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The Svalbard Treaty and research: Comment to Pedersen and Molenaar

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Introduction

Norway has been very clear about its determination to uphold sovereignty over Svalbard, based on the 1920 Svalbard Treaty.[1] Thus, any challenges or attempts to undermine Norwegian sovereignty should be taken seriously. Torbjørn Pedersen discusses in his article 'The Politics of Research Presence in Svalbard' in this issue to what extent some of the foreign scientific research on Svalbard should be seen as national posturing, threatening Norwegian sovereignty.

However, it is important to distinguish between intentions and effects of any national posturing. As Pedersen notes, the relevant activities must be interpreted: are they based on scientific or other relevant needs, or are meant to challenge Norwegian sovereign right to regulate activities on Svalbard. Only the latter forms of activities should be subject to concern. Secondly, the different measures taken by other states should be individually assessed. For example, the name of a research station would hardly in itself be a challenge, whereas the Chinese request for an international decision-making process in the adoption of a research strategy for Ny-Ålesund may give reason to worry. Thirdly, a distinction should be made between internal national communications and external international demands. Only the latter has the ability to be interpreted as a challenge. Finally, there is reason to emphasise that no state has an interest in an unregulated power struggle. Instead, they have a common interest in acknowledging Norway as a regulatory Hobbesian Leviathan, securing a common peaceful order.

I will not discuss the policy aspects further, but – like Erik Molenaar – concentrate on the legal aspects, i.e. the interpretation of the Svalbard Treaty. Molenaar submits that article 5(2) of the Svalbard Treaty 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.

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[1] *Treaty concerning the Archipelago of Spitsbergen*, signed at Paris, 9 February 1920, LNTS Vol. 2 No. 1 1920 pp. 7–19.

- 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 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.'

I will discuss these claims by first examining Norway's obligation to enter into negotiations about conventions to regulate scientific research; then I explore Norway's right to regulate research in the absence of such conventions; continued by a discussion of the distinction between the right to access and entry to the Svalbard archipelago and to conduct research; and, finally, I address who are the holders of any such rights.

The obligation to negotiate

The Svalbard Treaty article 5(2) provides that '[c]onventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories'.

It is interesting to note that the English official (authentic) text of the Svalbard Treaty refers to conventions – in plural. The French, as the other official text, is not so clear and could interpreted as referring either to a singular or several conventions:

> Il sera pourvu également par voie de convention aux conditions dans lesquelles les recherches d'ordre scientifique pourront être effectuées dans lesdites régions.

The English version as the most precise text should prevail. This is the situation even though the Norwegian – unofficial – text contains the singular 'overenskomst'.

The use of the plural form indicates that Norway should negotiate separate conventions with the different states parties to the Svalbard Treaty. This is supported by the fact that Norway and Sweden entered into an agreement through an exchange of notes on 12 January 1920, establishing that Swedish scientists would have the right to conduct research on an equal footing with Norwegian scientists.[2] It is furthermore supported by the concern expressed in the preparatory works that Germany as the defeated state in World War I would abuse any rights to conduct scientific research.[3] This could arguably be prevented by separate negotiations with each state and possibly different conditions for each state.

[2] G. Ulfstein, *The Svalbard Treaty: from terra nullius to Norwegian sovereignty* (Oslo; Boston: Scandinavian University Press, 1995), 396.
[3] Ibid., 394–395.

Article 5(2) means that each state party to the Svalbard Treaty may invite to negotiations about such conventions, and that they – also Norway – have an obligation to participate in the negotiations in good faith. But there is no obligation to reach agreement. Neither does the text establish the content of such conventions and the content of such conventions may vary among the different states.

The situation in the absence of negotiated conventions

Norwegian sovereignty established by the Svalbard Treaty article 1 prevails in the absence of restrictions provided by the Treaty. Article 5(2) does not provide for a non-discriminatory right to undertake research absent conventions accepted by Norway. Therefore, Norway is free to determine the conditions under which research may be undertaken, even involving discrimination between researchers from different states.

