The Polar Journal

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rpol20

A Response to "The Politics of Research Presence in Svalbard" by Torbjørn Pedersen

Erik J. Molenaar

To cite this article: Erik J. Molenaar (2021) A Response to "The Politics of Research Presence in Svalbard" by Torbjørn Pedersen, The Polar Journal, 11:2, 427-432, DOI: 10.1080/2154896X.2021.2014106

To link to this article: https://doi.org/10.1080/2154896X.2021.2014106

Published online: 03 Jan 2022.

THE POLAR JOURNAL
2021, VOL. 11, NO. 2, 427–432
https://doi.org/10.1080/2154896X.2021.2014106

Routledge
Taylor & Francis Group

OPINON

A Response to "The Politics of Research Presence in Svalbard" by Torbjørn Pedersen

Erik J. Molenaar

Netherlands Institute for the Law of the Sea (NILOS), Utrecht University, Utrecht, Netherlands

This essay responds to some aspects of the paper 'The Politics of Research Presence in Svalbard' by Torbjørn Pedersen that concern the interpretation and application of the Spitsbergen Treaty.[1] Pedersen emphasises that his paper is not a legal paper, and that it touches only briefly on legal issues relating to Svalbard and the Spitsbergen Treaty. After a summary of the different interpretations of the geographical scope of the Spitsbergen Treaty that exist among scholars and contracting parties to the Treaty, the paper also very briefly covers the question as to whether the Spitsbergen Treaty recognises a right to engage in scientific research and who can exercise this right. As these two questions are directly relevant to the main concerns and conclusions on national posturing advanced in the paper, I felt that a more in-depth and balanced analysis was both warranted and desirable.

In view of the length-limitations for essays such as these, it is not possible to also adequately cover the closely related questions on Norway's jurisdiction over scientific research and the possible applicability of the prohibition of non-discrimination.

Does the Spitsbergen Treaty recognise a right to engage in scientific research?

It is true that an explicit right to engage in scientific research cannot be found in the Spitsbergen Treaty. But this does not necessarily lead to the conclusion that scientific research is exclusively governed by Norway's absolute sovereignty over Svalbard without any constraints whatsoever. Such a conclusion would ignore the deliberations on scientific research during the negotiations on the Spitsbergen Treaty, the outcomes of these deliberations, and the practice of Norway and other States before and after the signature of the Spitsbergen Treaty.

In his seminal 1995 monograph *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*, Geir Ulfstein also examines the discussions on scientific research during the negotiations on the Spitsbergen Treaty.[2] Sweden advocated the inclusion of an explicit right, but others were concerned that such a right could be abused by Germany for military purposes. The President of the Spitsbergen Commission – in which the negotiations took

CONTACT Erik J. Molenaar e.j.molenaar@uu.nl Netherlands Institute for the Law of the Sea (NILOS), Utrecht University, Utrecht, Netherlands

[1]Treaty concerning the Archipelago of Spitsbergen, Paris, 9 February 1920. In force 14 August 1925; 2 *League of Nations Treaty Series* 7 (1920).

[2]At pp. 394–396.

place – also felt that an explicit right was unnecessary as he assumed that Norway was unlikely to adopt discriminatory regulations on scientific research. A Norwegian proposal to include a provision that would prohibit Norway from denying *bona fide* research did not attract the necessary support either. In the end, a two-pronged solution was adopted.[3]

First, Sweden and other delegations proposed that Sweden and Norway conclude a bilateral agreement containing an explicit right to engage in scientific research on a non-discriminatory basis. This agreement was concluded by means of an exchange of notes on 12 January 1920[4]; prior to the signature of the Spitsbergen Treaty therefore.

Second, another paragraph was added to Article 5 of the Spitsbergen Treaty. This provision reads, in its entirety, as follows:

> The High Contracting Parties recognise the utility of establishing an international meteorological station in the territories specified in Article 1, the organisation of which shall form the subject of a subsequent Convention.
>
> Conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories.

None of the things envisaged in Article 5 ever materialised. This does not mean, however, that the second paragraph has become irrelevant. It conveys the delegations' clear intention that one or more conventions containing conditions for conducting scientific research on Svalbard shall be concluded at some time in the future. The use of 'shall' here is probably best seen as evidence of a strong determination in this regard. Whereas the provision is not formulated as an obligation for contracting parties, this would also not have made much difference because in practice it is not possible to force States to negotiate and adopt treaties. The fact that the Spitsbergen Treaty does not establish permanent institutions – for instance a Council, Commission or Meeting of the Parties – and also contains no provisions on amendment or review, renders this even more difficult.[5] It can be assumed that Norway would not have been – and is still not – favourably disposed towards establishing permanent institutions as these would necessarily 'internationalize' Svalbard and thereby constrain Norway's sovereignty.

