THE SVALBARD ARCHIPELAGO UPON THE LAW OF THE SEA

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ABSTRACT

The Svalbard region (territories and territorial waters) constitutes a separate case of International Law, subject to the stipulations of the 1920 Spitsbergen treaty. Upon its legal regime, it belongs to the State of Norway, but all the nationals of the contracting parties have equal liberty of access and 'entry' ('relaxation' according to the French version) for any reason or object whatever to the waters, fjords and ports of the territories and may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality. In 1977, Norway established a 200 nautical mile Fisheries Protection Zone (FPZ) off Svalbard, which is considered as a new zone of the Law of the Sea. To date, the Spitsbergen treaty has offered a privilege of equal treatment against Norway to contracting states, particularly the (mainstreaming) coastal ones, as almost no landlocked country is a contracting state. The Svalbard Archipelago constitutes a challenge for contracting parties, such as Greece, which should put the stress on both mercantile navy and fishery. Besides, the Spitsbergen treaty consecrates the fundamental right of both ships, put into Svalbard ports, and of private individuals, exemplified by seafarers, to relax and therefore could be slightly seen as a precursor of Maritime Labour Convention (MLC). In general, it is indicative of anthropomorphism of ships in Maritime Law. So, it results a 'Maritime Law paradox', consisting in the pioneer content of this treaty, which is a Law of the Sea agreement endowed with Maritime Law innovations.

Keywords: Exclusive Fisheries Zone (EFZ), Fisheries Protection Zone (FPZ), Greece, landlocked states, Law of the Sea, Maritime Law, Norway, Right to relaxation, Spitsbergen treaty, Svalbard

INTRODUCTION: THE LAW OF THE SEA, A TRADITIONALLY CUSTOMARY BRANCH

The Law of the Sea constitutes a traditional branch of International Law, which regulates the various zones of the Sea, not of waters of other entities, such as rivers and lakes (Alexopoulos and Fournaraki, (2015). It is a genuine body of Public Law rules, having to do mainly with sovereignty and other forms of political power of States, particularly of the coastal ones.

The newer period of the Law of the Sea begins in the 17th century, due to the fact that maritime countries expressed their interest to govern in the sea place (Roukounas, 2006). One of them was

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Venice, which had already managed to become the biggest place of commerce of the Christian West (Vergé – Franceschi). The normativity on the matter had been an intrinsically customary branch, having little relationship with written rules, till 1958, when United Nations achieved the adoption of four (complementary) Conventions, known as the Geneva Conventions. Although that development was of unique importance, it was not exempted from weak points and therefore led to a new legislative initiative. The second codification attempt resulted in the United Nations Convention on the Law of the Sea (UNCLOS), concluded in 1982 in Montego Bay. This single code is comparable to the formal Constitution of sovereign States, that is why the doctrine has called it 'Constitution for the Oceans' (De Pooter). This text, as modified in 1994, includes almost all institutions of this branch, with the exception of a relatively new zone. It is about the Exclusive Fisheries Zone or Exclusive Fishery Zone (EFZ), having a customary origin. This zone secured increasingly wider support after the 1945 Truman Coastal Fisheries Proclamation (Molenaar, 2015). It is to point out that before the entry into force of the UNCLOS – probably by the early 1970s – a coastal State's entitlement to sovereign rights and jurisdiction for fisheries purposes within a 200 nautical mile EFZ had crystallized into customary international law. Anyway, we consider it as the 'big anarchist' of the Law of the Sea, because it escapes from international (non-customary) regulating power. Moreover, the last years the countries having made use of it, such as Iceland, have got the tendency to consider that they are endowed with an Exclusive Economic Zone (EEZ) instead of an EFZ.

Similar remarks are valid for the International Seabed, which was legally consecrated, (initially in a customary way, in 1973) as the 'Area', being a common heritage of mankind. It is also notable that the person promoting this consecration, the ambassador of Malta Pardo, is considered as the Father of the Law of the Sea in its current form. That diplomat served as Malta's representative at the Preparatory Commission of the Law of the Sea conference in 1972 and led the Maltese delegation to the UN Seabed Committee from 1971 to 1973. The Area has gained an interest of major importance the last decades whilst it is relevant inter alia to the abyss, which constitutes a key to the future mainly thanks to its metal deposits (Duperron and Gaill).

