

The contemporary legal framework of the Arctic Ocean: are there impacts of diminishing sea ice?

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It's already common knowledge that sea ice in the Arctic Ocean is diminishing and there are more and more opportunities for new economic activities in the Arctic region. As one convincing example are new possibilities for shipping through the Northern Sea Route (or Sevmorput as it is called in Russian legal documents) which would shorten transits from the Atlantic coast of West Europe to the Pacific coast of eastern Asian countries by one third – in comparison to crossing through the Suez Canal. This example is of practical significance for ship-owners, especially taking into account other advantages of using new global routes through the Arctic Ocean, such as avoiding risks of piracy in many southern waters.

So, it's not surprising that interests in the contemporary legal regime of the Arctic extend both from the Arctic States and non-Arctic States¹. There are lots of suggestions as to improve Arctic governance and relevant questions as to what was and what is the current legal status of the Arctic Ocean.

Proposals to improve Arctic governance are often connected *in concreto* with the need to improve legal regulation of economic activities in the Arctic Ocean before its permanent ice cap melts as was suggested in a number of research papers:

«The expansion of economic activity under conditions of environmental change poses new challenges for the entire Arctic region and the world. Access to open water across the Arctic Ocean is awakening interest from the energy, shipping, fishing, and tourism industries. Each of these globally important commercial activities, if not properly regulated, poses risks that together will be multiplied in the confined Arctic Ocean. Due to rapidly changing conditions and to inadequate baseline data regarding the dynamics of Arctic marine ecosystems, many vulnerabilities and potential consequences of anthropogenic impacts are poorly understood or unknown»².

Two recent legal instruments – the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic agreed upon by eight

¹ The term Arctic coastal States means usually the group of five States bordering the Arctic Ocean, each of them having internal waters, territorial seas, exclusive economic zone and continental shelf in this Ocean, i. e. Canada, Denmark (because of Greenland), Norway, Russia and Usa (because of Alaska). The term Arctic States means usually the group of eight States, the territories of which are crossed by the North Polar Circle; that is, in addition to the five States mentioned above, Finland, Iceland and Sweden. These eight States are also members of the Arctic Council.

² *Arctic transform. Arctic environmental governance workshop*, Cambridge, January 23, 2009, p. 1.

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Arctic States in 2011 and the Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean signed in 2010 are now important components of the contemporary legal regime of economic activity in the Arctic Ocean, represented at universal, regional and bilateral levels.

Introductory remarks relevant to universal legal basis of the Arctic Ocean

The Arctic, as noted, may «turn out to be a laboratory for a new international legal regime»³. The Ilulissat Declaration adopted by the Arctic coastal States on 28 May, 2008, provides, however, that there is «no need to develop a new comprehensive international legal regime to govern the Arctic Ocean». Assessing the contemporary policy framework for the Arctic Ocean and relevant challenges for international law, different opinions are suggested by international lawyers. Even more complicated and mosaic are political assessments of the potential growth of economic activities in the Arctic Ocean in the context of environmental security⁴.

The Ilulissat Declaration of the Arctic coastal States provides that «an extensive international legal framework applies to the Arctic Ocean». In fact, the Declaration doesn't provide for any new rules, but reflects the current state of the applicable contemporary international law, referring to the relevant rights and obligations of the Arctic coastal States.

The contemporary international law «consists of general international law and local rules»⁵. The first component – covered by the term general international law – means rules and principles that are applicable to a large number of States, primarily, on the basis of customary international law (though multilateral treaties, especially codifying conventions are also covered by this term)⁶. The second component is sometimes called regional international law⁷, but such a substitution seems to be not legally precise: while the term local rules in the context of international law obviously covers rules both of regional and bilateral level of regulation, it is difficult to assert that the term regional international law stands for bilateral international agreements and other forms of bilateral regulation.

As for the universal level of regulation of economic activities in the Arctic Ocean, the most important part of it is represented by the applicable international customary law. The latter means:

³ Rüdiger Wolfrum, *The Arctic in the context of international law. New chances and new responsibilities in the Arctic region*, «Heidelberg Journal of international law», 2009, 69/3, p. 533.

