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*Spain in the Arctic**

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ABSTRACT

As the 21st century unfolds, the Arctic sea-ice has been undergoing an unprecedented transformation leading to renewed international scrutiny of the Arctic Ocean. Faced with this renewed scrutiny of the Arctic, this study focuses on current Spanish interests in the Arctic. They are concerned basically, on the one hand, with the interpretation and application of the 1920 Svalbard Treaty regarding the Svalbard maritime zones, and, on the other hand, with Spanish position as Observer State in the Arctic Council towards an analysis on the scientific impact on Arctic political matters, but without forgetting the emerging presence of the European Union of which Spain is a member State.

Keywords

Arctic Ocean; Law of the Sea; Svalbard Treaty; Arctic Council; Spanish polar issues

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RÉSUMÉ

Alors que le siècle XXI progresse, la glace arctique a subi une transformation sans précédent qu'a conduit à une nouvelle visibilité internationale de l'Océan Arctique. En conséquence de cette attention nouvelle, la présente étude se concentre sur les intérêts espagnols actuels pour l'Arctique. Ces intérêts sont fondés principalement, d'une part, sur l'interprétation et l'application du Traité de Svalbard de 1920 concernent les zones maritimes de Svalbard, et d'autre part, sur la position de l'Espagne en tant qu'observateur au sein du Conseil de l'Arctique vers une analyse de l'impact scientifique sur les questions politique de l'Arctique, mais sans oublier la présence émergente de l'Union Européenne, dont l'Espagne est un des États membres.

Mots clés

Océan Arctique; Droit de la mer; Traité de Svalbard de 1920; Conseil de l'Arctique; Affaires polaires de l'Espagne

RESUMEN

A medida que avanza el siglo XXI, el hielo marino ártico ha experimentado una transformación sin precedentes provocando una nueva visibilidad internacional del océano Ártico. Frente a ella, el presente estudio se centra en los actuales intereses españoles en el Ártico. Principalmente, esos intereses se basan, por una parte, en la interpretación y aplicación del Tratado de Svalbard de 1920 sobre las zonas marítimas de Svalbard, y, por otra, en la posición de España como Estado observador en el Consejo Ártico hacia un análisis del impacto científico sobre los asuntos políticos árticos, pero sin olvidar la presencia emergente de la Unión Europea, de la que España es un Estado miembro.

Palabras clave

Océano Ártico; Derecho del Mar; Tratado de Svalbard; Consejo Ártico, Asuntos polares españoles

I. INTRODUCTION

Historically, Spanish interests in the Arctic have manifested since the era of geographical expeditions. From Alaska to the North Atlantic, the high Arctic latitude coasts were explored by a series of Spanish navigators, including Cabrillo (1542), Gali (1582) and Vizcaino (1596/1602).

La Casa de la Contractación, a School of Navigation founded in Seville in 1503, supported those expeditions which gave an important contribution of knowledge to the *Padrón Real*, a top-secret universal global navigation chart continuously updated with all observations and discoveries made on each exploratory voyage.

Throughout the 17th and 18th centuries, a series of expeditions searched, in vain, for the Northwest Passage and, finally, an expedition from the port of Cadiz on 30th July 1789

by the corvettes *Descubierta* and *Atrevida*, commanded by Malaspina and Bustamante, failed to find any passage leading from the Pacific to the Atlantic.[1]

Over the following two centuries, Spain dropped the idea of polar research. At the beginning of the 20th century, it signed the Svalbard Treaty of 1920,[2] and it was only in the 21st century that Spain renewed its Arctic interests, becoming an Observer State of the Arctic Council in 2006 as well as joining the International Scientific Arctic Committee (ISAC) in 2009.

Indeed, as the 21st century unfolds, the Arctic sea-ice has been undergoing an unprecedented transformation, thinning, decreased seasonal coverage and a substantial reduction in the area of (what had been considered) perennial ice in the central Arctic Ocean, which has led to renewed international scrutiny of the Arctic Ocean.

Faced with this renewed scrutiny of the Arctic, current Spanish interests in the Arctic are concerned basically, on the one hand, with the interpretation and application of the 1920 Svalbard Treaty regarding the Svalbard maritime zones (2), and, on the other hand, with its position as Observer State in the Arctic Council, looking at the scientific impact on Arctic political matters without forgetting the emerging presence of the European Union of which Spain is a member State (3).

II. EMERGING AND RE-EMERGING ISSUES IN THE SVALBARD ARCHIPELAGO

The ancient sagas, which are found in medieval texts of Norse oral tradition, narrate that in the twelfth century the Vikings first set foot upon the shores of what is now known as the Svalbard archipelago.

Since there is not much evidence in regard to this, the history of the archipelago takes its origins with the arrival of the Danes. In 1559 the expedition of Mr. William Barents was looking for an accessible route directly connecting the West with the East passing through the top of the known world via Arctic Ocean. The explorers encountered five main islands surrounded by a group of islets located halfway between Norway and the geographical North Pole, and named the largest one Spitsbergen, due to its morphology characterized by rugged peaks.

While there are many stories that echo the adventures of exploration and exploitation of living and non-living resources, in particular coal mining, hunting of bears, whales, walruses and seals, the archipelago commonly known as Spitsbergen archipelago has no true national history and is widely dubbed *no man's land*.[3]

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1 *Report on Spain's scientific research in the Arctic Region*, 2009, pp. 6 ss.

2 See for a general overview, R. Dollot, "Le droit international des espaces polaires", *RCADI*, vol. 75, t. II, 1949, pp. 115–200; M. W. Mouton, "The International regime of the Polar Regions", *RCADI*, vol. 107, t. III, 1962, pp. 169–286; D. Pharand, "The Legal Status of the Arctic Regions", *RCADI*, vol. 163, t. II, 1979, pp. 49–116.

