Terra Nullius and the Svalbard Question: Exploring an Anomaly in International Law

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Terra Nullius and the Svalbard Question: Exploring an Anomaly in International Law

A thesis submitted in partial fulfillment of the requirement for the degree of Bachelor of Arts in History from The College of William and Mary

by

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A Few Notes

This thesis will refer throughout to the archipelago of Svalbard. Historically, the archipelago was called Spitsbergen (often misspelled Spitzbergen), until a name change instituted by the Norwegian government in 1925. I will use Svalbard throughout to avoid confusion.

This thesis draws upon a variety of legal and diplomatic documents, some of which are in French. All translations are my own, with the original French text listed below in a footnote.

Primary sources from the Svalbard “Literature Lobby” were often published in obscure journals with a wide geographical range. In the interest of transparency and ease of future research, I have included a primary source finding aid available at the following link:

https://www.academia.edu/42902800/Svalbard_Question_Primary_Source_Finding_Aid
Chapter I: Introduction

On February 9, 1920, the Svalbard Treaty was signed by representatives of the United States of America, Great Britain, Denmark, France, Italy, Japan, Norway, Netherland, and Sweden in the French Foreign Ministry in Paris, assigning sovereignty of the Arctic archipelago to Norway and thereby instituting a solution to a problem that had troubled northern European diplomacy for decades.¹ The attempts of earlier conferences in 1910, 1912, and 1914 to resolve the Svalbard Question had ended in failure. The Svalbard Commission, a sub-committee of the Paris Peace Conference, was, in contrast, a remarkable success.² As has been elucidated by substantial scholarly exertion, the realization of a solution to the Svalbard Question was due to a number of factors, including passionate lobbying by the Norwegian Minister, Baron Wedel-Jarlsberg, declining American mining activity in Svalbard, British focus on attaining the German mandates, and the exclusion of Germany and the Soviet Union from the negotiations.³ Although the explanation of the causes of the resolution of the Svalbard Question is essential to understanding the dynamics surrounding the Svalbard negotiations, focus on the topic has led to a lack of scholarly appreciation for the importance of the relationship to and understanding of international law by those involved in the Svalbard negotiations. Furthermore, previous scholarship has emphasized the Svalbard Commission’s solution of Norwegian sovereignty, while largely ignoring the many intriguing suggestions at the time for divided or limited sovereignty in the archipelago. Intimately linked to these legal roads-not-taken is terra nullius, a Latin legal term that means “no man’s land.”

² Mathisen, Svalbard, 128, 132.
This thesis will explore the anomalous usage of *terra nullius* in the context of debates over the sovereignty of Svalbard from 1907 to 1920. Before delving into the world of the Svalbard Question and international law, it will be helpful to briefly sketch the recent history of *terra nullius* and explain some common misconceptions about its origin and meaning.

In November 1992, the High Court of Australia issued a landmark ruling in the native title case of *Mabo and Others v. Queensland (No. 2)*. The case is commonly represented as having “destroyed the legal doctrine of terra nullius by which Australia was colonized,” as it was phrased in a retrospective article from 2002. Terra nullius is thus presented as a now defunct colonial-era legal doctrine based upon racist suppositions that societies outside of Europe are barbaric and lacking in rights to property or sovereignty. The historical role of *terra nullius* is, in fact, far more complicated. Further scholarly work has led to the conclusion that the term *terra nullius* was not used in the context of colonization and dispossession of the Australian Aboriginals. Indeed, *terra nullius* did not even appear as a term until the 1880s. As the Australian historian, Andrew Fitzmaurice, put it, “*Terra nullius*, it seems, was an impostor.”

Why then was the repudiation of *terra nullius* by the Australian legal system so celebrated? The Australian legal scholar David Ritter suggests that the mistreatment of Australian Aboriginals sits uneasily with the liberal pretensions of the Australian common law, especially given its historical inaction in protecting Aboriginal land rights. *Mabo* thus created *terra nullius* as “a stage edifice that was

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5 Andrew Fitzmaurice, “The genealogy of *Terra Nullius,*” *Australian Historical Studies* 38, no. 129 (2007): 2. Fitzmaurice writes that the earliest use of *terra nullius* that he had found was in a work from 1885. I found a slightly earlier mention of *terra nullius* in the October 21, 1884 edition of the *Daily Telegraph & Courier* in the context of the Berlin Conference.
demolished so that the good name of the Australian legal system could be redeemed.” Fitzmaurice finds this theory of *terra nullius* as newly created myth to be less than satisfying. He instead argues that *terra nullius* is a descendent of the “legal tradition that dominated questions of the justice of ‘occupation’ at the time that Australia was colonized. *Terra nullius* is a product of the history of dispossession and the larger history of European expansion.”

He traces the evolution of the use of *terra nullius* by scholars in the *Mabo* sense of a broad justificatory doctrine “of the expansionism of the previous centuries of colonization” to the Columbia Joint Seminar in International Law taught by Charles Cheney Hyde and Philip C. Jessup in the 1930s. Students from the Seminar went on to publish a number of works, including “The acquisition to legal title in *terra nullius*” and *Creation of rights of sovereignty through symbolic acts 1400–1800*, that utilized *terra nullius* as an overarching term for centuries of evolving doctrines of colonization. Laura Benton, an American legal historian, similarly suggests that in recent scholarly usage “the term *terra nullius* may be standing in for not a single doctrine but a legal orientation and a diverse set of practices.”

Clearly, for many scholars, *terra nullius* is a useful shorthand for a variety of historical phenomena. Debate over the utility or misleading nature of this convention is likely to continue. This thesis will not be concerned with precursors of *terra nullius* in seventeenth, eighteenth, and nineteenth century colonial doctrines nor with its contemporary usage in reference to cases such as *Mabo*. Instead, I will focus on the definition of *terra nullius* as understood in contemporary international law. The most authoritative statement of the meaning of *terra nullius* comes from the International Court of Justice’s

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8 Fitzmaurice, “Genealogy,” 2.
Western Sahara Advisory Opinion of 16 October 1975. The Court described *terra nullius* as territory that is “open to acquisition through the legal process of ‘occupation,’” where occupation means “peaceably acquiring sovereignty over territory” that is not previously under sovereign rule. The Court further stressed that “territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius.*” Put more simply, *terra nullius* is a no man’s land that is open to claims by the first comer.

So much for the contemporary meaning of *terra nullius* in international law. The impetus for this thesis originates in American legal scholar Christopher R. Rossi’s article, “‘A Unique International Problem’: The Svalbard Treaty, Equal Enjoyment, and *Terra Nullius*: Lessons of Territorial Temptation from History.” In that work, Rossi argues that contemporary debates over Svalbard’s sovereignty result from the “peculiar equivocations” in the Svalbard Treaty, which are themselves derived from “Svalbard’s constructed *terra nullius* status.” The eccentricity of the 1920 Svalbard Treaty lies in its blending of “the full and absolute sovereignty of Norway” with “equal liberty of access” and equal rights to fishing, hunting, and mineral extraction for nationals of all other countries that are parties to the Treaty. The Norwegian legal scholar, Geir Ulfstein, characterizes the Svalbard Treaty as accomplishing three main goals: “granting sovereignty to Norway,” preserving “the previous *terra nullius* status through non-discrimination [against non-Norwegian nationals],” and securing “peaceful utilization” of the

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13 *Western Sahara*, 39.
archipelago.\textsuperscript{16} Thus, the unusual nature of Svalbard’s contemporary legal status and the 1920 Treaty that established it originate in the historical and legal conditions prevailing in the archipelago before 1920.

Svalbard’s history will explored in detail in the next chapter, but, for now, it will suffice to sketch some of the general developments. Svalbard, an Arctic archipelago located halfway between Norway and the North Pole, was discovered in 1596 and soon became a site for extensive whaling and sealing activity. The collapse of animal populations from overexploitation reduced economic opportunities in the archipelago by the end of the seventeenth century and caused Svalbard to recede from the interests of nearby nations. Svalbard only returned to European consciousness in a significant way by the end of the nineteenth century and the beginning of the twentieth century as coal mining expanded on the archipelago. The increase in population and economic activity spawned conflict and four international conferences were held during the 1910s with the intention of introducing governance to Svalbard.\textsuperscript{17}

Despite the nearly universal sentiment that Svalbard’s anarchic state was unsatisfactory, diplomats insisted on the maintenance of the archipelago’s status as \textit{terra nullius}.\textsuperscript{18} Herein lies one part of the anomalous nature of the legal description of Svalbard as \textit{terra nullius}. As mentioned above, according to the Western Sahara Advisory Opinion, \textit{terra nullius} in contemporary international law refers to unowned territory that is available for annexation by any nation. Svalbard before 1920 “was ownerless property in the unusual sense that states were maneuvering to preclude any state’s sole title to this territory that nevertheless had become enmeshed in conflicting multinational private property

\textsuperscript{17} For a detailed selection of sources on Svalbard’s history, see the next chapter. The main works for the pre-Treaty era are Trygve Mathisen, \textit{Svalbard in International Politics 1871-1925} (Oslo, Norsk Polarinstittutt, 1954) and Elen Singh, \textit{The Spitsbergen (Svalbard) Question: United States foreign policy, 1907-1935} (Oslo, Universitetsforl, 1980). Good sources for after 1925 are Trygve Mathisen, \textit{Svalbard in the Changing Arctic} (Oslo, Norsk Polarinstittutt, 1954) and Thor Arlov, \textit{A short history of Svalbard} (Oslo, Norwegian Polar Institute, 1994).
\textsuperscript{18} In this paper, I’ll be using diplomats as a shorthand for all government officials engaged in foreign policy activity related to Svalbard.
disputes,” all while there were suggestions of “various schemes for the international administration of the archipelago.”