⁴ *Environmental security in the Arctic Ocean*, Cambridge, University of Cambridge, October, 13-15 2010, pp. 264.

⁵ Grigori Ivanovich Tunkin, *Mezhdunarodnoe pravo (International law)*, Moscow, 1982, p. 59 (in Russian).

⁶ Peter Malanczuk, *Malanczuk Akerhurst's modern introduction to international law*, London, Routledge, 2003, 7th ed., p. 2. The International Court of Justice (IcJ) underlines the necessity «to refer primarily to customary international law» and directs to read the text of conventions «with caution». Even «general conventions», «codifying conventions» must «be seen against the background of customary international law and interpreted in its light» (*IcJ Reports*, 1984, pp. 290-291).

⁷ *Ibidem*.

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A. continuous legal practice by the Arctic States (including their legislative and administrative practice);

B. responses thereto (tacit agreements; acquiescence; the absence of relevant persistent objector, etc.).

In sum this customary law part of global level of regulation is linked primarily with bilateral and regional continuous treaty practice of each of the Arctic States and its national legislation practice applicable to the Arctic and relevant responses thereto on the part of other States.

The other part of the universal level of regulation of economic activities in the Arctic is represented by applicable universal treaties: Geneva Maritime Conventions, 1958; United Nations Convention on the Law of the Sea (Unclos), 1982; Marine Environmental Protection Conventions; Marine Shipping and Fisheries Conventions, etc..

Of special significance for proper interstate governance in the Arctic Ocean (taking into account relevant environmental changes) are environmental treaties – such as United Nations Framework Convention on Climate Change (Climate Convention), 1992; Kyoto Protocol of the 1997 to the Climate Convention, 1992; Convention on Biological Diversity, 1992; Convention on Long-range Transboundary Air Pollution, 1979; Vienna Convention for the Protection of the Ozone Layer, 1985; Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, etc..

So, it was too categorically but not very precise to state that «the Arctic region is currently not governed by any multilateral norms»⁸. In addition to universal multilateral norms mentioned above there are a number of regional multilateral norms, starting from the Agreement on the Conservation of Polar Bears of 1973. So, there are a number of multilateral treaties applicable to the Arctic region which provide for relevant norms. Some of these multilateral conventions have entered into force for all five Arctic coastal States. Such multilateral instruments are already used by countries of the Arctic region, especially for environmental measures and regulation of shipping. As for Arctic subsoil and mineral resources it should be noted that in the factual and legal peculiarities of the Arctic global conventions historically turned out to be not acceptable for all Arctic States.

There is no reason, for example, to overestimate the role of Unclos 1982 in the legal regime of the Arctic Ocean bed, not only because one of the Arctic coastal States is a party neither to Unclos 1982 nor to the Unclos Implementation Agreement 1994.

It is true that Unclos 1982 shall prevail, as between states parties, over the Geneva Conventions on the Law of the Sea 1958 – art. 311(1) of Unclos 1982. But this rule is not applicable to the four groups of relations – that is to relations of each of the four Arctic coastal States with the fifth – the Usa (which is not a party to Unclos 1982 and to the Unclos Implementation Agreement 1994 - on the area).

⁸ *European Parliament resolution on Arctic governance*, September 30, 2008, par. F.

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As confirmed by a number of documents, Unclos provisions on the area (the ocean floor beyond the continental shelf as the common heritage of mankind) and on its boundaries are correctly not considered by the Usa as a part of customary international law. In fact, the Unclos provisions on the area are not considered by many publicists as a part of customary international law also. These provisions are neither a part of regional international legal regime of the Arctic Ocean, formed long before Unclos was adopted. Message from the President of the United States transmitting Un Convention on the Law of the Sea, with Annexes, 1982, and the Agreement Relating to the Implementation of part XI of the Convention 1994, provides, in particular:

«The objections of the United States and other industrialized States to part XI were that: it established a structure for administering the seabed mining regime that did not accord industrialized States influence in the regime commensurate with their interests; it incorporated economic principles inconsistent with free market philosophy; and its specific provisions created numerous problems from an economic and commercial policy perspective that would have impeded access by the United States and other industrialized countries to the resources of the deep seabed beyond national jurisdiction».