3 M. Conway affirms: "[n]ot Spitzbergen as it commonly but incorrectly spelt. The name is Dutch, from Spits 'a point' " [*No Man's Land. A History of Spitsbergen from its Discovery in 1559 to the Beginning of the Scientific Exploration of the Country*, CUP, Cambridge, 1906, p. 4.

This expression has now been replaced by *rotating society land* deriving from the mining camps, which, starting from the seventies, gave rise to a phenomenon of socialisation. It has led to the establishment of permanent infrastructure for a rotating population of about 2500 inhabitants currently living in the archipelago for a period that usually does not exceed six years.[4]

The following sections provide, firstly, a brief historical introduction in order to understand the meaning and scope of the current legal status of the Svalbard archipelago (2.1); secondly a study on (re)emerging issues related to the Svalbard maritime zones, particularly, the Svalbard continental shelf (2.2); and finally, an analysis on national or international approach to the Svalbard issue (2.3).

2.1. The Svalbard Archipelago and its legal regime[5]

Danish-Norwegian Crown, and later the Norwegian, for centuries claimed sovereignty over the archipelago but never had the authority to impose itself as a sovereign and prevent free access and exploitation (especially of coal) by other States that considered the archipelago as *terra nullius*.

The controversy over the legal status of the Archipelago of Spitsbergen was eventually addressed by the Conferences of Kristiania in 1910 and 1912 and resolved during the Peace Conference held after the First World War (1919). In the framework of the latter the Spitsbergen Commission was established and Norway was asked to prepare a draft treaty on the legal status of the archipelago.

With the intention of satisfying the competing interests of States, Norway developed the draft based on the classical principle of International Law, the reciprocal *do ut des*: its sovereignty over the archipelago in exchange for equal rights of access and exploitation for the other States concerned.

In this regard, it attempted to provide an equitable solution which, on one hand, would recognize the sovereignty of Norway and, on the other, would preserve (at least partially) the earlier rights enjoyed by others under *terra nullius*, in particular, the equal rights of access, hunting, fishing or undertaking any kind of maritime, industrial and commercial activity for States parties to the Treaty.

Discussions within the Spitsbergen Commission focused mainly on two alternatives: either to give Norway a mandate, in accordance with the mandate system under the Covenant of the League of Nations also adopted in the framework of the Paris Conference in 1919 or to grant sovereignty over the archipelago by adopting the draft that had been prepared.

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[4] See, the 2009 Report "This is Svalbard", *Svalbard Statistics in the Official Statistics of Norway Series*, available at: www.ssb.no/svalbard/.

[5] See, *inter alia*, R. Brown: *Spitsbergen. An account of Exploration, Hunting, the Mineral Riches and Future Potentialities of an Arctic Archipelago*, Seeley, Service and Co. Limited, Londres, 1920; B. Stael-Holstein: *Norway in Arcticum. From Spitsbergen to Greenland?*, Levin e Munksgaard, Publishers, Copenhagen, 1932; E. Singh: *The Spitsbergen (Svalbard) Question: United States Foreign Policy*, Universitetsforlaget, Oslo-Bergen-Tromsø, 1980. More recently, see also, J. L. Meseguer: "Régimen jurídico de los espacios marítimos de Spitzberg (Svalbard). Posición de Noruega, España y otros Estados", *REDI*, vol. LIX, 2007, pp. 631–663.

Among the States with the greatest interest in the matter was Sweden, which supported the first alternative, but was in a minority. Russia would have probably been its main supporter, but because it was one of the States defeated in the First World War it did not participate in the Paris Conference.

Therefore, without much difficulty to reach an agreement, the Spitsbergen Commission approved the Norwegian draft. With this approval, the Danish name Spitsbergen was replaced by the official Norwegian name Svalbard; a name suggested by the old sagas that means "the land of cold coast".

Finally, the Treaty Concerning the Archipelago of Spitsbergen (hereafter "the Svalbard Treaty" or "Treaty of Paris (1920)") was signed on February 9, 1920.[6]

The Svalbard Treaty consists of a Preamble, ten articles and an Annex. The Preamble manifests the intention of the Contracting Parties to develop an equitable international regime in order to ensure peaceful development and use of the Svalbard archipelago.[7]

This purpose is reflected in the wording of Article 1, which reads: "The High Contracting Parties undertake to recognize, *subject to the stipulations of the present Treaty*, the *full and absolute sovereignty of Norway* over the Archipelago of Spitsbergen [...]".[8]

The exercise of "full and absolute" sovereignty is, however, subject to certain conditions stated in Articles from 2 to 9. Articles 2 and 3, according to the principle of non-discrimination, ensure respectively the exploitation of natural resources by nationals and ships of all States Parties and, under the local regulation, the right of access and entry for realization of maritime activities, industrial and commercial both on land and in the "territorial waters".[9]

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6 *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920/ Traité concernant le Spitsberg*; League of Nations/ Société de Nations – Treaty Series/Recueil des Traités, vol. 2 n. 41.

7 "Desirous, while recognizing the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, of seeing these territories provided with an *equitable regime*, in order to assure their development and peaceful utilization" [Preamble]. The emphasis is of the author.

8 The emphasis is of the author.

9 Article 2, par.1: "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. [...]".

Article 3, par. 1: "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 [...]".

