the mutual economic and political dependence of the United States and Canada might be expected to make them the ideal partners for participation in a joint development mechanism, the unwillingness of the United States to lend weight to the sector principle may hinder compromise.

It may be pointed out that the creation of a joint development area would not only be a practical solution allowing development to take place, but would also excuse the United States from explaining why it respects 1867 Convention on the cession of Alaska as regards the maritime frontier laid down between the United States and Russia in the west, while failing to recognize the frontier established by the same Convention between the United States and Canada in the east, the 141st meridian; cooperation along the lines suggested above might serve as a precedent for an agreement between the United States and the Soviet Union in the Bering Sea (51). Be

(50) *Crónica ONU*, vol.XXV, N.° 4, December 1988, p. 79.

(51) The Bering Sea, which lies to the south of the Arctic circle, is not geographically an Arctic Sea. For this reason, I refrain from commenting in detail on the dispute between the United States and the Soviet Union concerning title to 15,000 square miles of potentially hydrocarbon-bearing shelf in this sea.

that as it may, it is necessary to stress the vital importance of implementing procedures for cooperation in pollution control in such a hydrocarbon-rich region as this (52).

## 2. THE ARCTIC AS COMMON HERITAGE OF MANKIND.

In this section I shall examine the desirability or otherwise of declaring the Arctic to be Common Heritage of Mankind. I begin by summarizing the small amount of doctrine in this area. With regard to the development of a regime for the region, Young wrote that "we must begin by avoiding any temptation to compare the Arctic with the Antarctic, assuming that regime formation will succeed in the Arctic merely because it did in Antarctica. In fact, the two polar regions are antipodes in terms of regime formation as well as in geographical terms. In 1959, when the Antarctic Treaty was signed, the various parts of Antarctica were not fully integrated into the political systems of contiguous states. It is doubtful whether those states advancing territorial claims in Antarctica could even have met the standards of "effective occupancy" in any serious test of their claims. The entire region was already demilitarized on a *de facto* basis. No industrial activities of any kind were taking place on the Continent. And Antarctica was (as it still is) practically devoid of any permanent human population. None of these conditions obtains today in the Arctic region. As a result, we must reckon not only with the fact that the set of players involved in Arctic politics is not the same as the set of players participating in Antarctic politics. We must also grasp the fact that the interests, issues and bargaining positions of the states likely to participate in Arctic regimes are different from those of the members of the Antarctic Treaty" (53). Young is of course essentially right: an Arctic regime

The dispute arose from technical discrepancies regarding the way in which the dividing line established by the 1867 Convention should be drawn; Russia uses the Rhumb-line Method and the United States the Great Circle Method. For further details, see ANTINORI, C.M.: "The Bering Sea: A Maritime Delimitation Dispute Between the United States and the Soviet Union", *O.D.I.L.*, vol.18, pp. 14 7 (p. 32 *passim*).

(52) On questions of sovereignty, the sector principle and the problem of ice formations, see, e.g., MARTINEZ-PUNAL: "Los espacios polares: el Artico", *Anuario de Derecho Marítimo*, vol.VIII, pp.127-152.

(53) YOUNG, O.R.: "Arctic Water: The Politics of Regime Formation", *O.D.I.L.*, vol.18, 1987, p. 102.

must address the problems arising from the peculiarities of the Arctic, and not mechanically copy the solution arrived at for the Antarctic. Yet such similarities as do exist between the two cases cannot be ignored. Until the early 20th century, most of the Arctic was, like the Antarctic, *terra nullius*, a circumstance that gave rise to a complex set of problems concerning claims to sovereignty; and though these problems have largely been resolved, bringing all Arctic lands under national sovereignty, the two regions are still customarily discussed together. This custom is probably partly due the Arctic's having only relatively recently been deprived of its former status of *terra nullius*, and because of the ignorance of or scant attention to these questions by the doctrine of States that are not directly involved in them, but it surely throws doubt on whether the regimes being developed for the two regions, though admittedly different one from the other, cannot or should not be considered jointly. On what grounds must the traditional working methodology be departed from? Would such a departure be advantageous in any way? And where would it leave any common features of the two regimes? If such common features exist, it would seem that their joint examination must be beneficial for their elucidation; it is not impossible that they may grow in number and scope. Thus it is my belief that the arguments in favour of considering the Antarctic as the Common Heritage of Mankind, though they cannot be used as the basis of similar theses for the Arctic, may nevertheless play a legitimate role in stimulating theses of this kind, and should accordingly not be banished from consideration.