Substantial governance of a territory seems to rule out the possibility of a total absence of sovereignty there. Rossi is hardly the first scholar to contrast Svalbard’s *terra nullius* appellation with its preclusion from annexation and proposed international regulation. Indeed, as early as 1908, a French legal scholar, René Waultrin, argued that “it should be noted that there is something strange and contradictory about proclaiming that a territory lacks sovereignty and [then] giving it laws.”

The second anomalous component of Svalbard’s *terra nullius* status dates back to 1872, when Russia and Sweden-Norway agreed that Svalbard would remain “an undecided domain accessible to all states whose nationals seek to exploit its natural resources” and would be excluded from annexation. If *terra nullius* is, by definition, capable of annexation by the first state to claim sovereignty, how could Svalbard be declared *terra nullius* and yet incapable of annexation?

Rossi, drawing upon Geir Ulfstein’s analysis, suggests that Svalbard before 1920 more closely resembled a *res communis* (everyone’s thing) than a *terra nullius* (no one’s land). *Res communis* refers to parts of the world that are held in common by all of humanity, such as outer space and the high seas. To make the differences between *terra nullius* and *res communis* more apparent, I will introduce the terms acquisitive nullification and distributive nullification. Acquisitive nullification is a process

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22 Rossi, “Unique Problem,” 117.
wherein legal entities are created that are owned by no one sovereign and capable of such ownership by
the first comer. Distributive nullification creates legal entities that are owned by no one sovereign and
permanently excluded from the possibility of such ownership. Using this new terminology, the legal
anomaly of Svalbard according to Rossi and others is that it was labeled with an acquisitive nullification
term, *terra nullius*, while it was actually a legal regime characterized by distributive nullification. While
this new terminology is illuminating, it fails to capture the ambiguity in the usage of *terra nullius* in
practice. In the context of debates over Svalbard’s legal status, *terra nullius* was used to mean
acquisitive nullification, distributive nullification, and confused statuses in between. This multiplicity of
meanings is described in the following evocative passage from Rossi’s article:

> But what did *terra nullius* mean in Spitsbergen’s twentieth century context? Did it preclude
> possession by states as a confused or commingled expression of *res communis*? Did it imply a
> condominium arrangement among interested parties? Did it require formal multilateral legal
> administration through treaty creation? Or did it express a beachcomber’s delight, bestowing
> treasures on privateers who were lucky or capable enough to fall first into possession of ownerless
> property? Each of these usages attached to the meaning of *terra nullius* in Spitsbergen’s
> history...

Thus, the scholar who intends to make sense of the usage of *terra nullius* in the context of the Svalbard
Question must exercise caution in attributing any one meaning to the term. To clarify the different uses
of *terra nullius*, this thesis will establish a detailed taxonomy of the relevant historical actors, describe
their relations to each other, and explain their varied understandings of *terra nullius* and international
law. I will also explore previous attempts to explain the anomalous usage of *terra nullius* in secondary
literature before turning to a thorough analysis of the primary sources of the period. I will conclude that
*terra nullius* was used differently in the Svalbard context depending on the actor and his or her knowledge.

24 Rossi, “Unique Problem,” 120.
of international law. When informal diplomatic agreements were translated into specific legal terms, such as *terra nullius*, Svalbard’s anomalous status became clear. Several legal scholars understood this and argued that referring to Svalbard as *terra nullius* was paradoxical and likely incoherent. Diplomats and others read the legal scholars and began using the term *terra nullius* to refer to Svalbard, but did not understand or realize the importance of the legal debate, being far more focused on the practical problems of asserting historical claims and balancing national interests.
Chapter II: Historical and Legal Background

An analysis of the use of *terra nullius* in the context of the Svalbard negotiations requires an understanding of the relevant historical actors and their differing levels of knowledge of international law. While legal scholars might seem to be the only reasonable target for analysis of the use of *terra nullius*, it is essential to view each group as part of the broader context of the Svalbard negotiations. Legal scholars had the most sophisticated understanding of *terra nullius* and Svalbard’s status, but they relied on explorers and scientists for practical information about Svalbard and its development. Additionally, the knowledge of legal scholars was filtered through diplomats and government officials who engaged directly in the negotiation process. To properly illustrate the complex interaction of the actors involved in the resolution of the Svalbard Question, this chapter will begin with a historical background of Svalbard and the development of relevant concepts in international law.

Historical Background

Svalbard is an archipelago located about midway between Norway and the North Pole. The entire archipelago was known as Spitsbergen until 1925. Today, only the largest island is called Spitsbergen. This paper will use the term, Svalbard, even when speaking of historical negotiations that occurred before the name change. In 1596, the Dutch explorer Willem Barentsz discovered Svalbard. Svalbard had no indigenous population, but soon would be periodically inhabited by settlers from

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27 There is insufficient evidence to confirm or deny proposed earlier discoveries of Svalbard by Norsemen or Russian Pomors. See Mathisen, *Svalbard*, 7-8.
northern European countries, especially Norwegians and Russians.\textsuperscript{28} The first half of the seventeenth century witnessed fierce whaling competition and territorial disputes between the English, Dutch, and Danish-Norwegians. Svalbard’s international importance greatly decreased after a significant decline in its whale stocks. By the eighteenth century, Svalbard’s geopolitical and economic status was relatively insignificant and, by the nineteenth century, the archipelago was generally considered to be without territorial claimants.\textsuperscript{29} At this time, Swedish scientists and Norwegian hunters were a common seasonal presence in Svalbard.\textsuperscript{30}

In 1871, at the urging of the explorer and scientist Adolf Erik Nordenskiöld, the Swedish-Norwegian government considered the possibility of establishing a colony on Svalbard. Such a project might have required the annexation of Svalbard by Sweden-Norway. Given the geopolitical significance of such an act, Sweden-Norway decided to obtain the opinions of other European powers about the potential annexation of Svalbard.\textsuperscript{31} The Danish, Dutch, French, German, and British governments favored Sweden-Norway’s annexation of Svalbard, provided that their fishing rights were protected. In Russia, however, businesses with interests in the Arctic claimed that long-standing historical presence on Svalbard entitled Russians to rights to the archipelago.\textsuperscript{32} The Russian government therefore responded to Sweden-Norway with an argument for the maintenance of Svalbard as “an undecided domain accessible to all states whose nationals seek to exploit its natural resources.”\textsuperscript{33} The precise legal significance of this diplomatic exchange is disputed by scholars, but, practically speaking, Russia and

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\textsuperscript{29} Mathisen, \textit{Svalbard}, 9-17.
\textsuperscript{30} Mathisen, \textit{Svalbard}, 20.
\textsuperscript{32} Mathisen, \textit{Svalbard}, 24-25.
\textsuperscript{33} «un domaine indécis accessible à tous les États dont les nationaux cherchent à en exploiter les ressources naturelles.» Ministerstvo, \textit{Shpi\ts{}}bergen, 3.
\end{flushright}
Sweden-Norway emerged as guarantors of an international Svalbard open to economic exploitation, but not subject to annexation by any nation.\textsuperscript{34}

This informal diplomatic arrangement would prove remarkably influential on Svalbard’s later political and legal development. Indeed, despite certain schemes for Swedish-Norwegian annexation or joint sovereignty held by Russia and Sweden-Norway, Svalbard entered the twentieth century under the same regime that dated to 1871.\textsuperscript{35} Economic activity on the archipelago had increased remarkably, however, with the introduction of coal mining in Svalbard.\textsuperscript{36} A Norwegian company shipped the first coal from Svalbard in 1899 and American and British companies arrived soon after.\textsuperscript{37} The most important of these companies were the Scottish Spitsbergen Syndicate, founded by William Speirs Bruce, and the Arctic Coal Company, founded by the Americans Frederick Ayer and John Munro Longyear.\textsuperscript{38} With the increase in industry on Svalbard and the lack of laws or governmental regulation, concerns grew over claim jumping and labor strikes.\textsuperscript{39} Other observers worried about the impacts on Svalbard’s wildlife of unrestricted hunting by both professionals and tourists.\textsuperscript{40}

Svalbard’s growth in economic activity and subsequent conflict occurred at roughly the same time as the dissolution of Sweden-Norway in 1905. The newly independent Norwegian government, no longer constrained by Swedish dominance of its foreign policy, took an active role in seeking to resolve the governance crisis in Svalbard. In February 1907, Norway sent diplomatic notes to other European countries, offering to arrange a conference to solve what became known as the Svalbard Question.\textsuperscript{41}

\begin{flushleft}
\textsuperscript{34} Rossi, “Unique Problem,” 116-117. And Mathisen, Svalbard, 29.
\textsuperscript{35} Mathisen, Svalbard, 39-40.
\textsuperscript{36} Mathisen, Svalbard, 41.
\textsuperscript{37} Singh, Question, 11.
\textsuperscript{38} Singh, Question, 11-18 and Kruse, “Imperialists,” 64-69.
\textsuperscript{39} Singh, Question, 25, 48 and Mathisen, Svalbard, 44.
\textsuperscript{41} Berg, “Norwegianization,” 166. And Mathisen, Svalbard, 46-47.
\end{flushleft}
According to a U.S. government publication that served as a preparatory document for the 1919 Svalbard Conference, the Svalbard Question was “the adjustment of the rival claims and interests of different (and often conflicting) nationalities in an unpeopled land officially declared *terra nullius*, but in the past a center of whaling, fishing, and hunting, and in the present known to be possessed of very great mineral wealth, especially coal, and possibly of some strategic value, particularly with reference to Russia and the Scandinavian Peninsula.”

While the anarchical situation on Svalbard was widely understood to be unacceptable, it was not at all clear what form of governance would be instituted. Before entering into a discussion of diplomatic resolution of the Svalbard negotiations at the successful conference of 1919, it is first necessary to explore the legal presuppositions shared by the participants and commentators.