In the words of A. Martínez Puñal: "[e]l caso de la Svalbard ha sido presentado como una "comunidad mini-europea". En la [entonces] Comunidad Europea la soberanía de cada Estado dentro de sus fronteras no está sujeta a ninguna duda, pero, por medio del llamado derecho de establecimiento, los Estados miembros acordaron el derecho de los nacionales de dichos Estados a desarrollar actividades económicas dentro del territorio de cualqueira de los Estados comuniatrios sujetos a las mismas condiciones que los propios nacionales; como en el caso del derecho de establecimiento en la [entonces] Comunidad Europea, el derecho reconocido a los

Furthermore, the second paragraph of Article 2 gives Norway the competence over the preservation and management of flora and fauna provided that measures are not discriminatory for the rest of the States Parties.[10]

Articles 4 and 5 respectively regulate the establishment of telegraphy installations, including those on board ships and aircraft as well as weather stations; either by the Norwegian government or, where appropriate, under its authorization.[11]

In relation to the right of ownership over land and resources, Articles 6 and 7 refer to the Annex for the settlement of any territorial claims arising within a fixed period of three months from the entry into force of the Treaty and ensure equality of treatment for all nationals of the Contracting States in accordance with the provisions of the Treaty.

Among others, Article 8 is particularly important in practice since it regulates major activities, which are carried out in the archipelago, namely mining. This article states that mining activities in all territories of the archipelago are governed by Norwegian legislation, which should ensure a tax system in favor of the Svalbard archipelago (not Norway and/or other countries or nationals of the Contracting States) and guarantee respect of miners' labor conditions. The importance of mining activities results from the fact that both the Treaty and the Norwegian legislation on the matter, i.e. the Mining Code, came into force simultaneously in accordance with the provisions of Articles 8 and 10.[12]

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nacionales de los Estados partes en el Tratado de Spitzberg no implica ninguna inmunidad en relación con la legislación habida con base en la soberanía territorial noruega, si bien aquella no podría contemplar discriminación alguna para con los nacionales de Estados partes" ["Los espacios polares: el Ártico", *Anuario de Derecho Marítimo*, vol. 8, 1990, pp. 83–164, pp. 91–92]; see, also, I. Arroyo Martínez, El derecho maritmo ante el Ártico, *Anuario de Derecho Marítimo*, vol. 25, 2008, pp. 15–16.

10 Article 2, par. 2: "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 favor whatsoever, direct or indirect to the advantage of any one of them*". The emphasis is of the author.

11 Article 4, par. 2: "Subject to international obligations arising out of a state of war, owners of landed property shall always be at liberty to establish and use for their own purposes wireless telegraphy installations, which shall *be free to communicate on private business with fixed or moving wireless stations, including those on board ships and aircraft*". The emphasis is of the author.

Regarding with the aviation in Svalbard, G. Ulfstein affirms: "Aviation was in its infancy – or at least in its puberty – at the time of the Svalbard Treaty's adoption in 1920. Since then there has, however, been tremendous development in civil aviation. This new means of communication represents a revolution in Svalbard's relations with other geographical areas. As air communication has to large extent taken over the functions of maritime transportation, a pertinent question should be extended by analogy to air transportation and related activities" [*The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty*, Scandinavian University Press, Oslo, 1995, p. 191].

12 Article 8, par. 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. If during this period one or more of the said Powers propose to modify these

Furthermore, citing the peaceful use of the archipelago, Article 9 prohibits the establishment of naval bases and military fortifications. Finally, Article 10 provides a series of measures, including the openness of the Svalbard Treaty to adhesion by present-day Russian Federation, which formally materialized in 1935 and brought about the permanent settlement of the Russian colony, commonly known as Barentsburg, based mainly on mining exploitation activities of *Trust Arktikugol* company.

In short, the peculiarity of the equitable international regime introduced by the Svalbard Treaty is reflected in the fact that "full and absolute" Norwegian sovereignty over the territories and the "territorial waters" of the archipelago is, at the same time, a subject to the conditions mentioned above.

The Treaty, one of the pioneer international treaties for protection of the marine environment and rights of workers, was incorporated into Norwegian law with the Svalbard Act of June 17, 1925 making the archipelago a part of the Kingdom of Norway.[13]

Currently there are no relevant legal issues arising in regards to Norway's territorial sovereignty over the archipelago. While it is true that the activities related to coal mining industry still prevail in the archipelago, the increasing development of different economic activities has raised new legal issues related to the Svalbard continental shelf in the light of the contemporary International Law.

Moreover, given the silence of the Svalbard Treaty in relation to the airspace of the archipelago, the current practice reflects the effective exercise of sovereignty by Norway in regards to the airspace.

In this regard, the case *Trust Arktikugol*, 2009 bears particular importance. In April and November 2009, the Norwegian Criminal Court respectively of first and second instance, declared illegal the flights of a Russian helicopter belonging to mining company *Trust Arktikugol*. They were commercial flights undertaken without permission of traffic and not directly related to mining activities, which are exclusive under a permission issued by the competent authority in Norway.[14]

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regulations before they are applied, such proposals shall be communicated by the Norwegian Government to the other Contracting Powers in order that they may be submitted to examination and the decision of a Commission composed of one representative of each of the said Powers. This Commission shall meet at the invitation of the Norwegian Government and shall come to a decision within a period of three months from the date of its first meeting. Its decisions shall be taken by a majority". Cf. also, Article 10, par. 6: "The present Treaty will come into force, in so far as the stipulations of Article 8 are concerned, from the date of its ratification by all the signatory Powers; and in all other respects on the same date as the mining regulations provided for in that Article".

[13] Article 1 of the Svalbard Act: "Svalbard er en del av kongeriket Norge"; available at *Lovdata*: http://www.lovdata.no/.

[14] Norwegian courts [*Nord-Troms tingrett/Davvi Romssa duggegoddi-Dom. TNHER-2008-160753*, 4 April 2009; *Hålogaland lagmannsrett – Dom. 009-098322AST-HALO*, 12 November 2009] have accepted the restrictive interpretation of "comercial activities" elaborated by the prosecutor, the vice-governor of Svalbard, Lars Fause, according with the G. Ulfstein's analysis: "[o]n the basis of the meaning of commercial in 1920, the context and subsequent State practice it is, however, concluded that a narrow interpretation should be applied, i.e. that the meaning of

Although it seems that there are not, for the time, any interest for Russia or even for other States Parties to the Svalbard Treaty on claiming a broad interpretation of the right of free and non-discriminatory access and entry to the archipelago by air,[15] the *Trust Arktikugol* case constitutes an important precedent that crystallizes the effective control of Norway in the airspace of the archipelago.