With the Antarctic thus not totally out of mind, let us examine the case of the Arctic, where, as we have seen, the general establishment of exclusive economic zones and national continental shelves has been carried out by the coastal States. Art. 1 Para. 1 of the Convention on the Law of the Sea states that for the purposes of this Convention, "'Area' means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". The limits of the international seabed and ocean floor Area are thus defined by those of the national continental shelves. In the Arctic, this means that the international Area is located, in accordance with Art. 76 Para. 5 of the Convention, 350 nautical miles from the coastal baselines or 100 nautical miles from the 2, 500-metre isobath (the line connecting points 2, 500 metres deep). This is a relatively small, permanently ice-covered area around the North Pole. The Arctic High Sea is a larger area; it is subject to Part VII of the Convention, including the provisions concerning freedom of navigation. This



latter remark is not as divorced from reality as might appear, since a) the ice covering most of this region consists of relatively -thin, drifting floes that when broken up by an icebreaker do not prevent navigation, and b) the Arctic High Sea almost everywhere has a depth of at least 500 metres – and in many places between 2,200 and 4,500 metres – which allows navigation by submarines (54). Beyond the continental shelves and exclusive economic zones there are thus two legal areas: the sea bottom located outside national jurisdiction, and the High Sea.

The seabed and ocean floor is part of what the Convention on the Law of the Sea calls the "Area". The Area is the subject of Part XI of the Convention, within which Art. 136 states that "the Area and its resources are the common heritage of mankind" (55). Thus the Arctic seabed and ocean floor beyond national jurisdiction, as part of the Area, belong to the common heritage of mankind. Art. 137 of the Convention establishes in Para. 1 that "No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized". Besides Arts. 136 and 137, all other provisions concerning the Area are likewise applicable to the Arctic seabed and ocean floor, though their practical effects would depend on the presence and quantity of resources present. Rodriguez-Carrion is therefore quite right when he writes that "the Arctic Ocean is almost unanimously considered as high sea subject to the regime corresponding to this kind of marine area, and since the III Conference on the Law of the Sea its floor and subsoil fall within -the International Seabed and Ocean Floor Area" (56).

With regard to the Arctic High Sea, considered without reference to its ecological context, the only respect in which the Arctic

(54) VAN DER ESSEN: "Les régions...", *cit.*, p. 479.

(55) Similarly, Paragraph 1 of U.N. Resolution 2749 (XXV) containing the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, states that "The seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the Area), as well as the resources of the Area, are the common heritage of mankind".

(56) RODRIGUEZ-CARRION, A.J.: *Lecciones de Derecho Internacional Público*, 2nd Ed., Madrid, 1990, pp. 442, 443; our translation. Likewise in favour of subjecting the seabed and ocean floor to the Area regime is CAFLISCH: *op. cit.*, p.60. See also PHARAND, *The Legal...*, *cit.*, pp. 77, 78 and "L'Arctique et l'Antarctique: Patrimoine Commun de l'Humanité", *Annals of Air and Space Law*, vol.VII, 1982, pp.415-430, and THEUTENBERG, *op. cit.*, p.60.

Ocean differs from any other ocean is the presence of ice floes on its surface. Like other oceans it offers the freedom of the sea, in particular freedom of navigation, a right that is in fact increasingly made use of. Other freedoms of the sea that are exercised include freedom of overflight, freedom of fishing and freedom of scientific research, and increasing knowledge of the seabed and technological advances have likewise made it possible to lay submarine cables and pipelines. In Pharand's words, "In these circumstances, the water of the Ocean must be considered as high seas, as any other ocean" (57). At the same time, however.

The Arctic is unique in many respects and is of great importance for the understanding of our environment. It is a rare, so-called zero area: an area where, without the disruption of pollution, we can still look back thousands of years on our own chain of development. The Arctic countries have a great responsibility for preserving this last retrospective mirror, in-large ecologically untouched, and to prevent pollution from reaching the region. The risk of pollution is increasing as more oil rigs and other tools of technology approach the Arctic region. The conditions in the Arctic are significant for our own daily environment. Initiatives ought to be taken in order to protect the environment of the Arctic region and to preserve the Arctic fauna (58).