The current paper aims at introducing to the question of legal nature and economic opportunities in the region of Svalbard.

We suppose that contracting parties to the 1920 Spitsbergen treaty should get benefit from this region.

THE 1920 SVALBARD TREATY, OFFERING A PRIVILEGE TO STATES AGAINST NORWAY

The Arctic Archipelago of Svalbard constitutes a rather 'unknown' region reminding of the archaeological zone, which has been introduced through the UNCLOS but in an unclear way, let alone

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with no name. We consider it as an 'invisible zone' due to the fact that there is the tendency not to include it, at least explicitly, in the maps of the Law of the Sea, apparently implying that it is about a specific version of the contiguous zone. However, it has been signalized that this zone, being comparable to the contiguous one, should be promoted to a clearly consecrated autonomous zone of the Law of the Sea, namely independent to the contiguous one (Maniatis, 2018b).

As far as the Svalbard region is concerned, the proto-condominium arrangements discussed in the 1870s and immediately preceding World War I attempted to conform the concept of condominium to parochial interests – and not the other way around – principally because no individual State was capable enough to secure or perfect its own economic security interest (Rossi, 2015). Indeed, the Russo/Swedish-Norwegian Agreement of 1872 was inspired by the concept of *terra nullius* (commonly called a 'no man's land'), given that the archipelago was regarded as a territory which could not be the object of exclusive possession by any State.

Unlike other unclaimed territories, which historically have been acquired by discovery, effective or symbolic occupation, or by force, Norway's sovereignty over Svalbard was conferred on it by a legal text. It is about the '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'. Article 1 of this text recognizes the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, as the Svalbard archipelago was commonly referred to, whilst the King of Norway proclaimed the islands as Svalbard in 1925. The Archipelago comprises, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.

Last but not least, article 9 establishes the demilitarization of the archipelago as 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.

THE ANTHROPOMORPHISM OF SHIPS AND THE FUNDAMENTAL RIGHT TO RELAXATION

Article 2 previews that ships and nationals of all the contracting parties enjoy equally the rights of fishing and hunting in the territories (specified in Article 1) and in their territorial waters. It is to point out that the formulation on the matter is quite impressive, confirming the anthropomorphism of ships

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as long as ships are endowed with rights, let alone the fact that they are equalized to human beings and in English are parallelized to women (Maniatis, 2018a).

Article 3 mentions that the nationals of all contracting parties 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 news and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality. It is to clarify that the French official version of the treaty does not make use of the aforementioned term 'entry' but of the term 'relaxation', which is personalized and more friendly to human rights of private individuals. In a similar way, the same article previews that notwithstanding any rules relating to coasting trade (in French 'cabotage') which may be in force in Norway, ships of the High Contracting Parties going to or coming from the territories specified in Article 1 shall have the right 'to put' into Norwegian ports on their outward or homeward voyage for the purpose of taking on board or disembarking passengers or cargo going to or coming from the said territories, or for any other purpose. However, for one more time the French text makes an explicit reference to the right to relaxation, let alone of the ships themselves (implying the relaxation of their crews, as well). More concretely, the text (as it is also the case of other linguistic versions, such as the Greek one) makes use of the term 'to relax' instead of the aforementioned term 'to put'. So, the French text has an anthropocentric approach and a more intensive anthropomorphism than the English version. This formulation reminds of the International Labour Organization (ILO), established one year earlier, to promote the rights of the working population. It is to signalize that one of the most important legal texts of Maritime Law consists in Maritime Labour Convention (MLC), which constitutes the ILO convention number 186, established in 2006. The fourth pillar of International Maritime Law (after SOLAS, STCW and MARPOL) embodies all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions. It applies to all ships entering the harbors of parties to the treaties and to all ships flying the flag of state party and consecrates the seafarers' right to rest and leisure.