Russian helicopters had been exercising flights not strictly related to mining activities without permission of traffic since late nineties. Only in 2007, the same year that controversy over the implementation of the Svalbard Treaty to continental shelf of the archipelago arose, the Norwegian government of Svalbard decided to stop this practice.

Considering the above, it is evident that Norway's approach is to enforce full nationalization reducing to minimum the application of the non-discrimination regime in relation to the airspace of the archipelago and, *mutatis mutandis*, to the marine and submarine areas of Svalbard.

2.2. The Svalbard continental shelf: the Spanish diplomatic note of March 2007

In relation to the Svalbard archipelago, the Norwegian proposal (2006)[16] to the Commission on the Limits of the Continental Shelf (hereafter "CLCS" or "Commission") regarding the Svalbard continental shelf, resulted in the formulation of question about interaction between the contemporary Law of the Sea and the Svalbard Treaty of 1920 which, in accordance with the historical moment in which it was signed, only refers to the maritime legal area of "territorial waters".

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commercial should not cover all activities to make profit" [*The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty*, ob. cit., p. 200].

[15] Regarding to the Svalbard Treaty, the first instance Norwegian Court reports: "Etter Svalbardtraktaten vil et forbud mot at Trust Arktikugol driver kommersiell virksomhet være ulovlig. Innskrenkninger i russiske selskapers adgang til å fly vil innebære et monopol for norske selskaper, og en ulovlig diskriminering av russiske. Russiske myndigheter har overfor det norske utenriksdepartement protestert mot innskrenkningen av Trust Arktikugols luftfartstillatelse i 2007" [pág. 5]. No official translation into English "According to the Svalbard Treaty, a prohibition for TA (Trust Artikugol) to run commercial activity would be illegal. Putting conditions for the Russian companies 'opportunities to fly will imply a monopoly for Norwegian companies, and thereby an unlawful discrimination of the Russian (company). Russian authorities have made an objection against the limited permission the TA got in 2007 directly to the Norwegian ministry of foreign affairs". According with the e-mail correspondence between the author and the lawyer of the company *Trust Arktikugol*, Nadia Thraning: "[...] my client didn't want to use the Spitsbergen Treaty as an argument at the court of appeal. I cant't tell you this in detail, partly because of confidentiality my client enjoys. However, it is no secret that Trust Arktikugol does not agree with Norway's interpretation of the treaty. It's a pity that no one so far has brought the question into the norwegian court system, at least not to the court of appeal or the High court, but I think it is only a question of time. I have at least instructed my client about the possibilities" [19 February 2010].

[16] *Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea, Executive Summery*, 27 November 2006.

In other words, the arising question is: does the Treaty apply to continental shelf of the Svalbard archipelago in accordance with the contemporary Law of the Sea?

Spain replies in the affirmative, as demonstrated by the Note Verbale, 2007. By contrast, Norway replies in the negative and does not consider that the question of the Svalbard Treaty relates to the technical competence of the CLCS.[17]

Being one of the thirty-nine States Parties to the Svalbard Treaty, Spain, through its Permanent Mission to the United Nations, in March 2007 notified the Secretary General on sending a Note Verbale to Norway in regards to the submission by Norway to the CLCS, 2006.

Spain expressly clarified that the Note did not imply any comment on the Norwegian competence to establish marine and submarine areas in Svalbard archipelago, but only revealed its position regarding the interpretation and application of the Svalbard Treaty in those areas. Therefore, within the work of the International Legal Department of the Ministry of Foreign Affairs and Cooperation (Spanish: *Asesoría Jurídica Internacional del Ministerio de Asuntos Exteriores y de Cooperación*; hereinafter "AJI"), one specify the purpose of the Note as "laying foundations for Spain's position that maintains compatibility between the Treaty of Paris and the Convention on the Law of the Sea, without any formal statement on the legal status of the areas in order to prevent prejudice in the future. By reserving the right of Spain to exploit resources begins the formalization of a dispute with Norway on the continental shelf, hence the difference of a global character is conceived applicable to all marine areas and focused on the applicability of the Treaty of Paris".[18]

Subsequently, the AJI reiterates that "[the] silence is in accordance with an agreed strategy within the Ministry of Foreign Affairs and Cooperation and authorized by the Minister, in order to preserve the legal position that Spain could be forced to argue in a potential legal conflict".[19]

In regards to the substantive question of interpretation and application of the Svalbard Treaty, Spain argues that, to the extent that the enlargement of the continental shelf by Norway is intended to be made from Svalbard to the north (i.e. in the Nansen Basin in the western Arctic Ocean) or to the East (i.e. in the international enclave of the Barents Sea), the Svalbard Treaty would be fully applicable to those areas and believes that Norway will respect the rights of free access and non-discrimination guaranteed for other States Parties by the Treaty of Svalbard.[20]

For its part, the Permanent Mission of Norway to the United Nations presented a clear and concise respond. It solely emphasized that the archipelago of Svalbard is a part of the Kingdom of Norway and did not consider the Spanish Diplomatic Note as

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[17] See, Spanish Verbal Diplomatic Note, dated 3 March 2007 and Norwegian Verbal Note, dated 28 March 2007 referring to the note dated 3 March 2007 from Spain. Both of them are available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm.

[18] Decisional Note, *Propuesta de Notas verbales relativas a la reserva por España de sus derechos en los espacios marinos que circundan el archipiélago de Svalbard*, Doc. N. 14.095, 26 February 2007, p. 2.