**Svalbard and International Law**

By the nineteenth century, Svalbard was considered by nearby European nations to be a no man’s land. Cold, remote, and depleted of natural resources, the archipelago avoided the transition between the medieval and modern conceptions of sovereignty that is often argued to have occurred after the 1648 Peace of Westphalia. In its apartness from the rest of Europe, Svalbard resembles other “legally anomalous spaces” that existed primarily in European overseas empires. In these exceptional spaces, sovereignty and territory were not nearly as intertwined as in European states.

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From its discovery to the early twentieth century, Svalbard functioned as a common resource pool for citizens from many nations, with two main consequences. First, due to the lack of state sovereignty, national governments were largely uninterested in and ignorant of Svalbard. This absence of state knowledge and authority empowered non-state actors to exert a substantial influence on the Svalbard negotiation process. Second, Svalbard’s unusual lack of governance differed greatly from typical rules for European states, sparking debate over its legal status and perplexing commentators and negotiators.

One attempt to translate Svalbard’s *sui generis* status into the language of international law was through reference to condominia. According to American legal scholar Joel H. Samuels, “[a] condominium in international law exists when two or more States exercise joint sovereignty over a territory.” Condominia are unpopular in contemporary international law because of their divergence from the typical rules of state sovereignty. Nevertheless, the period from 1800 to 1950 witnessed the “golden age of the condominium,” when the arrangement was a relatively common solution to territorial disputes. Indeed, Russia, one of nations most interested in Svalbard, had recently participated in a condominium with Japan over the island of Sakhalin. Negotiators from Russia and Japan had been unable to decide on a border dividing Sakhalin, which lay between their spheres of influence, so they agreed that it would exist “undivided between Russia and Japan.” This state of

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48 Samuels, “Condominium,” 730.
49 Samuels, “Condominium,” 733.
50 Russia also entered into a condominium with China over land east of the Amur and Ussuri Rivers after the Treaty of Aigun. The condominium only lasted from 1858 to 1860, as Russia soon took full possession of the territory. N. Wing Mah, “Sino-Soviet Relations in Retrospect,” *The Russian Review* 9, no. 4 (1950): 268.
affairs would last from 1855 to 1875, when Japan gave up its rights to Sakhalin, placing it under sole Russian sovereignty, in exchange for some of the Kuril Islands and other concessions.\textsuperscript{52} For Russian diplomats, it was perhaps only a short step between the “undivided” Sakhalin of 1855 and the “undecided” Svalbard of 1871. Thus, the condominium was certainly a relevant, if somewhat unusual, possibility on the minds of those attempting to provide an answer to the Svalbard Question in the 1910s.

Despite the apparent resemblance between Svalbard and condominiums, one crucial difference existed. A condominium is a territory where sovereignty is exercised jointly by multiple nations, but a no man’s land has no sovereignty at all.\textsuperscript{53} Svalbard was, therefore, more reminiscent of territory outside of Europe that had not yet been subjected to colonial conquest. Although the most recent development of principles for the occupation of territory lacking a sovereign had occurred in the 1884-1885 Berlin Conference’s division of Africa, such discussion had been ongoing for centuries in legal circles.\textsuperscript{54} Historians have traced an evolution in descriptions of such territory from \textit{res nullius} (nobody’s thing) to \textit{territorium nullius} (nobody’s territory) to \textit{terra nullius} (nobody’s land). \textit{Res nullius}, a notion in Roman law, was appropriated by European colonialists to describe land that belonged to no one and could be freely annexed.\textsuperscript{55} Scholars of the early modern period disagreed on whether \textit{res nullius} could describe land that was inhabited, as was the case in the Americas.\textsuperscript{56} The term remained contested until the Berlin Conference from 1884 to 1885. The Institut de Droit International met in 1888 to formalize the legal rules created by the Conference. At this meeting, the German legal scholar, Ferdinand von Martitz,

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\textsuperscript{54} Fitzmaurice, \textit{Sovereignty}, 284-286.  
\textsuperscript{55} Benton & Straumann, “Acquiring Empire,” 2-3. Some historians disagree that \textit{res nullius} was a Roman law doctrine, see Fitzmaurice, “Genealogy,” 6.  
\textsuperscript{56} Fitzmaurice, “Genealogy,” 8.
\end{flushright}
proposed that the term *territorium nullius* be used to refer to annexable territory. Martitz argued that the territory of governments who did not belong to the community of the law of nations was *territorium nullius*. The controversial proposal, which clearly favored expansive colonization, was rejected by most of the Institut. While Martitz was unable to gain the approval of the Institut, he had suggested a powerful colonialist argument that raised the bar for exemption from colonization from property ownership and basic social organization to sovereignty as defined as membership in the community of the law of nations.  

The term *terra nullius* appears in a few scattered uses to refer to an abandoned desert island in 1885 and a Venezuela border region in 1899. *Terra nullius* did not become a widely used term until the French legal scholar Camille Piccioni introduced it into the debate over Svalbard’s status in 1909. It was used throughout the Svalbard negotiations and again in the Eastern Greenland case in 1933 and the *Western Sahara* Advisory Opinion in 1975. Although *terra nullius* saw continued use throughout the twentieth century, scholars argue that the term did not have the same meaning in 1909 as it did in 1975. Marie Jacobsson even refers to governmental use of *terra nullius* in the Svalbard context as “inexplicable from an international law perspective.” As will be discussed in later chapters, the meaning of *terra nullius* in the context of the Svalbard Question was ambiguous. Not surprisingly, negotiators and commentators who had less legal expertise frequently made inaccurate or confused statements about *terra nullius* and Svalbard’s status.

Nevertheless, Svalbard’s apparent difference from the contemporary doctrine of *terra nullius* is real and can only be understood through an analysis of the “extraordinarily varied and rather curious”

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58 Fitzmaurice, Genealogy,” 2-3.
59 Fitzmaurice, Sovereignty, 325-326.
history of the archipelago and its unique status. Observers at the time realized that Svalbard was different from colonial territory because it had no indigenous inhabitants, it was frequented by Europeans from a number of nations, and it sustained little or no permanent population. In the words of French legal scholar René Waultrin, Svalbard differed from colonial governance in the “tropical regions” because it lacked even an “embryo of government.” Colonial administrators had no experience governing territories with very low population and no local institutions. Lauren Benton argues that, for histories of colonialization, “[o]ur account of European writers’ and scholars’ views on res nullius must be separated analytically from an understanding of references to res nullius by imperial agents, many operating far from Europe and with partial or indirectly acquired understandings of Roman law.” In the context of the Svalbard negotiations, the distinction between legal experts and non-experts is more problematic but still existent. Knowledge of international law and, consequently, usage of the term terra nullius varied widely between different groups of actors in the Svalbard negotiations. With adequate background on Svalbard’s history and relevant international law, it is now time to construct a taxonomy of actors in the context of the Svalbard Question.

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Chapter III: The Svalbard Question: Toward a Taxonomy of its Historical Actors

This chapter will detail the different groups of actors in the Svalbard negotiations, name the most significant members of each group, and describe the knowledge each group had of international law. It will conclude by presenting a framework for in-depth analysis of the use of *terra nullius* in documents from the period. The actors engaged in answering the Svalbard Question extend far beyond the small number of negotiators present at conferences. Indeed, with the exception of Norwegian Minister Baron Wedel-Jarlsberg and American Secretary of State Robert Lansing, leading historians of the Svalbard Question, such as Elen C. Singh and Trygve Mathisen, have devoted most of their attention to non-governmental actors. Scholarship describing the actors involved in the Svalbard Question has typically built upon Singh’s work. She created the term “Literature Lobby” to refer to the flood of publications written during the 1910s to convince various European governments of the benefits of and historical justification for claiming Svalbard. Works from the “Literature Lobby” covered topics including the settlement history of Svalbard, the economic value of the archipelago, and the legal rights to it possessed by various nations. Dutch writers emphasized the presence of the Netherlands in Svalbard’s early history. Lobbyists from Britain and the United States focused on the economic benefits of possessing sovereignty over Svalbard and the presence of companies on the archipelago owned by their nationals. Norwegian authors pointed to Norway’s substantial historical and contemporary presence in Svalbard to argue that the archipelago should belong to Norway. Some of the most important members of the “Literature Lobby” were Charles Rabot, a French naturalist; Adolf Hoel, a Norwegian geologist; and William Speirs Bruce, a British scientist. These writers produced popular and

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65 Singh, *Question*, 94.
academic articles and even books to argue for their positions.\textsuperscript{66} As will be discussed below, the “Literature Lobby” is less of a unitary group of actors than an overarching term that includes explorers, scientists, legal scholars, and corporate lobbyists.