This interpretation is supported by the preparatory works of the Treaty. They show that the negotiating states in the Spitsbergen Commission was very deliberate in avoiding a provision which would establish explicit rights to conduct research on Svalbard. As already mentioned, the underlying concern probably being to avoid any abuse by Germany.[4] The deliberations thus shows that a choice was made not to include non-discriminatory rights to conduct scientific research. Contrary to what is maintained by Molenaar, the Norway-Sweden agreement on research demonstrates that Norway may, but does not have to, allow equal rights to research.

There are statements in Norwegian official documents indicating that the Svalbard Treaty provides some rights, possibly non-discriminatory rights, to conduct research. However, these statements are of such a general nature that they cannot commit Norway to have accepted non-discrimination against foreign research. It is thus concluded that, on the basis of the wording and the preparatory works of the Svalbard Treaty, Norway has the right to discriminate against foreign research.

The distinction between the right of access and of research

Molenaar argues that article 3(1) '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 demilitarization'.

It is true that article 3(1) provides 'equal liberty of access and entry for any reason or object whatever' to Svalbard. However, the rest of the paragraph explicitly restricts non-discrimination to 'maritime, industrial, mining and commercial operations' – and does not cover scientific research. How should the line be drawn between the non-discriminatory right of access and entry 'for any reason or object whatever' and Norway's unrestricted right to regulate research?

Norway is not in a position to deny *researchers* access to Svalbard for the purpose of conducting research, unless this is done in a non-discriminatory manner. On the other hand, Norway may regulate *research activities*, for example, by adopting building regulations or environmental regulations. Norway may also prohibit the establishment of new

[4].Ibid.

research bases in Ny-Ålesund or satellite stations nearby Longyearbyen, even if it involves national discrimination. This is a consequence of the fact that research *activities* are not explicitly covered by the provisions on non-discrimination, as opposed to 'maritime, industrial, mining and commercial *operations*' (emphasis added).

The Svalbard Act of 1925 section 27 contains a limited right for scientists to raise cabins or other constructions for research purposes. I will not discuss this further since this belongs to Norwegian legislation and is not part of the Svalbard Treaty.

Who has rights?

The Svalbard Treaty article 3(1) obliges Norway to allow non-discriminatory access and entry to 'nationals' of the states parties. Article 2(1) allows non-discriminatory fishing and hunting to 'ships and nationals'. Article 10(1) provides that Russian 'nationals and companies' shall enjoy the same rights as 'nationals' of the other states parties.

However, this means that nationals, ships and companies are beneficiaries, not that they are right holders. The Treaty is not a human rights treaty according rights to individuals, but an inter-state state establishing rights and obligations between states.[5]

It seems that Molenaar agrees. On the other hand, he argues that nothing in the Treaty 'precludes governmental officials, governmental ships or governmental (research) institutions from exercising rights to engage in activities'. I agree that the right of access and entry would apply to governmentally controlled vessels and companies. However, Norway would have no obligation to allow access for foreign officials to exercise their governmental authority, or access by naval ships or aircraft.[6]

Conclusions

Norway's sovereignty over Svalbard is firmly established in the Svalbard Treaty article 1. This also means that Norway may restrict any national research 'posturing' seen to undermine its sovereignty

Article 5(2) provides that '[c]onventions shall also be concluded laying down the conditions under which scientific investigations may be conducted'. Norway cannot deny invitations to negotiate conventions on the conditions. However, there is no guarantee that such negotiations will succeed. In the absence of such conventions, Norway can regulate research and even – if it so desires – discriminate among international researchers.

The Norwegian policy is to 'continue facilitating international research activity in Svalbard', but such activities 'must be conducted in line with relevant Norwegian regulations'.[7] Furthermore, Norway has stated that it is 'no longer relevant to negotiate separate agreements on the conditions for scientific research in the archipelago'.[8]

[5].Ibid., 226–231.
[6].Ibid., 182.
[7].Meld. St. 32 (2015–2016) Report to the Storting (white paper) 'Svalbard', 22 (https://www.regjeringen.no/contentassets/379f96b0ed574503b47765f0a15622ce/en-gb/pdfs/stm201520160032000engpdfs.pdf).
[8].Ibid.

As long as Norway maintains its open door-policy to international research, it is unlikely that other states parties will request negotiations about conventions on international research. They also have a common interest in preserving Svalbard as a peaceful and well-managed region for scientific research.

Disclosure statement

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