[19] Informative Note, Doc. Nº 14.824, 1 February 2008, p. 3.

[20] Verbal Note, 2 March 2007, para. 4.

relevant. Furthermore, the submission to the Commission was based on the interpretation and application of UNCLOS and on the powers conferred on the Commission, in accordance with Article 76 and Annex II UNCLOS, and not on the substantive issue of interpretation and application of certain provisions of the Svalbard Treaty.

Relevant or not,[21] the submission of the Spanish Diplomatic Note to the CLCS reveals, however, a new issue in regard to the underwater areas of Svalbard and the exploitation of non-living resources, which is related, *mutatis mutandis*, to the old question of sea area and exploitation of living resources. Suffice it to recall that in 2004 and in 2006 the Norwegian authorities detained Spanish cod vessels for incorrect registration of fishing quotas in the fisheries protection zone of Svalbard. The quotas imposed by Norway setting a total allowable catch, Spanish vessels did not consider relevant in light of their rights of free access and non-discrimination in fishing activity in marine areas of Svalbard because by displaying the flag of a State Party to the Svalbard Treaty they are recognized as a subject to the international regime of equity of the Treaty. Without going (yet) to engage in an international legal dispute, Spain has always maintained a firm policy of non compliance of the fisheries protection zone bounded by Norway with the Svalbard Treaty.[22]

As for the Norwegian proposal to demarcate the outer limits of the continental shelf of the Svalbard archipelago, Spain, being consistent with its position on the marine areas of the archipelago, now reserve rights to natural resources belonging to the continental shelf of Svalbard, including areas beyond two hundred miles.

2.3. National or international approach to the Svalbard issue?

Apart from Spain, thirty-nine States Parties to the Svalbard Treaty, about a third, are engaged in discussions on the Svalbard issue. That question mainly concentrates around two approaches: national *(i)* and international *(ii)*.[23]

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[21] In the aforementioned Decisional Note it is clarified that "[l]a remisión a la Comisión de Límites se realiza únicamente a título informativo ya que dicha Comisión no tiene competencia para entrar a debatir el régimen jurídico sustantivo aplicable a la plataforma continental sino únicamente su límite exterior ampliado. En cualquier caso, esta Asesoría Jurídica Internacional entiende que la publicidad derivada de la remisión de esta segunda Nota Verbal [al Secretario General de las Naciones Unidas] puede beneficiar los intereses tanto jurídicos como políticos de España" [Cf. Decisional Note, n. 14.095, cit. p. 2].

[22] See, J. L. Meseguer: "Régimen jurídico de los espacios marítimos…", op.cit.

[23] R.E. Fife: "L'objet et le but du traité du Spitsberg (Svalbard) et le droit de la mer", in *La mer et son droit: mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Pedone, Paris, 2003, pp. 239–262; G. Hønneland: "Fisheries in the Svalbard Zone: Legality, Legitimacy and Compliance", in A.G. Oude Elferink y D.R. Rothwell: *The Sea of Law and Polar Maritime Delimitation*, Kluwer Law International, The Hague, 2002, pp. 317–335; A.N. Vylegzhanin y V.K. Zilanov: *Spitsbergen Legal Regime of Adjacent Marine Areas*, Eleven International Publishing, Utrecht, 2007, translated and edited by W. Bulter; D.H. Anderson: *The Status under International Law of the Maritime Area around Svalbard*, in the Symposium "Politics and Law-Energy and Environment in the Far North", held at *Norwegian Academy of Science and Letters*, 24 January 2007; C.A. Fleisher: *The New International Law of the Sea and Svalbard*, in the Symposium "The Norwegian Academy of Science and Letters, 150th Anniversary Symposium", celebrated on 25 January 2007; T. Pedersen:

(i) The national approach is the approach advocated by Norway.[24] The country based its "full and absolute" sovereignty on Article 1 of the Svalbard Treaty and considers that the conditions, which its sovereignty is subject to, guarantee enjoyment of the right to non-discriminatory and free access for the other States Parties to the Treaty. Norway also maintains that these conditions shall be interpreted and applied restrictively: *ratione loci*, namely, the territories specified in Article 1 and its "territorial waters", and *ratione materiae*, only in connection with exercising and practicing of all maritime, industrial, mining or commercial activities, which, in accordance with local laws and regulations, take place in these territories in accordance with Article 3, paragraph 2 of the Svalbard Treaty.

Norway seems to interpret the Svalbard Treaty using a method of literal analysis of the terms that constitute the text. The text of the Treaty can reflect, according to a subjective standard, the intention of the Contracting Parties or rather the intention of Norway which drafted the Treaty, to recognize despite particular conditions "full and absolute" sovereignty of Norway in the Svalbard archipelago.

Norway also seems to rely on the classical concept of sovereignty in which, for its fullness and exclusivity, the limitations should not be assumed and, according to the maximum of "effectiveness" of interpretation of the text, the sovereignty which the Svalbard Treaty recognizes should be exercised effectively to achieve an adequate result. Therefore, with the arrival of new millennium entailing the increased international interest in the Arctic region in general and in the Svalbard archipelago in particular, Norway adopted a strategy focused on a nationalization process in order to strengthen its effective sovereignty over all islands and in legal spaces generated by them.

Thus, in 2001, in addition to adopting a specific Environmental Protection Act for the Svalbard archipelago, Norway replaced the low water line with the straight baselines to draw the outer limit of the territorial sea of the archipelago, and two years later extended its width from 4 miles, which, under the law of that time was the width of the "territorial waters" to which the Svalbard Treaty referred, to 12 miles in accordance with the contemporary Law of the Sea.