Explorers and scientists were the most involved and passionate actors in the context of the Svalbard Question. They came from a variety of different nations, including Norway, Sweden, Britain, France, and Russia. Explorers and scientists often wrote for popular magazines, allowing their experiences of Svalbard to reach wider audiences. Indeed, the British explorer and art historian Sir William Martin Conway was largely responsible for “incorporating the archipelago in the late nineteenth-century European ‘planetary consciousness’” with two books (from 1897 and 1898) detailing his adventures in Svalbard.\textsuperscript{67} Mary Katherine Jones finds Conway to be “an almost unique figure in Arctic terms, on the boundary between amateur and professional,” whose accessible and self-deprecating writing style made Svalbard seem accessible to would-be tourists.\textsuperscript{68} Conway continued to agitate for British governmental action to end the lawlessness of Svalbard by using his influence as a Member of Parliament, but met with little success.\textsuperscript{69}

Other British scientists and explorers interested in Svalbard included William Speirs Bruce and Robert Neal Rudmose Brown. Bruce will be discussed below in the section for corporate lobbyists. Rudmose Brown was his friend and assistant, as well as an academic botanist. Due to Bruce’s poor health, Rudmose Brown often gave talks or published papers for him.\textsuperscript{70} Both men were in favor of a British intervention in or annexation of Svalbard to resolve its lack of governance. In a 1919 paper,

\begin{itemize}
  \item \textsuperscript{68} Mary Katherine Jones, “From explorer to expert: Sir William Martin Conway’s ‘delightful sense of something accomplished,’” Polar Record 50, no. 3 (2014): 319.
  \item \textsuperscript{69} See, for example, House of Commons, Affairs in Egypt, 15 May, 1919 (Sir Martin Conway), Accessible at: https://hansard.parliament.uk/Commons/1919-05-15/debates/c8b2dbf0-c8bf-4451-a75d-717d6646a328/affairsinegypt?highlight=spitsbergen#contribution-cd6af209-8489-46d6-8699-32c128d91f82.
  \item \textsuperscript{70} Jones, “Literature,” 32, 34, 40.
\end{itemize}
Rudmose Brown bolstered the British case for Svalbard by arguing for the strength of British scientific expeditions with the claim that “no living man knows more of Spitsbergen than Dr. W. S. Bruce.” Furthermore, Norway was “late in the field,” placing it in an inferior position to Britain.\footnote{R. N. Rudmose Brown, “Spitsbergen, \textit{Terra Nullius},” \textit{Geographical Review} 7, no. 5 (1919): 316, 318-321.}

The French naturalist and geographer, Charles Rabot, came to a remarkably different conclusion about Svalbard’s status. Rabot was the editor of \textit{La Géographie} and a frequent collaborator with Norwegian scientists. He was in favor of Norway’s claim to sovereignty over Svalbard and worked with Norwegian military officer Gunnar Isachsen and Norwegian geologist Adolf Hoel to draft the Norwegian Government’s statement to the Paris Peace Conference.\footnote{Mary Katherine Jones, “Charles Rabot’s Arctic \textit{idée fixe}: Spitsbergen coverage in \textit{La Géographie}, 1900–1920,” \textit{The Polar Journal} 2, no. 2 (2012): 275. And Jones, “Literature,” 32, 33, 34, 37.} In a 1919 article, Rabot argued that Svalbard was not \textit{terra nullius} and already belonged to Norway because it had inherited a Danish claim from the seventeenth century. He thus reasoned that it only remained for the other negotiating parties to recognize Norway’s rightful claim.\footnote{Charles Rabot, “The Norwegians in Spitsbergen,” \textit{The Geographical Review} 8, no. 4-5 (1919): 221, 225-226.} While Rabot was certainly influential on the outcome of the Svalbard negotiations, he was far from a legal expert. Indeed, while the explorers and scientists were generally respectful toward legal scholars, they were far more knowledgeable about the actual conditions of Svalbard and considered much of the legal analysis to be idle speculation. As Rudmose Brown put it, “[t]he problem [of Svalbard] is not an abstraction for the student of political science to amused himself with, but a practical issue fraught with important economic consequences.”\footnote{R. N. Rudmose Brown, \textit{Spitsbergen: an account of exploration, hunting, the mineral riches and future potentialities of an Arctic archipelago} (London, Seeley, Service & Co., 1920): 290.} Although explorers and scientists clearly scoffed at the more imaginative and impractical solutions to the Svalbard Question, they were still reliant on legal scholars for specialist knowledge about Svalbard’s legal status and the meaning of \textit{terra nullius}. 

Indeed, legal scholars were influential commentators and participants in the Svalbard negotiations and exercised a substantial influence on the use of the term *terra nullius*. In the words of Oscar Schachter, international lawyers form a “professional community, though dispersed throughout the world and engaged in diverse occupations, constitut[ing] a kind of invisible college dedicated to a common intellectual enterprise.”\(^{75}\) Since Schachter suggested the existence of an invisible college of lawyers in the 1970s, the metaphor has become remarkably popular among legal scholars. Recent scholarship has challenged whether the invisible college can remain unified given the increasing fragmentation of international law and the disparities in legal traditions throughout the world.\(^{76}\) During the Svalbard negotiations, however, the fragmentation of international law remained many decades away. Additionally, the legal scholars who commented on Svalbard’s status were either European or American and generally not from nations directly interested in the outcome of the Svalbard negotiations. As such, it seems reasonable to consider René Waultrin, Camille Piccioni, Robert Lansing, and James Edward Geoffrey de Montmorency as relatively disinterested and objective members of the invisible college of international lawyers.

René Waultrin was a French legal scholar who specialized in the polar regions.\(^{77}\) He published a number of articles in the *Revue Générale de Droit International Public*, a top international law journal. His most important piece in the context of the Svalbard Question is “La question de la souveraineté des terres arctiques,” from 1908, which explores questions of sovereignty in Svalbard, Bear Island, and the Northeast Passage. It is worth noting that Waultrin uses the term *res nullius* and not *terra nullius* in his

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article. Nevertheless, his usage of *res nullius* closely matches later uses of *terra nullius* by other legal scholars.

The first scholar to use the term *terra nullius* in the context of the Svalbard negotiations was Camille Piccioni in his 1909 article “Le Spitzberg. Son organisation international,” also published in the *Revue Générale de Droit International Public*. Piccioni had long been interested in topics, such as condominium and perpetual neutrality, that complicated traditional ideas of state sovereignty. Andrew Fitzmaurice credits Piccioni with popularizing *terra nullius*, noting that the term began to emerge in general works on international law only a few years later.

Building upon earlier work by Waultrin and Piccioni, Robert Lansing published a 1917 article that described Svalbard as “A Unique International Problem.” Although Lansing had written the piece before he became U.S. Secretary of State, it was indicative of his official attitude toward the Svalbard Question at the 1919 Conference. An important consideration for Lansing was the recent sale of the Arctic Coal Company in 1916. As the United States no longer had any economic stake in the archipelago, Lansing was free to propose abstract philosophical solutions to the Svalbard Question. Lansing clearly reveled in the task, emphasizing that Svalbard’s status was “entirely novel” and “unusual.” The uniqueness of the Svalbard Question prompted “consideration of the fundamental principles underlying governmental institution.” He pondered dividing territorial and political sovereignty to maintain Svalbard’s *terra nullius* status, while also instituting limited governance. He also appeared somewhat sympathetic to the annexation of Svalbard by a “neutral Scandinavian power.”

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79 Fitzmaurice, Sovereignty, 312.
81 Lansing, “Problem,” 765.
82 Lansing, “Problem,” 770.
illustrates the abstract philosophical attitude of legal scholars that was so criticized by explorers and scientists:

Whatever may be the final outcome, the subject as originally presented is most absorbing to the student of political science and offers him an opportunity to test his theories of sovereignty, government, ownership, and similar abstractions, by attempting to apply them to the unusual state of affairs which has arisen in Spitzbergen as a result of American enterprise and energy, which, overcoming Arctic ice and barrenness, proved to the world the wealth of the islands which no country had before that time ever cared to claim as its possessions.\footnote{Lansing, “Problem,” 771.}

Although legal scholars could be remarkably unaware of the real world consequences of the Svalbard Question, their speculations did provide a starting point for negotiation. In Lansing’s case, his interest in the Svalbard Question was doubly important because he functioned both as a legal scholar and as a key negotiator.

Diplomats were another important group involved in the Svalbard negotiations. As mentioned above, this thesis will use diplomat to refer broadly to any government official engaged in foreign policy activity related to Svalbard. The most well-known and influential diplomats engaged in resolving the Svalbard Question were Baron Wedel-Jarlsberg and Robert Lansing. Wedel-Jarlsberg was the Norwegian Minister for the Svalbard Commission of the Paris Peace Conference. As was noted above, Wedel-Jarlsberg’s passionate lobbying was a significant factor in Norway securing sovereignty over Svalbard.

His most important counterpart was the U.S. Secretary of State, Robert Lansing. As was discussed earlier, Lansing expressed an interest in the Svalbard Question in a 1917 article. In his role as Secretary of State, Lansing favored Norwegian sovereignty as the solution most likely to ease tensions in northern Europe.\footnote{Singh, \textit{Question}, 89.} In contrast to the more prominent Wedel-Jarlsberg and Lansing, Fred K. Nielsen, the Assistant
Solicitor for the State Department and American representative at the conference, focused more on the
details of the resolution of the Svalbard Question. In 1920, he published an article describing the
results of the Svalbard Commission and directed somewhat critical remarks at the “somewhat fantastic
plans” that had been proposed by legal scholars but avoided by the grant of sovereignty to Norway.
While diplomats were essential in reaching the final Svalbard Treaty, they were largely reliant on legal
scholars for descriptions of *terra nullius* and Svalbard’s status. In terms of engagement with Svalbard
itself, diplomats were little better than legal scholars. An anecdote told by the historian, Trygve
Mathisen, illustrates the point nicely:

Longyear invited the conference delegates on a trip to Svalbard, so that they could study
conditions at first hand. Fortunately for Longyear the invitation was declined. The 20 odd
diplomats would hardly have been particularly comfortable on board the old whaler at the
disposal of the Arctic Coal Company.

In contrast to legal scholars and diplomats, coal mining corporations and their agents demonstrated the
benefits of engagement both with those living in Svalbard and government officials further south in
Europe and the United States. As mentioned above, the Scottish Spitsbergen Syndicate and the Arctic
Coal Company were the two most influential corporations in Svalbard in the 1910s. William Speirs
Bruce, the founder of the Scottish Spitsbergen Syndicate, relied on his reputation as a polar explorer and
his connections with the Royal Geographical Society to lobby the British government to annex Svalbard.
In 1917, Douglas W. Freshfield, the President of the Royal Geographical Society, wrote to the British
Secretary of State for Foreign Affairs at the request of the Council of Royal Geographical Society
emphasizing “the importance of taking immediate steps to safeguard British interests, political,

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strategic, and commercial, in Spitsbergen [Svalbard], and to urge that the matter be adjusted with our Allies before the termination of the war.” The Royal Geographical Society, which typically avoided taking specific political positions. Unfortunately for Bruce, the British government never took any action toward the annexation of Svalbard, possibly due to its greater interest in the German mandates.