It is thus of the utmost importance to conserve the pristine conditions of the Arctic environment. However, while recognizing the need for Arctic nations to take appropriate measures in the marine areas under their jurisdiction, I would disagree with forecasts like Theutenberg's:

The development of the law of the sea and the establishment of the new sovereignty zones therefore has an important political and military/strategic bearing) on the Arctic in the longer perspectives. Areas which were quite free and could be reached without legal difficulties only a decade ago are now under national control in one

(57) PHARAND: "The Legal Status of the Arctic Regions, *Recueil des Cours*, T. 163, 1979-II, p. 84 and "The Law...", pp. 176, 177. Butler noted that "insofar as the water and ice areas of the Arctic are concerned, the regime of high seas is operative as a matter of positive law" (BUTLER, W.E.: *Northeast Arctic Passage*, Alphen aan den Rijn, 1978, p. 77); while Pastor-Ridruejo asserted: "Finally, with regard to the Arctic Ocean *sensu stricto*, it must be considered legally as high sea, and hence as governed by the principle of freedom" (PASTOR-RIDRUEJO: *Curso...*, *cit.*, pp. 461, 462; our translation).

(58) THEUTENBERG: *op. cit.*, p.55.

respect or another. Looking at a map of the Arctic and the Norwegian Sea, with the new zones inserted, it is evident that most of the Arctic will in the future be under national control – for the time being only as regards economic exploitation, but possibly in other respects in times to come. This is a useful reminder of the concept of “creeping jurisdiction”. (59)

The establishment of the exclusive economic zone concept – which I have had occasion to express my approval of (60) – does not, to my mind, justify jurisdiction creeping further out to sea, and I accordingly consider it to be unlikely that Arctic States could be recognized as having environmental powers outside their shelf jurisdiction and exclusive economic zones, except for such powers as might derive from the Convention under Arts. 117 (Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas), 118 (Co-operation of States in the conservation and management of living resources) and 119 (Conservation of the living resources of the high seas). It may be pointed out, moreover, that, at least in theory, it would be possible for conflict to arise between measures taken by coastal States and any measures taken by the Authority of the Area under Art. 145 of the Convention (Protection of the marine environment).

My misgivings with respect to creeping jurisdiction do not, of course, imply that I am in favour of “lawless” situations in which nonfulfilment of obligations under the Convention of the Law of the Sea is allowed to come about through their reduction to mere norms of behaviour; rather, I have advocated the design of international mechanisms able to lead towards the solution of critical situations arising from the lack of institutional structures capable of responding

(59) THEUTENBERG: *op. cit.*, p.46.

(60) PUEYO-LOSA, J.A. and MARTINEZ-PUÑAL, A.: *La administración de los recursos biológicos marinos ante el Nuevo Orden Jurídico-Marítimo Internacional*, III Congreso Iberoamericano del Medio Ambiente, Santiago de Compostela, June 23-29th 1981. La Coruña, 1982. MARTINEZ-PUÑAL: *Los derechos...*, *cit.*; “Reflexiones sobre los intereses pesqueros españoles y los derechos de los Estados sin litoral y en situación geográfica desventajosa en los recursos vivos de las zonas económicas exclusivas de otros Estados”, *Industrias Pesqueras*, N.º 1422, pp. 13-15 and N.º 1423, pp. 11-14; “Los derechos de los Estados sin litoral y en situación geográfica desventajosa en la zona económica exclusiva: el ámbito de la participación”, *Anuario de Derecho Marítimo*, V, 1986, pp. 97-154; “Los derechos de los Estados sin litoral y en situación Geográfica desventajosa en la Zona Económica Exclusiva: fundamentación y Nuevo Orden Económico Internacional”, *Anuario Mexicano de Relaciones Internacionales*, 1986, pp. 321-335; “La zona económica exclusiva: valorización de sus razones de oportunidad (con consideración particular del caso azoriano)”, in *8 Semana das Pescas dos Açores. Relatório*, pp. 71-78 (also published in *A.D.M.*, vol. III, pp. 257-284).

adequately to a profoundly interdependent international reality (61). In particular, one might wonder whether it would be desirable to declare, in some appropriate international instrument, that the Arctic High Sea, like the Arctic Area, is part of the Common Heritage of Mankind. In this event, the greater area of the high sea zone would result in Common Heritage water lying not only over Common Heritage ocean floor but also over national continental shelf. This is a bold hypothesis, for judging the feasibility of which there are perhaps as yet too few points of reference, but it is not an arbitrary one; in the framework of the UNESCO World Heritage Programme it has already been suggested that Lancaster Sound be designated a World Heritage Area, a category designed to protect areas of major ecological importance (62).

The Arctic Common Heritage of Mankind, be it limited to the Arctic Area or include the Arctic High Sea, should be understood as defined essentially for its protection in the spirit of Art. 145 of the Convention on the Law of the Sea though without ruling out such possible exploitation as the fragile nature of the Arctic might allow. The declaration of the Arctic High Sea as part of the Common Heritage would forestall any tendency on the part of Arctic States to seek the gradual extension of their jurisdiction towards the North Pole, a tendency that would be fuelled by interpretations contrary to the proper understanding of the Arctic seabed beyond national jurisdiction as part of the International Seabed Area, or of the Arctic High Sea as high sea. Such a declaration would incidentally constitute a further step in the progressive socialization of the high seas in general.