In 2006, submitted the outer limits of its continental shelf to the Commission on the Limits of the Continental Shelf considering that the islands do not have an appropriate continental shelf and moreover, being the Eurasian margin, a single continuous continental margin as confirmed by the Commission, the islands are a natural extension of the continental margin of Norway. Amid recent developments, in 2009 Norway also reaffirms its effective control over the airspace on the occasion of the flights of *Trust Arktikugol's* helicopter declared as illegal.

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"Norway's Rule on Svalbard: Tightening the Grip on the Arctic Islands", *Polar Record*, vol. 45, 2009, pp. 147–152; T. Pedersen y T. Henrisken: "Svalbard's Maritime Zones: The End of Legal Uncertainity?", *IJMCL*, vol. 24, 2009, pp. 141–161; Ø. Jensen: "Kontinentalsokkelkrav i Polhavet: alminnelig havrett eller folkerett sui generis?", in *Lov og Rett*, vol. 48, 7, 2009, pp. 406–424.

[24] R. E. Fife: "Svalbard and the Sorrounding Maritime Areas. Background and Legal Issues – frequently asked questions" available at the Norwegian Governament website: regjeringen.no.

(ii) As far as the strategy of nationalization is considered, the United Kingdom launched an initiative to achieve, according to an international approach, a coordinated opposition of States Parties to the Svalbard Treaty which clearly were in disagreement with the position of Norway, among them in particular, Spain, of course, the U.S., France, Germany, Holland, Denmark, Russia, Iceland and Canada.[25]

The internationalist approach focuses on a method of dynamic analysis based on criterion of common sense interpretation, which in good faith should be attributed to the terms of the Treaty, including its Preamble and Annexes. According to the teleological criterion (not merely subjective intention/will of the parties), one would interpret the objectives pursued by norms of the Treaty, also those concerning the limitations of sovereignty of Norway, in favor of States Parties in order to reach a fair agreement between Norway and other States Parties, a purpose clearly expressed in the Preamble of the Treaty.

The classical rule of restrictive interpretation of the concept of sovereignty come under review because, although having much significance in traditional international law for its consistency with a voluntarist conception of law, was not incorporated in the Vienna Convention 1969, which gave preference to the teleological dimension of interpretation.

The teleological dimension, being itself a dimension of dynamic nature, brings ability of a posteriori adaptation of the written rules to the legal context in force at the time of interpretation, even beyond the subjective intent of Contracting States which, in turn, becomes (should transform) in harmony with the subsequent development of contemporary international law. Suffice to say, that the International Court of Justice did not strictly interpret the reservation made by Greece in 1928 that excluded jurisdiction of the Permanent Court of International Justice on disputes concerning the "territorial status", and subsequently included in this expression a notion of continental shelf despite the fact that in 1928 this notion did not even exist.[26]

Therefore, taking into account that a "fact" with legal implications must be considered in light of law contemporary to that fact, any dimension of Norwegian sovereignty over Svalbard, i.e. land, sea and air, would be subject to conditions stipulated by the Svalbard Treaty.[27]

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[25] T. Pedersen: "The Dynamis of Svalbard Diplomacy", *Diplomacy & Sattecraft*, vol. 19, n. 2, 2009, pp. 236–262, pp. 255 ss.

[26] "Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, *the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time*. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, *for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of international law* [*Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978*, p. 32].

[27] See, *Island of Palmas* case: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled" (*RIAA*, vol. 2, p. 845). See, also, *Legal Consequences for the States of the*

Moreover, jurisprudence seems to mostly support the idea that the law must be interpreted in light of the legal system in force at the time of interpretation.[28]

The debate continues and the emerging interest in exploration and exploitation of non-living resources in the underwater area of Svalbard islands raises the need for an urgent solution to the issue.

III. SPAIN AS OBSERVER STATE OF THE ARCTIC COUNCIL[29]

The Arctic Council is a political forum to promote cooperation, coordination and interaction basically on environmental protection and sustainable development between Arctic States which also actively involve the indigenous peoples as well as passively the Observer States, *inter-alia*, Spain.

The following sections analyze, on one hand, the Spanish Arctic structure at national level (3.1) and on the other hand, the Spanish Arctic scientific expedition within the Forth International Polar Year and the re-emerging polemic with Norway (3.2). Finally, looking at the interaction between Spain, the European Union and the Arctic Council, the last section will address some reflections on current developments in the Arctic cooperation (3.3).

3.1. The Spanish Arctic structure[30]

On 18 May 1998, the Spanish Permanent Inter-ministerial Commission for Science and Technology created the Spanish Polar Committee (CEP).[31]

The CEP has jurisdiction over both the Antarctic and the Arctic Regions. In the case of the Antarctic, due to Spain's accession to the Antarctic Treaty in 1982 and its signing of the Protocol to the Antarctic Treaty on Environmental Protection in 1991, the CEP is responsible for general coordination, approval of permits related to environmental

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Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 270 (1970) where the International Court of Justice affirmed that "an international instrument has be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" [*ICJ Reports*, 1971, p. 31]. Cf. also, *Case concerning the Gabčíkovo-Nagymaros proje (Hungary v. Slovakia), ICJ Reports*, 1997, p. 78.

28 For example, see the *Namibia* case (*ICJ Rep. 1971*, pp. 31–32); *Proyecto Gabčíkovo-Nagymaros* (*ICJ Rep. 1997*, pp. 67–68); *Case concerning the Dispute Regarding Navigational and Related Rights*, (*ICJ Rep. 2009*, para. 70].

29 Arctic Council: www.arcticcouncil.org/.

30 Cf.: http://www.micinn.es/stfls/MICINN/Investigacion/FICHEROS/2006-organigrama2.pdf. See also, el Instituto de Estudios Estratégicos del Ministerio de Defensa: http://www.ieee.es/; C. Echevarría, "Nuevas estrategias ene l Ártico, *Revista Ejército de Tierra Español*, n. 816, 2009, available at: http://www.portalcultura.mde.es/Galerias/revistas/ficheros/R_Ejercito_816.pdf.