The Arctic Coal Company, owned by Americans Frederick Ayer and John Longyear, was much more successful in its lobbying mission than the Scottish Spitsbergen Syndicate. Longyear was a mining and lumber magnate from Marquette, Michigan. Ayer, Longyear’s friend and business associate, was a wealthy investor from the Boston area. Longyear had originally become interested in coal mining in Svalbard after a visit as a tourist in 1903. Given their wealth and political connections, Longyear and Ayer soon ranked among the most important American actors interested in the Svalbard Question.

Corporate lobbyists, even if they were not actual explorers like Bruce, tended to travel relatively often to Svalbard, unlike diplomats and legal scholars. Ayer and Longyear pressured the U.S. State Department to ensure that property rights would be protected in Svalbard. Schemes such as American annexation or corporate ownership of Svalbard gained some support, but were eventually turned down by Congress due to State Department concerns and Norwegian protests. Perhaps the Arctic Coal Company’s most important impact on Svalbard’s future was its success in lobbying the U.S. State Department to resist international agreements that would introduce taxation on Svalbard. 

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91 “John Munro Longyear, C.S.,” Longyear Museum, Available at: https://www.longyear.org/learn/pioneer-index/longyear-john-m/
92 Cameron Hartnell, Arctic network builders: the Arctic Coal Company’s operations on Spitsbergen and its relationship with the environment (PhD., Michigan Technological University, 2009): 57. And Mathisen, Svalbard, 42.
93 Mathisen, Svalbard, 41-42.
94 Singh, Question, 39-43.
and German reluctance to accept diminished influence in Svalbard was a significant factor in the failure of the conferences of 1910, 1912, and 1914.95

Corporate lobbyists, while quite influential in shaping the path of the Svalbard negotiations, fit only loosely in the category of the “Literature Lobby.” With the exception of William Speirs Bruce, corporate lobbyists often limited their communication to private conversations with government officials, in contrast to the more popular campaigns of explorers and scientists discussed above. Consequently, their role in the evolution of the term *terra nullius* is minimal.

**Conclusion**

Svalbard by the 1910s was in a unique but increasingly unstable situation. The system of state sovereignty had failed to take root in Svalbard, with an international commons enduring instead. With ever-increasing tensions due to the introduction of coal mining on the archipelago, the newly independent Norwegian government attempted to resolve the Svalbard Question over the course of four conferences. Due to previous governmental ignorance of and apathy toward Svalbard, non-state actors, including explorers, scientists, legal scholars, and corporate lobbyists, were able to influence the negotiations to a remarkable extent. Each of these groups possessed different knowledge that was relevant to resolving the Svalbard Question. Explorers and scientists knew the environmental and economic conditions of Svalbard first hand and often expressed frustration at the abstract philosophizing practiced by other groups. Diplomats had set the terms of the debate in 1871-1872 and were aware of the complex geopolitical considerations that restricted their ability to reach a solution to the Svalbard Question. They relied on legal scholars for theory about Svalbard’s current and future

status and on explorers and scientists for up-to-date data about economic activities on Svalbard. Corporate lobbyists straddled the world between explorers and diplomats, as many visited the archipelago repeatedly while also remaining in close contact with government officials. Legal scholars might seem to be the sole obvious choice for analysis of the use of *terra nullius*, but, as has been argued above, it is essential to view each group involved as part of the larger system of the Svalbard negotiations. While legal scholars did possess by far the most coherent and detailed views about *terra nullius* and Svalbard’s status, they were reliant on explorers and scientists for information about Svalbard’s current and historical human presence. Furthermore, to effect change in Svalbard’s status, legal scholars needed to communicate successfully with diplomats and government officials directly involved in the negotiation process. The next chapter will compare this complex taxonomy of actors with more reductive attempts in the secondary literature to characterize the period. This thesis will argue that only by understanding the interplay between different actors in the context of the Svalbard Question can the issue of the anomalous usage of *terra nullius* be fully understood.
Chapter IV: Historiographical Interpretations of Terra Nullius Usage in the Context of the Svalbard Question

Studying the use of terra nullius in the context of the Svalbard Question is a difficult task due to the interdisciplinary nature of the issue. The secondary literature on the topic is split quite starkly into historical and legal camps. These two groups are rarely cite or even acknowledge the existence of each other, making a comprehensive summary of scholarly work on terra nullius and Svalbard a demanding task. This chapter will present a survey of historiographical interpretations of terra nullius usage in the context of the Svalbard Question from 1954 to the present day. I make no claims to having made a completely exhaustive search, but this chapter will present a state of the field that is far more comprehensive than any preexisting work.\(^96\) The secondary sources fall into three main categories in their treatment of the anomalous usage of terra nullius. One group acknowledges the contradiction between terra nullius and regulation and the prevention of annexation, but does not attempt to resolve it. A second group explains the contradiction as a mistaken use of an international law concept with enduring meaning. The third group identifies the anomalous usage of terra nullius as knowing political manipulation of one sort or another. The most important characteristic of all three groups is a general lack of deep analysis of the historical context of and actors involved in the resolution of the Svalbard Question.

The first secondary source to address the question of the use of *terra nullius* in the Svalbard context is Trygve Mathisen’s 1954 book, *Svalbard in International Politics 1871-1925*. The book remains the best overview of Svalbard’s history during the relevant time period. Mathisen devotes most of his attention to diplomatic negotiations and much less to legal terminology. Toward the end of the book, Mathisen reflects on the Svalbard Treaty and states that it was “one of the most upright territorial decisions in diplomatic history” because of its balance between Norwegian sovereignty and equal access for other nations. He claims that the outcome of the Svalbard Treaty is easier to understand if Svalbard during the negotiations is seen not as *terra nullius*, but as “terra omnium.” It seems that Mathisen is arguing that actors in the Svalbard context were not necessarily wrong to refer to Svalbard as *terra nullius*, but the situation nevertheless seemed to resemble *res communis* (the international law equivalent to “terra omnium”) more closely. He does not make any claims about what Svalbard actors thought that *terra nullius* meant.

The next scholar to touch on the topic was the Dutch legal scholar J. H. W. Verzijl in the early 1970s. In the third volume (“State Territory”) of his *International Law in Historical Perspective* series, he describes Svalbard as a “very special type of *terra nullius*” and an “artificial *territorium nullius*.” Verzijl appears to use the terms *terra nullius* and *territorium nullius* interchangeably. His use of the word “artificial” coincides nicely with French legal scholar, René Waultrin’s characterization of a “political” *res nullius* status. Verzijl does not address whether historical actors during the Svalbard negotiations would have considered the *terra nullius* regime to be “artificial,” or if it only appears so years later after changes in meaning. If Verzijl elaborated more on the nature of the artificiality of *terra nullius* in the Svalbard context, then it might be possible to place him in the intentional political manipulation school.

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100 « *Res nullius au point de vue politique* » Waultrin, “Question,” 122.
of thought. The limited discussion he gives of the topic instead passes this task on to later scholars, such as Geir Ulfstein and Christopher R. Rossi.

Verzijl’s concept of an “artificial” terra nullius proved influential in later analysis by legal scholars. Most notably, it was cited in Geir Ulfstein’s 1995 work, *The Svalbard Treaty; From Terra Nullius to Norwegian Sovereignty*. Ulfstein begins by distinguishing between *terra nullius* and *res communis*. The two terms are similar in that both describe territory that is not under the sovereignty of any one state. However, they can be distinguished because *terra nullius* is open to being placed under the sovereignty of the first nation that claims it, while *res communis* can never be acquired by a single state. Ulfstein admits that considering Svalbard to be *terra nullius* while forbidding its annexation seems to be a “contradiction” and he appeals to Verzijl’s description of the regime as “artificial.”²⁰¹ However, for the rest of his book, which explores Svalbard’s contemporary legal status, he assumes that the archipelago was accurately described as *terra nullius* and thus ignores the historical usage question.²⁰² Ulfstein’s work proved to be quite influential and is probably the most cited authority on the use of *terra nullius* in the Svalbard Question, despite mostly evading the issue in a space of three pages. In his 2012 article, “Naturressursene og verdenspolitikken på Svalbard 1596-2011,” [“Natural resources and world politics in Svalbard 1596-2011”], for example, Roald Berg cites Ulfstein and argues that, “[t]he Spitsbergen Islands were regarded as *terra nullius* or no-man’s land without state ownership and not subject to any authority. This was the international legal status. The practical reality was that the islands became *terra communis*: common land for citizens of all countries.”²⁰³ Similarly, a plaque at the Svalbard Museum in Longyearbyen claims that “Svalbard was a kind of international common land.”²⁰⁴ These approaches are

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²⁰⁴ Observations during a personal visit to Svalbard, summer 2019.
similar in that they describe pre-treaty Svalbard as an open-access commons and acknowledge that it was referred to historically as *terra nullius*, but do not attempt to resolve the resulting contradiction.

Marie Jacobsson’s 2004 book chapter, “Acquisition of territory at the time of Otto Nordenskjöld: a Swedish perspective,” demonstrates a different approach to the apparent paradox of a governed, open-access *terra nullius* that is immune from annexation. She argues that the anomalous use of *terra nullius* by the Norwegian and Swedish governments during the Svalbard negotiations is “inexplicable from an international law perspective.”\(^\text{105}\) Jacobsson attempts to locate the reason for this mistaken usage in the small number of international lawyers in those countries, suggesting that only a near total lack of expertise in the field could be responsible for such a blatant error.\(^\text{106}\) She appears not to have considered the possibility of the meaning of *terra nullius* changing over time. Jacobsson also makes no attempt to explain why countries with more robust international law infrastructure also used the same meaning of *terra nullius* as the Norwegian and Swedish governments. For this reason, her account is of limited utility for understanding the usage of *terra nullius* in the Svalbard context.