SVALBARD, AN ARCHIPELAGO OF (MAINSTREAMING) COASTAL STATES

Fourteen States were original signatories of the Spitsbergen treaty whilst the Soviet Union and Germany signed the agreement in 1924 and 1925, respectively. The Treaty came into force on 14 August 1925 whilst in 2018 there were 46 parties to the treaty. For instance, Greece ratified the text in 1925 without enacting a particular role on the matter. It is to put the stress on the fact that the Law of the Sea has a 'democratic' orientation, not ignoring the legitimate interests of landlocked countries. Some States of this very common category are endowed with military navy, such as Bolivia, for their

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national waters, such as lake and river ones. This remark is also valid for private ships, as it has been traditionally the case of the Grand Duchy of Luxembourg. This country has its fleet of ships flying the Luxembourg flag whilst about 335 shipping companies are registered in Luxembourg. So, it is obvious that dealing with military navy or shipping is not merely a geographical matter and the Law of the Sea has an important autonomy against conventional institutions and approaches to the source of wealth. It goes without saying that the 'big State of the sea' is available for the enhancement of national prestige, if not for the completion of sovereignty of States, particularly the ones marked by important geographical or historical limitations in their identity.

To date, the doctrine has omitted to remark that landlocked countries, with only three (essentially two) exceptions, have abstained from acquiring rights resulting from the Svalbard treaty. More concretely, Hungary ratified the treaty on 29 October 1927 and Czechoslovakia acceded to this text on 9 July 1930. As a result, the Czech Republic in 2006 and Slovakia in 2017 informed that they considered themselves bound to the treaty since their independence on 1 January 1993, as successor States of the dissolved State of Czechoslovakia. It is obvious that landlocked States have not been literally indifferent on the matter but have been traditionally discouraged from getting involved in an area far away from their territory, not to speak about other parameters like transport controversies of old times. So, Svalbard archipelago has proved to be a de facto opportunity for differentiation between coastal countries, particularly the mainstreaming ones, and the rest ones. However, in the current era of globalization and climate change implicating Arctic ice melting, even landlocked countries are motivated to get benefit from the Svalbard Archipelago, as the last years some coastal countries, such as Spain, have begun to do in the Fisheries Protection Zone (FPZ) off Svalbard. A journey from metropolitan Spain to Svalbard lasts from 5 to 6 days but it is obviously value for money.

In a similar way, the Greek nation is the world leader in terms of mercantile navy and so is motivated to get benefit from the Svalbard archipelago in terms of shipping. However, severe criticism has been raised against Hellenic Republic for its traditional minimalism relevant to the economic and geopolitical opportunities offered by the International Law and particularly the Law of the Sea. We recommend Greece acquire a specialized, single Shipping and Fishery Ministry, essentially a 'Svalbard Archipelago Ministry', being competent for Hellenic Coastguard, shipping and fishery, and oriented inter alia to internationalize the Greek fishery activities. Greek fishermen, the last years, have been led to destruct about 13.000 private fishery vessels due to the official EU policy against overfishing. The Greek State has not adopted a counterbalancing policy to safeguard these ships, representing a traditional, national shipbuilding art, not to speak about the promotion of fishery activities in the Svalbard archipelago.

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CURRENT QUESTIONS RELEVANT TO THE SVALBARD ARCHIPELAGO

Despite the fact that the important military restrictions have been imposed, as already signalized, the archipelago is not entirely demilitarized.

Furthermore, Norway argues that the text offers to other countries equal economic access but only to the territories of Article 1 and their territorial waters, whose breadth was 4 nautical miles then (and 12 nautical miles currently). It adds that the continental shelf is a part of mainland Norway's continental shelf and should be governed by the aforementioned Geneva Convention on the Continental Shelf, adopted in 1958. However, it has to cope with the permanent reaction of its powerful neighbor country, namely initially Soviet Union and currently the Russian Federation, which supports the position that the Spitsbergen Treaty is applicable to the entire zone.