31 Cf.: http://www.micinn.es/portal/site/MICINN/menuitem.8ce192e94ba842bea3bc811001432ea0/?vgnextoid=3f0f1e7a6fa49210VgnVCM1000001d04140aRCRD&vgnextchannel=429338effdb33210VgnVCM1000001d04140aRCRD.

protection legislation, and setting priorities for all scientific and technological activities related to the Antarctic Treaty.[32]

In the case of the Arctic, the CEP assumes the responsibilities derived from Spain's permanent Observer Status on the Arctic Council, attained in October 2006.

The Ottawa Declaration of 1996 formally established the Arctic Council as a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the eight Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic. Furthermore, the Arctic Council is supplemented by permanent and *ad hoc* observer status entities which are passively involved in the ministerial conferences of the Arctic Council.[33]

The Rules of Procedure which were adopted by the Arctic Council in the framework of the First Conference, held on 17 and September 18, 1998 in Iqaluit (Canada), states that the admission of new observer entities (permanent and ad hoc), will be decided according to the general rule by consensus of the eight Member States.[34]

Currently, the administrative restructuring of the Arctic Council is in full swing. Arctic States are emphasizing that the best way to solve circumpolar problems is to develop circumpolar cooperation, which difficulties access for non-Arctic States and entities. As demonstrated during the sixth Ministerial Meeting of the Arctic Council in April 2009, particularly, by "rejection" of the Chinese, Italian, South Korean and the EU application for permanent observer status, it seems that the Arctic Council is turning itself into a private "North Club". Moreover this "rejection" raised concerns for States, namely Spain, which already have the status of permanent observer status, as the loss of that status could be verified in the case of the Arctic States discretion to decide by consensus at the next ministerial conference.[35]

As last developments, in 2009 Spain became member of the IASC which play a crucial role in developing a new common interdisciplinary approach to the Arctic shared by all concerned international entities.[36]

3.2. The Spanish expedition in the Arctic

A few months after the aforementioned diplomatic note of March 2007 on Svalbard, as part of the Spanish scientific campaign developed, for the first time, during the Fourth

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[32] The National Polar Antarctic Data Centre (NPDC) includes the Spanish Polar Archive and was established due to a Spanish Polar Committee initiative that Technical Secretary coordinates all the activities corresponding to the National Antarctic Authority.

[33] Article 3 of the Ottawa Declaration: "Observer status in the Arctic Council is open to: Non-Arctic States; inter-governmental and inter-parliamentary organizations, global and regional; and non-governmental organizations".

[34] See, Articles 36–38 of Rules of Procedure and its Annex II. The non-Arctic States with the Observer Status in the Arctic Council are six: Germany (since 1991); United Kingdom (since 1991); Poland (since 1991); Northlands (since 1996); France (since 2002) and Spain (since 2006).

[35] The author thanks Juan Antonio Martinez-Cattaneo Hingston, current Ambassador in special mission for Antarctica and for Arctic issues, for its useful comments during the meeting on 21 May 2009 at the Spanish Ministry of Foreign Affairs and Cooperation headquarter, Madrid.

[36] Cf: http://www.iasc.info/.

International Polar Year,[37] the expedition of the oceanographic vessel *BIO Hespérides* in Svalbard waters again caused the need to politically preserve rights, which could correspond to Norway and Spain.

On June 28, 2007 Norway authorized via Verbal Note a campaign of the above mentioned research vessel and expressly stated that the license issued by the Petroleum Authority of Royal Ministry of Petroleum and Energy did not grant a right for Spain to explore the hydrocarbons reserves in marine areas of Svalbard.

On July 3, 2007, the Spanish General Directorate of Multilateral Economic Relations and Cooperation Aerial, Maritime and Terrestrial, inquired the AJI, via an internal note, their opinion on pertinence of responding to the Norwegian note stressing that the explicit restriction could constitute a violation of Norway's international obligation to ensure free and non-discriminatory access of all States according to the Svalbard Treaty.[38]

AJI considered relevant to respond and composed a verbal note referring to the authorization note granted to the campaign of *BIO Hespérides* vessel. In regards to the question of the hydrocarbons reserves, the AJI reminded that firstly, Spain had not sought authorisation of any exploration for oil and, secondly, that the Spanish position regarding access to mineral resources of Svalbard can be found in the previous diplomatic note, 2 March 2007, paragraphs of which there was no need to reproduce.

In a meeting and working lunch in February 2008 between the Spanish Secretary of State for the European Union had with the Norwegian State Secretary for European Affairs, the AJI was requested an information note on legal aspects of fisheries in Svalbard.

AJI not only informed on the matter regarding the fisheries sector but also took the opportunity to clarify, in general, Spain's position on the Svalbard using the following three arguments to defend it: "1) The Treaty of Paris is in effect in its entirety and is compatible with UNCLOS, 2) From the Treaty of Paris are derived rights for States Parties referring to the recognition of a right of access to exploit fishery resources and mining, with submission where appropriate, to the competence of Norway to establish conservation measures; 3) Spain does not consider the problem of Svalbard as an exclusive fishing question. On the contrary, the defence of Spanish interests is the defence of the integrity of the Treaty of Paris and of all the rights deriving for the States Parties".[39]

In other words, Spain seems to take an international approach to the Svalbard issue.