A recent work addressing the role of *terra nullius* during the Svalbard negotiations is M. Zadorin’s 2018 article, “The doctrine of ‘common territory’ versus ‘terra nullius’: political geography in the political and legal context of Spitsbergen’s status in the late 19th century – first half of the 20th century.” Zadorin views the description of Svalbard as *terra nullius* as a dishonest means by which the Norwegian government consolidated control over a previously international common resource area. He cites significant Russian activity in Svalbard before 1871 and his approach can best be understood in the broader context of Soviet and later Russian discontent with the Svalbard Treaty.\(^\text{107}\) Zadorin’s argument

\(^{105}\) Jacobsson, “Acquisition,” 310.

\(^{106}\) Jacobsson, Acquisition,” 311, 315.

is best summarized by his claim that “the marking of Svalbard as “terra nullius” until the signing of the Treaty of 1920 existing to this day in a large layer of historical, political and legal literature, is the starting point for the violation of the international common use regime in relation to the Spitsbergen archipelago.”

Zadorin’s article can therefore be understood as a response to Ulfstein and others who illustrate the apparent discrepancy between Svalbard’s de facto commons status and de jure terra nullius designation, but do not attempt to reconcile the two. He argues that the difference is real and explainable by the Norwegian government’s manipulation. This argument does not seem to be well supported by primary sources, not least for the reason that the Russian government enthusiastically endorsed the status quo principle of terra nullius throughout the 1910s.

A related view is expounded in the 2016 law article by Christopher R. Rossi entitled, “‘A Unique International Problem’: The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History.” Rossi focuses specifically on how the “territorial temptation,” a phenomenon that occurs when states manipulate established legal order, especially of global commons, to acquire resources or territory, has manifested itself in the context of Svalbard. Rossi opens the paper with a contemporary example from 2015 of Dmitry Rogozin, Russia’s deputy prime minister at the time, who made an unauthorized stop in Svalbard. The subsequent back-and-forth between the Norwegian and Russian government showed that ambiguity remains over Svalbard’s status nearly a century after the signing of the Svalbard Treaty in 1920.

Rossi traces Svalbard’s present anomalous status to its legal position in the years leading up to the Svalbard Treaty. He argues that a number of states relied on the ambiguous meaning of terra

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nullius to secure resources or sovereignty in the archipelago. Citing Ulfstein, Rossi distinguishes between terra nullius and res communis. Terra nullius means a no man’s land that is open to occupation and annexation by the first claimant. Res communis means a thing belonging to everyone that cannot be appropriated by any person or group.\textsuperscript{112} When a state was unable to successfully assert sovereignty, Rossi claims, it would affirm the terra nullius status of Svalbard as an area open to access and resource extraction by all nations, but incapable of annexation (actually res communis).\textsuperscript{113} This model of diplomatic balancing can account for the international similarities in anomalous usage of terra nullius in a way that Zadorin cannot. While Rossi’s account of planned ambiguity regarding the meaning of terra nullius is very intriguing, his article lacks the required primary source support.

Perhaps the most historically rigorous work on terra nullius has been undertaken by Andrew Fitzmaurice, an Australian historian. He touched upon the role of terra nullius in Svalbard briefly in his 2007 article, “The Genealogy of Terra Nullius.” He expanded this analysis in his 2014 book, Sovereignty, Property and Empire, 1500–2000. In a chapter called “Terra Nullius and the Polar Regions,” Fitzmaurice argues that there was significant evidence for “the transformation of the idea of terra nullius, in the early polar debates, from being a description of land that was common, and so could not be appropriated, to land that was open to the first taker.”\textsuperscript{114} Thus, Fitzmaurice argues that terra nullius in the Svalbard context simply meant what res communis does today. I have significant doubts about the starkness of this transition in meaning, as well as about his claim that it occurred largely because of technological innovations and expansionist ideas in Norway in the 1920s and 1930s.\textsuperscript{115} Nevertheless,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} Rossi, “Unique Problem,” 117.
\item \textsuperscript{113} Rossi, “Unique Problem,” 98.
\item \textsuperscript{114} Fitzmaurice, Sovereignty, 316-317.
\item \textsuperscript{115} Fitzmaurice, Sovereignty, 317. A more plausible explanation in my view is that the emergence of res communis as a concept in international law during the 1920s and 1930s caused a clarification in meaning of terra nullius. Fabien Carlet insightfully refers to “gaps of international law” due to the “absence of the definition and recognition of the ancient concept of res communis” during the Svalbard negotiations [« les lacunes du droit international » ; « l’absence de définition et de reconnaissance du concept antique de res communes. »]. Fabien Carlet, “Bien commun et souveraineté étatique: la dispute autour du Spitzberg,” Bulletin de l’Institut Pierre Renouvin 44, no. 2 (2016): 38. I plan to explore this question more deeply in future research.
\end{itemize}
\end{footnotesize}
Fitzmaurice’s work contains a far greater number of primary sources from the period of the Svalbard Question and counts as a substantial step forward in understanding the use of *terra nullius*.

This survey of secondary works on Svalbard and *terra nullius* has identified three primary strategies. The first approach, used by Geir Ulfstein and a number of others, is to acknowledge the potential incongruence between the regulated open-access nature of Svalbard and its *terra nullius* description, but make no attempt to reconcile it. The second, as exemplified by Marie Jacobsson, is to dismiss any anomalous use of *terra nullius* as erroneous and deriving from ignorance of actual international law. The third strategy is to acknowledge the incompatibility of *terra nullius* and international regulation and argue that the misuse was deliberate and strategic. Zadorin and Rossi both opt for this route. This thesis builds upon the approaches mentioned above by providing a more nuanced and pluralistic account of the actors involved in the Svalbard Question. In the next chapter, I will turn to the primary documents to show that *terra nullius* in the Svalbard context was used differently depending on the actor. Ultimately, I will conclude that although the meaning of *terra nullius* was somewhat in flux, certain perceptive thinkers understood and criticized its anomalous usage.
Chapter V: The Use of Terra Nullius in the Context of the Svalbard Question

Before delving more deeply into the diverse meanings of terra nullius as the term was used in the context of the Svalbard Question, it will be useful to recall the definition of terra nullius in contemporary international law. As discussed above, the 1975 Western Sahara Advisory Opinion provides the authoritative definition in international law of terra nullius as territory belonging to no nation that is open to acquisition and the imposition of sovereignty. This thesis distinguished between acquisitive nullification, the creation of legal entities that have no sovereign and are capable of placement under such sovereignty by the first claimant state, and distributive nullification, the establishment of legal entities that are owned by no sovereign and excluded from the possibility of such a status. While the contemporary use of terra nullius in international law corresponds with acquisitive nullification, scholars of the Svalbard Question have argued that the usage of terra nullius from 1907 to 1919 was more similar to distributive nullification and hence anomalous from the contemporary perspective. This thesis will now explore, in roughly chronological order, the usage of terra nullius in key documents of the Svalbard Question period. I will focus primarily on the published writings of the “Literature Lobby,” as well as occasional unpublished pamphlets and letters.

The first published work to deal substantially with Svalbard’s status under international law was René Waultrin’s “La question de la souveraineté des terres arctiques” [“The Question of the Sovereignty of the Arctic Lands”], published in 1908 in the Revue générale de droit international public, a French international law journal. In his article, Waultrin took up three main issues in Arctic sovereignty: “La question du Spitsberg,” “La question de l’Île d’Ours,” and “La question du passage du Nord-Est” [“The Question of Spitsbergen (Svalbard)”, “The Question of Bear Island,” and “The Question of the North-East Passage”].¹¹⁶ This thesis will focus only on his discussion of Svalbard. Waultrin’s article does not use the

¹¹⁶ Waultrin, “Question,” 80, 185, 401.
term, \textit{terra nullius}, but it does use a related one, \textit{res nullius}. The exact relation between the terms is controversial and likely differs on the context of usage. In Waultrin’s case, he uses \textit{res nullius} in a basically identical way to how \textit{terra nullius} was used by other authors only a few years later. As such, his article is essential to understanding the development of \textit{terra nullius} in the context of the Svalbard Question.

Waultrin wrote that the topic of Arctic sovereignty, and Svalbard more specifically, posed difficult political, economic, and moral questions. The political questions involved the legal status of land and sea that was strategically important to specific nations, such as Canada or Russia. The economic questions expressed the importance of valuable mineral deposits. The moral questions posed the issue of protecting the lives and property of those of travelled or lived in the region. This last question was starkly important given the recent labor strike that had taken place in Svalbard.\footnote{Waultrin, “Question,” 78-79.} The principles of international law posed by these issues were: “What are the legal foundations for taking possession of these territories? To what conditions should a sustainable establishment be subject? What regime should be imposed?\footnote{“Sur quels fondements juridiques baser la prise de possession de ces territoires? A quelles conditions y subordonner un établissement durable? Quel régime leur imposer?” Waultrin, “Question,” 79.} Waultrin then goes on to detail the history of Svalbard. He writes that from 1871 to 1872, the foreign ministries of Russia and Sweden exchanged diplomatic notes regarding Svalbard’s status. He admits that he does not have access to the documents and that “[w]e only know that the two governments considered Spitsbergen (Svalbard) to be \textit{res nullius}.”\footnote{“On sait seulement que les deux gouvernements considérèrent le Spitsberg comme \textit{res nullius}” Waultrin, “Question,” 105.} Thus far, Waultrin has merely transformed the informal agreement of the 1871-1872 diplomatic exchange into legal terminology. However, he then expresses a key worry that shows questions about the proper definition of Svalbard’s status existed from the very beginning of scholarly discussion. Waultrin writes, “[w]ithout wishing to
discuss the terms of a poorly known agreement...it should be noted that there is something strange and contradictory in proclaiming a land without a master and giving it laws, or at least subjecting it to regulations.”