More precisely, on 1 January 1977, Norway's 200 nm Economic Zone off its mainland came into effect, followed by a 200 nm FPZ off Svalbard later in 1977 and a 200 nm Fishery Zone (a de facto EFZ) off Jan Mayen in 1980 (Molenaar, 2015). According to this country, the usual Law of the Sea regime applies seaward of the outer limit of the territorial sea and entitles it to a continental shelf and EEZ and their associated sovereign rights and jurisdiction. However, no other parties to the Treaty support this position and an important number of them take the view that Svalbard generates – or can generate – all the usual coastal State maritime zones but that the Treaty applies to all of these. In view of these different positions, Norway established a FPZ off Svalbard, while insisting on its right to establish an EEZ or on its customary right to acquire an EFZ – and has granted certain allocations of fishing opportunities to a limited number of parties, largely based on historic track records. A scholar has supported the opinion that this FPZ is a new maritime zone of the Law of the Sea (Molenaar, 2015). In view of the uniqueness of the situation – in particular the fact that sovereignty over Svalbard was granted by, and subject to, the 1920 Svalbard Treaty – no other coastal States will feel compelled or have an incentive to establish a similar maritime zone off part or all of their territory. While several other coastal States have also established FPZs, for instance Spain in 1997 relating to most of its coast in the Mediterranean Sea, and Libya in 2005, their enactments show that they are really de facto EFZs. However, we consider that the position that the FPZ of Norway is the unique authentic zone of this category has not been proved (as for its unique character) whilst it is also to add that the regime of various zones relevant to fishery is not quite clear. For instance, Spain has established its own EEZ in the aforementioned region of FPZ, without considering that the FPZ has been abolished through the creation of the new zone on the matter.

Anyway, scholars have taken the position that rapid ice melting and conditions of global warming, together with technological advances and increasingly accessible resources, have awakened competing interests over the legal regime that both confers on Norway full and absolute sovereignty

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and limits that sovereignty by establishing equal access and non-discrimination rights for all states parties to the Svalbard treaty (Rossi, 2015).

Besides, the doctrine has argued that the Svalbard Treaty is outdated, a victim of the passage of time and unanticipated developments now producing ambiguities in its application.

Furthermore, the Svalbard case can offer invaluable food for thought for anyone who cares about the Arctic and is ready to grapple with its full legal, political and psychological complications (Bayles, 2011). The existing Treaty regime aims at two of the same things that all serious players say they want for the whole Arctic region: peace and stability in 'hard' military terms, and responsible resource management with fair shares for all.

CONCLUSION: A TREATY GENERATING INNOVATIONS LIKE THE RIGHT TO RELAXATION

We conclude that the first thing to highlight as for the Spitsbergen treaty is the fundamental right of both ships, put into Svalbard ports, and of private individuals, exemplified by seafarers working in the ships on the matter, to relax. Relaxation is omitted by the English version of the treaty, which is a quite paradoxical matter but goes in with the spirit of the very recent creation of the ILO. So, the treaty could be slightly seen as a precursor of the fourth pillar of International Maritime Law, consisting in the ILO text 'MLC'. In general, the Spitsbergen treaty is also indicative of the wider phenomenon of the anthropomorphism of ships in Maritime Law. So, it results a paradox coming from the content of this classical treaty of the Law of the Sea, which is not uniquely a pioneer convention of this branch of law, being still customary, but also emblematic and modern as far as Maritime Law is concerned. This phenomenon could be called the 'Maritime Law paradox'. It is to add that this syllogistic could be concluded with a reference to the (future) fundamental rights to tourism and hospitality as long as tourism is conducted through maritime journeys. Anyway, tourism and hospitality constitute 2G fundamental rights in the world history, namely belonging to the same era to the Spitsbergen treaty, which had recently begun (in 1918).

Besides, the Svalbard treaty has generated a very uncommon status quo, which has to do with a restricted national sovereignty of Norway and with exploitation rights of nationals of many other countries whilst Soviet Union made use of its mining rights on land, in contradiction to other countries. If the ideas of conferring and restricting sovereignty (of the coastal State of Norway) have been the Treaty's most unusual features, they have also indirectly led Norway to innovate, by creating an authentic FPZ off Svalbard, instead of an EFZ, so an original new maritime zone of the Law of the Sea. Anyway, not only Norway but also its great competitor, Russia, are hardcore players in the Arctic region, whose legal status could be regulated eventually through a region-specific international treaty.

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Last but not least, the paper hypothesis has been confirmed, given that coastal countries besides Norway, such as Greece, are motivated to proceed to economic activities and confirm their interest in this region, marked by peaceful international economic coexistence. The Arctic Ocean and particularly the Svalbard Archipelago should become the field of an original, anthropocentric, peaceful approach of a wider set of countries, the landlocked included…

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