3.3. Spain and the European Union: Why they should care about the Arctic?

Currently, the legal question in the Svalbard Archipelago and, in general, in the Arctic Ocean seems to affect particularly the will of the Arctic coastal States to selectively apply the international rules of the Law of the Sea, by giving priority to those that maximize, in general, sovereignty, sovereign rights and national jurisdiction, and by relegating to a residual application – if its application is allowed – of rules that tend to ensure international freedoms and to safeguard the interests of the non-Arctic international

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[37] Cf: http://ipy.arcticportal.org/.
[38] Doc. N. 14.551, 28 August 2007.
[39] *Ibidem*, p. 3.

actors (for example, Spain and the European Union), or those of the benefit mankind as a whole. This, moreover, is consistent with the meaning of the UNCLOS.

The EU is actually the only non-Arctic international actor that is laying the groundwork for a process of defining a policy for the Arctic from a multilateral governance perspective, also based primarily on the legal framework of UNCLOS, but of all the rules of UNCLOS.

The Nordic Council of Ministers, with its Arctic and EU expertise, has recently given a valid contribution to the elaboration of the future EU approach to the Arctic. Following the adoption of the 2008 Ilulissat Declaration on the Arctic Ocean by the five Arctic coastal States in which they claim to be in a unique position to address the possibilities and challenges of the changing Arctic Ocean pursuant to the Law of the Sea,[40] the Nordic Council of Ministers hosted – in the same town of Ilulissat – the Conference, *Our Common Concern for the Arctic*, in which Arctic and non-Arctic entities participated. The Conference did not reach conclusive findings for facing any of the new conditions or specificities of the Arctic and ended up drafting a list of common concerns.[41]

The common concerns for the Arctic were taken into consideration by the European Parliament (EP) in its Resolution on Arctic Governance adopted on 9 October 2008. It finally proposes adopting an international treaty for the protection of the Arctic, inspired in part, in the Antarctic system, at least for the unpopulated and unclaimed area at the centre of the Arctic Ocean.[42]

Nevertheless, the EP's perspective contrasts with the European Commission's perspective which advocates the full implementation of the already existing obligations – namely the UNCLOS and other relevant related instruments – rather than proposing new legal instruments.

In its Communication, *The European Union and the Arctic Region*, adopted on 20 November 2008, the Commission led to a structured and coordinated approach to Arctic matters, as the first layer of an Arctic policy for the EU.[43]

However, the extent of the legal basis for such a proposal is not yet clear. In accordance with the Commission's perspective, the Council of the European Union – in its last Conclusion on Arctic issues of 8 December 2009 – requested the Commission to present an Arctic policy report on progress made by the end of June 2011.[44]

IV. CONCLUSION

The Statement, *The State of the Polar Research*, from the International Council for Science-World Meteorological Organization Joint Committee for the International Polar Year 2007–2008, provides compelling evidence that changes are occurring in the Arctic

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40 Text of the Ilulissat Declaration is available at Greenland Home Rule Government: http://uk.nanoq.gl.

41 Cf.: http://www.norden.org/en.

42 European Parliament, *Resolution on Arctic Governance*, 9 October 2008.

43 COM(2008) 763 final, 20 November 2008.

44 Council conclusions on Arctic issues 2985th Foreign Affairs, Council Meeting, Brussels, 8 December 2009.

ice-atmosphere-ocean system, although the potential for the Arctic Ocean to undergo further rapid ice discharge remains the greatest unknown. However, the Statement reports a clear message: "what happens in the Polar Regions affects the rest of the world and concerns us all".[45]

Doubting very much that the Arctic States will allow an Antarctic solution to areas where they have sovereignty, sovereign rights and jurisdiction, the question is to draw up the legal bases of Spain interests in the Arctic, namely in terms of: legal competence in the Arctic; regulation of different kinds of Arctic activities; cooperation for the Arctic with and within different international entities, i.e. the European Union and the Arctic Council.

The President of the last session of the Conference of Montego Bay, held from December 6 to 11, 1982, Mr. TTB Koh, affirmed: "[t]he question is whether we achieved our fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time".[46]

In this respect, the Arctic Ocean is a test of time for the UNCLOS. Its teleological interpretation could lead to constructive work in which its historic significance is normatively adapted to new realities and needs that have led to the current new international scrutiny of the Arctic, while recognizing rights and obligations for flag, port and coastal States provided for in International Law, including the UNCLOS.[47]

In this sense, by transcending the geographical boundaries towards Spanish interests in the Arctic, it would be possible to look at the Arctic in its uniqueness and in the context of an interdependent international order which is, therefore, circularly mapped, and where – by chance or by fate –, the Arctic curiously remains as a basin in the center of the world as depicted in the logo of the United Nations.

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[45] The State of the Polar Research, WMO Publications, February 2009, p. 16.

[46] "We have strengthened the United Nation by proving that with political will, nations can use the Organization as a center to harmonize their actions. We have shown that with good leadership and management the United Nations can be efficient forum for the negotiation of complex issues. We celebrate the victory of the rule of law and of principle of the peaceful settlement of disputes. Finally, we celebrate human solidarity and the reality of interdependence which is symbolized by the United Nations Convention on the Law of the Sea" [Koh, T.T.B., 1991, p. 16].

[47] In the words of M. Aguilar Navarro: "El Derecho Internacional – como todo Derecho – se refiere ante todo a una situación social en la que la nota característica es el antagonismo, el *conflicto de intereses*. Pensar en suprimir dicha oposición de intereses resulta tarea vana pues se trata de algo constitucional con la vida histórica. *Lo que el Derecho Internacional tiene que hacer es arbitrar un régimen en el que puedan armonizarse, conciliarse y dirimirse pacíficamente estas oposiciones*. La cooperación internacional es el termino amplísimo que puede cobijar socialmente todas estas modalidades utilizadas por el Derecho para 'formalizar y reglamentarla pugna de los intereses (SERENI)' [La cooperación internacional y la teoría del control", in *Revista de Administración Pública*, n. 30, 1959, pp. 69–84, pp. 72–73]. The emphasis is of the author.