The diplomatic notes from 1871-1872, which were later published in 1912, did not use the terms *res nullius* or *terra nullius*. Instead, they referred to Svalbard as “an undecided domain accessible to all states whose nationals seek to exploit its natural resources.” This is an apt description of Svalbard at the time of Waultrin’s writing and also conforms with his understanding of the content of the notes.

Furthermore, a diplomatic note sent by Norway in February 1907 to a number of nations with interests in Svalbard states that “My Government [Norway] expressly wishes to emphasize that it is not the goal of this present communication to raise the question of a modification in the state of the islands as countries which do not belong to any State, and which are to the same degree open to subjects from all States.” Waultrin did not have access to this note either, but he writes that “we know enough about it to know that it does not envisage the possibility of a change in the situation of the territories in question as *res nullius*, equally open to all.”

Thus, while Waultrin did not know the precise language of the diplomatic negotiations, it is probably safe to assume that he is right to say that if asked, negotiators would describe Svalbard as *res nullius*, by which they would mean territory lacking sovereignty and open to resource extraction by all nations. Waultrin also clearly expresses an objection to this understanding of the definition of *res

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120 “Sans vouloir discuter les termes d’un accord mal connu...il faut remarquer qu’il y a quelque chose d’étrange et de contradictoire à proclamer un territoire sans maître et à lui donner des lois, tout au moins à le soumettre à des règlements. » Waultrin, “Question,” 105.

121 « un domaine indécis accessible à tous les Etats dont les nationaux cherchent à en exploiter les ressources naturelles. » Ministerstvo, *Spitsbergen*, 3.

122 « Mon Gouvernement [Norway] désire expressément faire ressortir qu’il n’a pas pour but, par la présente communication, de soulever la question d’une modification dans l’état des îles comme contrées qui n’appartiennent à aucun État, et qui sont au même degré ouvertes aux sujets de tous les États. » Ministerstvo, *Spitsbergen*, 12-13.

123 « On en connaît suffisamment l’esprit pour savoir qu’elle n’envisage pas l’éventualité d’une modification de la situation des territoires dont il s’agit comme *res nullius*, également ouvertes à tous. » Waultrin, “Question,” 120.
nullius because he does not think that territory said to be lacking sovereignty can at the same time be regulated by governments.

Waultrin returns to this problem later in the article, where he writes, “[r]es nullius from a political point of view, Spitsbergen would not, however, be susceptible to annexation: this remains prohibited to prevent the action of a third power coming to replace the international organization. The archipelago will constitute a free land, analogous to what the high seas are, and subject like it to regulations.” The characterization of a “political” res nullius suggests that Svalbard is quite unlike a typical res nullius. Like the high seas, Svalbard is under international regulation and cannot be claimed by any one nation. Somewhat tellingly, the high seas are described in contemporary international law as res communis (common areas), a legal status quite distinct from terra nullius. Thus, Svalbard more resembles the unique case of international regulation of the high seas than it does ungoverned land. “Political” res nullius is a useful approximation of a concept that would later become known as res communis. For Waultrin, however, simply referring to Svalbard as res nullius was misleading.

Discussion of Svalbard’s international status would become increasingly common in the next few years. In 1908, French historian and journalist René Puaux wrote a short article for L’Opinion entitled “La Conference Internationale du Spitzberg” (“The International Conference of Spitsbergen”). He briefly details Svalbard’s history and recent Norwegian attempts to hold a conference to decide its legal status. Puaux suggests that the varied foreign interests would make consensus on a new legal status for Svalbard difficult, “leaving Spitsbergen res nullius but allowing, at fishing season, an international police

124 “Res nullius au point de vue politique, le Spitsberg ne serait cependant pas susceptible d’annexion : celle-ci demeurent interdite pour empêcher l’action d’une tierce puissance venant se substituer à l’organisation internationale. L’archipel constituera une terre libre, analogue à ce qu’est la haute mer, et soumise comme elle à des règlements.” Waultrin, “Question,” 122.
125 Ulfstein, Treaty, 37.
force, represented in this case by a coast guard of one or another power invested with full powers...”\textsuperscript{127}

In this article, Puaux seems to confirm Waultrin’s perception of the diplomatic usage of \textit{res nullius} in a political sense.

In 1909, two more publications discussing Svalbard’s international status appeared in print. One was “La question du Spitzberg. Les intérêts de la science devant la conférence internationale” [“The Spitsbergen Question. Scientific interests before the International Conference”], written by the French essayist Léonie Bernardini.\textsuperscript{128} She describes Svalbard as \textit{“terra nullius, open and equally accessible to all the nations.”}\textsuperscript{129} In 1871, she says, Russian opposition to Swedish-Norwegian annexation of the archipelago caused Svalbard to remain \textit{terra nullius}. Further international negotiations would not change this basic fact, but would likely result in some sort of legal code for the archipelago.\textsuperscript{130} Bernardini does not appear to suggest any incoherence in imagining Svalbard regulated and also maintaining its \textit{terra nullius} status.

A second publication on the Svalbard Question to appear in 1909 was “Le Spitzberg. Son organisation internationale.” [“Spitsbergen. Its international organization.”], by the French legal scholar Camille Piccioni in the \textit{Revue générale de droit international public}.\textsuperscript{131} This article appeared in the same international law journal as did Waultrin’s article and it cited his work. Piccioni, like Bernardini, writes that the 1872 agreement between Russian and Sweden-Norway caused Svalbard to retain its \textit{terra nullius} status.\textsuperscript{132} Recent attempts at negotiations between the Norwegians, British, and Russians would likely “leave Spitsbergen in the situation of \textit{terra nullius}, with the more or less vague idea of multi-

\textsuperscript{127} Puaux, “Conference,” 11-12.
\textsuperscript{129} “\textit{terra nullius, et également accessibles à toutes les nations.}” Bernardini, “Spitzberg,” 818.
\textsuperscript{130} Bernardini, “Spitzberg,” 819.
\textsuperscript{132} Piccioni, “Spitzberg,” 118.
stakeholder control, of a kind of plural *condominium*, which, by this very fact that the number of participants in the *condominium* is larger, is intended, as we hope to demonstrate, to differ on certain points from the *condominium* for two, hitherto known form of co-sovereignty.” Piccioni thus suggests that proposals to implement international regulations in Svalbard while leaving it *terra nullius* resembled a condominium approach of unprecedented size.

As was described in the previous chapter, a “condominium in international law exists when two or more States exercise joint sovereignty over a territory.” This thesis also argued that a significant distinction between Svalbard and condominia was that a condominium is a territory where sovereignty is exercised jointly by multiple nations, but a *terra nullius* territory permits no sovereignty at all. Thus, while Piccioni goes on to give a detailed history of condominia in international law, he reaches a similar conclusion to Waultrin that the terminology used by the diplomats is misleading. Piccioni considers a common suggestion for the solution of the Svalbard Question: “Why should Spitsbergen not remain a *terra nullius*, but a *terra nullius* where the few local industries and the rights and duties of those who engage in them are summarily regulated?” and responds, “[t]his solution, launched in the press, is perhaps that which the Conference will arrive at; but it is far from excluding all difficulty.”

Piccioni continues “[a]nd first, even if the Conference solemnly recognizes Spitsbergen as *terra nullius*, the mere fact that this archipelago will receive an embryo of organization, — a status, however rudimentary it may be, — that will suffice to remove it from the category of territories lacking

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133 « laisser le Spitzberg dans la situation de *terra nullius*, à l'idée plus ou moins vague d'un contrôle à plusieurs, d'une sorte de *condominium* plural, qui, par cela même que le nombre des participants au *condominium* est plus vaste, est destiné, comme nous espérons le démontrer, à différer sur certains points d'avec le *condominium* à deux, forme jusqu'ici connue de la co-souveraineté. » Piccioni, “Spitzberg,” 118-119.
134 Samuels, “Condominium,” 728.
136 « pourquoi le Spitzberg ne demeurerait-il pas une *terra nullius*, mais une *terra nullius* où les quelques industries locales et les droits et devoirs de ceux qui s'y livrent seraient sommairement réglementés? Cette solution, lancée dans la presse, est peut-être cette à laquelle s'arrêtera la Conférence ; mais elle est loin d'exclure toute difficulté. » Piccioni, “Spitzberg,” 127.
sovereignty.” He argues that the negotiating countries that are attempting to regulate Svalbard while claiming that it remains *terra nullius* are using confused terminology and have no power to exert their decision on third party states. Piccioni writes “[b]y the mere fact that ten states declare it *nullius*, the situation of Spitsbergen has already changed: it is no longer susceptible to appropriation, and it therefore loses one of the main characteristics of vacant territory.” He continues “[h]owever, if the Conference prefers the term “nobody’s territory” to “undivided territory” or “common sphere of influence,” this makes no difference. One must conclude from the proclamation of the archipelago as *terra nullius* that no one intends to reserve any exclusive right there even from an economic point of view, and that Spitsbergen, even and above all after ten states have organized security there, will remain open to all nations.” Piccioni ultimately views the multilateral attempt to regulate a *terra nullius* territory as vaguely incoherent and likely doomed to irrelevance.