(61) MARTINEZ-PUÑAL: “Sobre un Nuevo Orden Político Internacional: Elementos”, *Factos & Ideas*, IV, N.º 6-7, pp. 51-82 (also published in *Problemas de la Ciencia Jurídica. Estudios en homenaje al Prof. Francisco Puy Muñoz*, Vol.II, Universidad de Santiago de Compostela, 1991, pp. 493-514).

(62) PHARAND: *The Northwest Passage Arctic Straits*, Dordrecht, 1984, p.124. The hypothesis I put forward is in fact not unimbued by the philosophy that leads Fleischer to write of “biological resources qua common heritage of mankind” (FLEISCHER: “La pêche”, *Traite...*, *cit.*, pp. 846, 955 and 956) and Rodríguez-Carrion to deal with the high sea, the International Seabed Area, the Arctic and Antarctic polar regions and outer space all in a single lesson entitled “Regions that are Common Heritage of Mankind” (RODRIGUEZ-CARRION: *op. cit.*, pp. 432-455). The need for “special consideration and perhaps special legal arrangements” in the Arctic on account of its special environmental characteristics, among others, is discussed by GLASSNER, M. J.: *Neptune’s Domain. A Political Geography of the Sea*, Boston, 1990, pp. 97, 98. On the environmental background, see STONEHOUSE, B. (Ed.): *The Arctic and Pollution*, Cambridge, 1986.

My approach to the Arctic is thus close to that of Sucharitkul, who in discussing the future of the concept of a Common Heritage of Mankind wrote the following:

"What, then, will be the place of the concept of common heritage of mankind in tomorrow's international law? The future of this concept depends on the capacity of mankind, as an institution, to adapt, to balance the various interests, to order them in a way that is just and beneficial for all, and to discern the proper precedence and priority of each while maintaining a sufficient flexibility and spirit of compromise in the general interest of the whole of mankind. In turn, States must protect their vital and special interests, watching over and protecting the specific interests of their citizens and of agents acting on their behalf. However, in the last analysis, it is the general interest of mankind that should prevail.

... On this Earth there are patches of territory that belong to no one, to no particular State, but which serve the whole world and are thus the common property of all mankind. They include, for example, the upper atmosphere around the Earth, the Earth's stratosphere and ionosphere, the Earth's core, axis, depths or interior, *the glaciers or glacial territories in the polar regions of the north and south of the Earth (in spite of certain claims)*, the seabed beyond national jurisdiction, the high seas, the airspace above the high seas and oceans." (63)

To conclude, I should like to stress that the thesis put forward in this article does not rule out the possibility that the institutional system that might eventually be adopted to govern the Arctic might afford recognition to the special situation of Arctic nations. With or without any declaration of the Arctic as belonging to the Common Heritage of Mankind, the desirability of these existing mechanisms for mutual understanding has been emphasized by Pharand:

(63) SUCHARITKUL, S.: "Evolution continue d'une notion nouvelle: le patrimoine commun de l'humanité", *El Derecho y el Mar*, *cit.*, pp. 279, 280 (our translation and italics). I would point out that the Common Heritage hypothesis, among others, was also considered by Friedheim, who in discussing the regime of the Arctic wrote that "systems of governance might range from virtually no governance at all at one end of the spectrum, to some form of collective governance at the other, such as the Common Heritage of Mankind" (FRIEDHEIM, R.L.: "The Regime of the Arctic - Distributional or Integrative Bargaining", *O.D.I.L.*, vol.19, N.º 6, 1988, p. 493).

"It therefore, in the first place, pertains to these Arctic States to proceed with their scientific research, and if this research should reveal the existence of mineral resources in the international zone susceptible to exploitation, their collaboration will be an essential requisite for such exploitation. There might then be an agreement between, on the one part, the Arctic States and, on the other, the international deep seabed authority, for the establishment of a particular legal regime concerning the exploitation of these resources." (64).

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(64) PHARAND: "L'Arctique...", *cit.*, pp. 420, 421; our translation. For a view of the geographical, economic and strategic background of the legal regimes of navigation through Arctic straits and the environmental protection of the Arctic, see, *inter alia*, MARTINEZ-PUÑAL: "Los espacios polares...", *cit.*, pp. 127-152.