It is submitted that Article 5(2) contains three implicit assumptions or understandings. First, scientific research can only be constrained by conditions laid down in conventions. This requires such conventions to be negotiated and adopted by States, and to be ratified by them in order for the conventions to enter into force. Or, put differently, scientific research in Svalbard can only be regulated at the international level. Second, the negotiations on the envisaged conventions would be undertaken by the contracting parties to the Spitsbergen Treaty. This means that contracting parties have an implicit right to be involved in these negotiations, and thereby an implicit right to be involved in the international regulation of scientific research. Third, the objective of the conventions would be to lay down the conditions under which research can be

[3]See also Art. 9 of the Spitsbergen Treaty on demilitarisation.
[4]Ulfstein, *The Svalbard Treaty*, 396.
[5]The only institutional component of the Spitsbergen Treaty is included in Art. 8(4), which provides for the possibility to establish a temporary Commission to adopt mining regulations in case one or more contracting parties would have proposed amendments to the draft mining regulations drawn up by Norway. In addition, in 2006 the United Kingdom convened an informal meeting with nine other contracting parties, but not Norway (Pedersen, 'Denmark's Policies Toward the Svalbard Area', 329) and some years thereafter Iceland called for a Conference of the Parties to discuss the issue of the geographical scope of the Treaty (Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard', 55).

conducted. From this objective's narrow focus on conditions it logically follows that a right to conduct research was assumed to already exist at that time. This would have been different if the delegations had chosen a broader objective, such as 'the conduct of scientific investigations'. In other words, Article 5(2) can be regarded as implicit recognition of an already existing right to conduct research.[6]

Attention must also be paid to paragraph 1 of Article 3 of the Spitsbergen Treaty, which stipulates:

> 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.

This provision consists of two parts. The second part – 'subject to [. . ..] absolute equality' – relates only to 'maritime, industrial, mining and commercial operations'. These operations (or enterprises) are also governed by paragraph 2 of Article 3, which deals with their 'exercise and practice'. By contrast, the first part of Article 3(1) – 'The nationals [. . ..] Article 1' – applies not only to these operations but more generally. This part grants a right of access and entry to the waters, fjords and ports of Svalbard 'for any reason or object whatever'. This also encompasses scientific research, unless this would lead to inconsistency with other provisions in the Spitsbergen Treaty; for instance Article 9 on demilitarisation.

The actual engagement in scientific research and the practice of States relating thereto is also relevant. The deliberations on scientific research during the negotiations on the Spitsbergen Treaty must be seen against the background that scientific research on Svalbard had already commenced in the first half of the 19th Century.[7] Preserving former *terra nullius* rights, equal treatment and the *status quo ante* in this regard is an overarching objective of the Spitsbergen Treaty that is operationalised in most of its provisions. Scientific research on Svalbard continued after the entry into force of the Spitsbergen Treaty in 1925 until today. It can be safely assumed that the vast majority of the research undertaken in Svalbard from the first half of the 19th Century until now had strong linkages with States. Much of that research will either have been largely or fully funded by States, been undertaken by governmental research institutions or research institutions closely connected to States, or been subject to other forms of control by States. The conduct of such research is therefore relevant for the issue of subsequent practice discussed below.

Pedersen notes that it is only recently that Norway started to engage in 'increasingly proactive management of international research activities in the Svalbard archipelago'. In 1995, Ulfstein concluded that Norwegian regulation did not interfere with the substance of research as such.[8] He also referred to statements in several Norwegian official documents that reflect Norway's position up until 1995 that the Spitsbergen Treaty provides for a right to conduct research and that Norway is required to respect an open access regime in this regard.[9] As reflected in Pedersen's paper, China takes a similar position. This position is included in more general terms in China's Arctic

[6]Ulfstein, *The Svalbard Treaty*, 397–398 acknowledges that Art. 5(2) 'provides some minimum rights to conduct research on Svalbard'.
[7]Ibid., 390.
[8]Ibid., 396.
[9]Ibid., 391, 396–397.

Policy[10] and more specifically in correspondence between China and the Research Council of Norway referenced in Pedersen's paper. In this correspondence China insisted 'on "an international decision-making process" for research policy in Svalbard, and for autonomous national research stations in Svalbard devoid of Norwegian interference'. It is highly likely that other contracting parties to the Spitsbergen Treaty have positions on scientific research as well, even though not all of these will be in the public domain. The most recent Netherlands Polar Strategy – for the years 2021-2025 – explicitly notes that the Spitsbergen Treaty provides for freedom of scientific research.[11] The previous polar strategy for the years 2016–2020 was silent on this issue.