Usage of *terra nullius* over the next few years was relatively sparse. In 1912, the Norwegian cartographer and military officer and later Norwegian negotiator, Gunnar Isachsen, wrote a brief article about the discovery of Svalbard in a book detailing Prince Albert of Monaco’s expeditions to the archipelago. Isachsen wrote that after the 1871-1872 diplomatic exchange, Svalbard remained *terra nullius*. He cited Waultrin’s article, showing that the work of legal scholars was reasonably well known to scientists, explorers, and other laypersons interested in the archipelago, although the nuances were
unlikely to be fully transmitted.\textsuperscript{141} Another work was published in the same year by Arnold Ræstad, a Norwegian lawyer and diplomat, which provided a remarkably detailed survey of Svalbard’s diplomatic history.\textsuperscript{142} The article focused primarily on the period from Svalbard’s discovery in 1596 to its gradual decrease in international importance by the late eighteenth century. Ræstad argued that Svalbard in the eighteenth century was not considered as \textit{terra nullius}, but rather as an undecided status generated by widespread apathy. He emphasized that the Danish and Norwegian kings had never given up their claims to sovereignty from centuries earlier. This appeal to historical claims of the archipelago would become a key component of arguments by Norwegian negotiators for Svalbard to be placed under Norway’s sovereignty.\textsuperscript{143}

After the failure of the 1910, 1912, and 1914 conferences to accomplish any progress toward solving the Svalbard Question, interest in the topic appears to have waned until near the end of the First World War. One major exception was an article published by the American Secretary of State, Robert Lansing, in 1917, but written before he took office. In this work, Lansing remarks on the “extraordinary political state of islands” that were populated and hosting industry, but remained unannexed by any nation. He suggests that continued declarations of Svalbard’s \textit{terra nullius} status had dissuaded annexation.\textsuperscript{144} According to Lansing, the issue posed by Svalbard was “entirely novel” and thus a search of the historical record would be of little use. How could a territory with no sovereignty be governed? Lansing argued that legal scholars would have to turn to political philosophy and “an analysis of the abstract idea of sovereignty.”\textsuperscript{145} Doing so, he drew a distinction between territorial sovereignty (governance of an area) and political sovereignty (governance of a group of people). He claims that the

\textsuperscript{141} Isachsen, “Spitsberg,” 112.
\textsuperscript{144} Lansing, “Problem,” 764.
\textsuperscript{145} Lansing, “Problem,” 765.
ability to pull these two types of sovereignty apart demonstrates the possibility of governance of Svalbard that maintained its terra nullius status.\textsuperscript{146} Although quite satisfied with his solution, Lansing suggests that increased tensions in Europe due to the First World War might make international governance impossible. In this case, a Scandinavian nation would likely be given sovereignty over Svalbard. Nevertheless, Lansing cautioned that assigning sovereignty to one nation would hardly be easy given the multitude of competing claims.\textsuperscript{147}

Lansing can be considered as a legal thinker in the same category as Waultrin and Piccioni. However, while they argue that government regulation and terra nullius are simply incompatible, Lansing digs deeper into the philosophical underpinnings of international law to argue that a reconciliation might be possible. His article provides evidence for a legitimate theoretical dispute about the meanings of terra nullius and sovereignty. Ultimately, Lansing’s musings were never acted upon and most diplomats, scientists, and explorers continued to uncritically combine terra nullius with governance in Svalbard.

As the First World War drew to a close and the possibility of a resolution of the Svalbard Question arose, a number of works on the subject were published. The majority were written by non-legal experts and with a clear nationalistic aim in mind. Some, like those written by Charles Rabot claimed that Svalbard “is not a terra nullius” because claims by the Danish and Norwegian kings were still active.\textsuperscript{148} Others, perhaps envisioning a post-war territorial scramble, argued that “Spitsbergen is a terra nullius; property acquired by occupation is at the mercy of the strongest new-comer; might is right; there is no security against or redress for wrong-doing.”\textsuperscript{149} Still others argued that “Spitzbergen is a

\textsuperscript{146} Lansing, “Problem,” 765-767.

\textsuperscript{147} Lansing, “Problem,” 770-771.


\textsuperscript{149} Anonymous, “British interests,” 247.
Terra Nullius, and no Power is to-day in a position to claim this vast area.” These works might occasionally cite the legal scholars mentioned above, but seldom showed understanding or interest in the finer points of international law.

Ultimately, however, the various schemes of resolving the Svalbard Question were ignored in favor of common sense Norwegian sovereignty. Indeed, while reflecting on the outcome of the Conference, the American representative, Fred K. Nielsen, wrote that “[p]olitical considerations affecting this relatively unimportant territory which had previously necessitated the consideration of somewhat fantastic plans did not stand in the way of a practical solution of the question which has frequently in the past been the cause of international complications.”

To sum up, Svalbard was in the unusual position of possessing growing population and industry, yet lacking sovereignty. The previous informal agreement between Sweden-Norway and Russia from 1872 was interpreted by legal scholars as maintaining a terra nullius status of the archipelago. Issues with Svalbard’s lawless status required intervention and a number of diplomats and other interested parties suggested that Svalbard be given a limited level of international governance while remaining terra nullius. The legal scholars Waultrin and Piccioni pointed out the incompatibility of Svalbard’s unannexability and proposed international governance with its terra nullius status, while Lansing attempted to reconcile them.

Discussion of the issue outside of international law journals was largely unaware of the anomaly and thus referred uncritically to Svalbard as both terra nullius and potentially subject to governance. Perhaps the best example of this general lack of precision toward legal terminology on the part of diplomats occurs in a letter written in January 1919 by Count Ehrensvard to the Swedish Foreign Minister Hellner: “the Spitzberg should remain terra nullius. This will be achieved through this solution

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[a Norwegian mandate]; it may be a *res omnium*, mais les extrêmes se touchent and in essence it amounts to the same.”\(^{152}\) For diplomats, as for scientists, explorers, and lobbyists, the priority was solving the concrete political issue and not engaging in abstract legal theorizing. As such, they drew upon legal scholars’ summarization of the 1872 status quo as *terra nullius* while ignoring the definitional and philosophical problems that this raised.

Chapter VI: Conclusion

In a 2005 article entitled, “The Edges of Empire and the Limits of Sovereignty: American Guano Islands,” Christina Duffy Burnett provides a counterpoint to the focus on imperialism as “the acquisition of territory, the projection of power, the extension of sovereignty.”¹⁵³ Instead, “[t]he practice of imperialism in the United States, and elsewhere, has been tentative and ambiguous as well as aggressive and assertive; it has relied on the creation of legal categories that do their work by withholding, retracting, and assiduously delimiting national power, as well as by increasing and extending it.”¹⁵⁴ This is a valuable viewpoint and can help clarify a number of developments that occurred in the diplomatic history of Svalbard. The 1872 agreement between Russia and Sweden-Norway maintained Svalbard as “an undecided domain accessible to all states whose nationals seek to exploit its natural resources” that was also incapable of annexation.¹⁵⁵ Neither Russia nor Sweden-Norway could annex Svalbard without incurring significant penalties to their international reputation. By declaring Svalbard an unannexable commons, they excluded potential third parties and positioned themselves as the primary guarantors of its status. A similar strategy appears to have been undertaken throughout the 1910s as Svalbard’s *terra nullius* was treated as sacrosanct in negotiations. No nation was in the position to unilaterally claim Svalbard, but each wanted remain eligible for future claims. Maintaining Svalbard’s *terra nullius* status allowed this to occur.

Did the diplomats’ strategically restrictive policy toward Svalbard’s sovereignty influence the usage of *terra nullius*? I believe it did, but not intentionally. When the informal diplomatic agreement of 1872 was translated into concrete legal terminology, it was inevitable that confusion would result.

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¹⁵⁴ Burnett, “Guano,” 800.
¹⁵⁵ «un domaine indécis accessible à tous les Etats dont les nationaux cherchent à en exploiter les ressources naturelles.» Ministerstvo, *Shpitsbergen*, 3.
The agreement was a strategic solution to appear to reject sovereignty over Svalbard, but by doing so
claim the position to determine its status for the future. Instead of being identified as *terra nullius* by
traditional legal principles, Svalbard was simply declared to be so by Russia and Sweden-Norway. The
paradox of this unusual method of nullification came to light once Svalbard’s un governed status became
practically infeasible. Not only was Svalbard a *terra nullius* that could not be annexed, but soon it could
become both unannexable and internationally governed. Legal scholars including Waultrin, Piccioni, and
Lansing recognized this incompatibility. While Waultrin and Piccioni rejected the *terra nullius*
appellation as incorrect or at least misleading, Lansing attempted to provide a new theoretical definition
of sovereignty to justify it. Ultimately, however, this complex legal debate was unimportant for the
diplomats, scientists, and explorers who comprised the majority of the Svalbard “Literature Lobby.” The
anomalous use of *terra nullius* by diplomats and others is thus a “case of pragmatic men seeing existing
legal terminology as too strictly binding for a deeply idiosyncratic political question.” To a certain
extent, the diplomats were right to ignore abstract legal issues, as various proposals of international
governance were dismissed and the practical solution of Norwegian sovereignty was chosen.

Nevertheless, the unique nature of the 1920 Svalbard Treaty testifies to the importance of Svalbard’s
unusual legal status and the fascinating legal debate that came with it.

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156 I owe this excellent phrase to Professor Michael Butler.
Bibliography

Primary Sources


House of Commons, Affairs in Egypt, 15 May, 1919 (Sir Martin Conway), Accessible at: https://hansard.parliament.uk/Commons/1919-05-15/debates/c8b2dbf0-c8bf-4451-a75d-717d6646a328/ AffairsInEgypt?highlight=spitsbergen#contribution-cd6af209-8489-46d6-8699-32c128d91f82


“Traité de Commerce, De Navigation, Et De Délimitation Entre La Russie Et Le Japon,” *旧条約彙* (Toyko, Ministry of Foreign Affairs Treaty Bureau, 1930-1936), Accessible at:


**Secondary Sources**


Cornelia Lüdecke, Lynn Tipton-Everett, and Lynn Lay (Columbus, The Ohio State University, 2012).


Hartnell, Cameron, *Arctic network builders: the Arctic Coal Company’s operations on Spitsbergen and its relationship with the environment* (PhD., Michigan Technological University, 2009).

“John Munro Longyear, C.S.,” *Longyear Museum*, Available at: https://www.longyear.org/learn/pioneer-index/longyear-john-m/