It is submitted that the research conducted on Svalbard before and after the entry into force of the Spitsbergen Treaty, the direct or close involvement in this research by contracting parties to the Spitsbergen Treaty, the consistent and uniform practice of Norway on this research – until very recently – and positions of other contracting parties to the Spitsbergen Treaty, are all highly relevant for the Treaty's interpretation. Arguably, it is quite plausible that they amount to 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).[12] Such subsequent practice must be taken into account in the interpretation of treaties, and is of crucial importance in cases where interpretation does not immediately lead to clear and unequivocal conclusions. In the case at hand, an explicit right to conduct scientific research is not included in the Spitsbergen Treaty, but it can be argued that an implicit right can be construed on the basis of a textual interpretation of Articles 3(1) and 5(2) in 'their context and in the light of [the Treaty's] object and purpose'.[13] Accordingly, it can be argued that contracting parties to the Spitsbergen Treaty have a right to conduct scientific research on Svalbard based on the interpretation of its provisions, their context, the treaty's object and purpose as well as subsequent practice.

The above analysis and line of argumentation also puts the 1920 agreement between Norway and Sweden in a different perspective. Instead of regarding this as an agreement with 'constitutive effect' – creating new rights and obligations – it can also be regarded as merely serving a confirmatory purpose: providing confirmation and assurances to Sweden that certain rights and obligations already existed.

Who can exercise a possible right to engage in scientific research?

The question as to who can exercise a possible right to engage in scientific research is raised by Pedersen's view that contracting parties to the Spitsbergen Treaty 'cannot claim extensive rights of their own but on behalf of their nationals'.[14] The words 'extensive rights' are

[10]The State Council Information Office of the People's Republic of China, 'China's Arctic Policy', in sections I and II.
[11]Netherlands Government, 'The Netherlands' Polar Strategy 2021–2025', 25.
[12]Vienna, 23 May 1969. In force 27 January 1980, 1155 UNTS 331. See also the International Law Commission's 2018 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (available at https://legal.un.org/ilc/).
[13]Art. 31(1) of the VCLT.
[14]This statement is included in the main text after footnote 26. In the sentences preceding footnote 44, Pedersen observes: 'Beijing asserted that the Svalbard Treaty gives the contracting parties to the Svalbard Treaty (the treaty says their nationals) a set of liberties in the archipelago'.

presumably meant to refer to rights to engage in concrete activities such as fishing and scientific research. Articles 2(1) and 3(1) of the Spitsbergen Treaty seem to support Pedersen's view. The latter has been cited above, and the former reads:

> 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.

This wording suggests that the rights are granted directly to ships and nationals and that they – and not the contracting parties – are the rights holders. It is submitted, however, that a literal interpretation of Articles 2(1) and 3(1) of the Spitsbergen Treaty is not convincing because the Treaty was adopted in 1920, well before the evolution and general acceptance of international human rights law and the recognition that humans can be rights holders. All the rights explicitly or implicitly granted or recognised by Articles 2(1) and 3(1) are therefore held by contracting parties, even though the actual exercise of these rights will be by ships and nationals of these contracting parties.[15]

More importantly, in light of the focus on national posturing in the paper by Pedersen, is that except for the stipulations on demilitarisation in Article 9, in principle the Spitsbergen Treaty does not preclude governmental officials, governmental ships or governmental (research) institutions from exercising rights to engage in activities. This means that the view by Pedersen set out above has little or no practical implications.

National posturing

The core concern of the paper by Pedersen is that 'Some of the international research presence in Svalbard has the ambience of foreign missions, representing state actors rather than individual researchers or research institutions.' This is the result of 'national posturing through naming and labelling, ensigns and other national symbols, and even calls from capitals for a say in Svalbard policymaking' which 'may be viewed by Oslo with justified skepticism'. It is submitted that these concerns and conclusions are based on the position that the Spitsbergen Treaty does not provide a right to engage in scientific research, and that there can be no involvement whatsoever by the governments of contracting parties in such research. As argued above, this is not the only possible interpretation of the Spitsbergen Treaty and also not necessarily the most convincing one.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Bibliography

Molenaar, E.J. "Fisheries Regulation in the Maritime Zones of Svalbard." *International Journal of Marine and Coastal Law* 27 (2012): 3–58. doi:10.1163/157180812X610541.

Netherlands Government, "The Netherlands' Polar Strategy 2021-2025. Prepared for Change," February 2021, available at https://www.government.nl/documents/publications/2021/03/01/polar-strategy accessed at 3 December 2021

[15]See also Ulfstein, *The Svalbard Treaty*, 219–230 on the addressees and beneficiaries of non-discrimination.

Pedersen, T. "Denmark's Policies toward the Svalbard Area." *Ocean Development & International Law* 40 (2009): 319–32. doi:10.1080/00908320903076904.

The State Council Information Office of the People's Republic of China, "China's Arctic Policy", White Paper, 26 January 2018, available at http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm ,accessed at 3 December 2021.

Ulfstein, G. *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*. Oslo: Scandinavian University Press, 1995.