In this message the Us President states that the Implementation Agreement of 1994 «fundamentally changes the deep seabed mining regime of the Convention»⁹. But the Senate did not react positively and did not give its consent to Usa accession to the 1982 Convention and to ratification of the Agreement. As some Usa legislators put it:

«[...] there was no reason to have signed this badly flawed treaty in the 1980s and even less justification today. In 1980, when it was clear that the United States and its allies would not sign the treaty, Congress enacted the Deep Seabed Hard Mineral Resources Act. This statute regulates the mining activities of Us citizens in the seabed beyond the jurisdiction of any country».

And:

«The benefits to the United States by ratifying the treaty as it stands now are, at best, minimal. The United States already has taken the position that all the other parts of the law of the sea treaty represent customary international law and we act accordingly»¹⁰.

Since the Usa is not a party to Unclos – and since part XI thereof (the area) and art. 76 (new limits of the continental shelf) are not rules of customary international law – the American continental shelf is now legally unlimited extends – according to the Convention on the Continental Shelf of 1958 – «to where the depth of the superjacent waters admits of the exploitation of the natural resources» of submarine areas¹¹. So a recent announcement by the Us side that the Us continental shelf extends to more than 900 miles to the North of Alaska

⁹ 103rd Congress, 2nd Session, *Senate treaty document 103-39*, Washington, Us government printing office, 1994.

¹⁰ Committee on Merchant Marine and Fisheries, Subcommittee on Oceanography, Gulf of Mexico and the Outer Continental Shelf hearing on law of the sea treaty and reauthorization of the Deep seabed hard mineral resources act serial No 103-97, 26 April 1994, Washington, Us government printing office, 1994, p. 3.

¹¹ Art. 1 - Convention on the Continental Shelf, 1958.

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(without respecting relevant Unclos mechanisms) is in full accordance with art. 1 of the Convention on Continental Shelf, 1958 and is consequently quite legitimate.

In this context the global level of regulation of economic activities in the Arctic Ocean seems to be differentiated. Global regulation of shipping and protection of the environment in the Arctic High Seas are already in demand, but in many Arctic areas are still physically impractical. Regional *lex specialis* is needed for a transition period of melting ice cap in the central Arctic Ocean. The global level of regulation of utilization of mineral resources on the Arctic Ocean bed (provided by part XI of Unclos and Implementation Agreement, 1994) turns out to be inapplicable today; the area and the relevant global mechanism (of common heritage of mankind) in the Arctic Ocean cannot be formed in the present legal circumstances. As correctly noted, one «useful approach in developing effective governance for a rapidly changing Arctic may be [...] to draw a clear distinction between the overlying water column and the sea floor. Ecologically and legally distinct from the sea floor, the overlying water column and the sea surface of the central Arctic can remain an undisputed international area»¹². For the Arctic Sea floor regional, bilateral and national levels of regulation are more appropriate within contemporary legal and political environment.

Common interests of the Arctic and non-Arctic States in the High North

There are interests common to all interested countries and the eight Arctic States, and a huge potential area for cooperation among them – namely the Arctic High Seas. Such common interests provide new chances for international economic cooperation in the central Arctic.

In order to bridge the differences in the legal views on an international governance framework for the high seas in the central Arctic, it is advisable to reach a sort of international consensus on the legal qualification of ice and water areas in the Arctic beyond 200 miles from the baselines as high seas. Such a consensus would not seem to be difficult to reach. But it is important: a number of authors still consider such areas not to be high seas.

«Canada has occasionally expressed doubt as to the status of the Arctic Ocean as high Seas, particularly the Beaufort Sea»¹³. Some contemporary authors support the legal views of V. Lachtin, E. Korovin, Y. Dzhavad, A. Zhudro and some other Soviet authors and such views are rigid: there is «no high seas areas in the Arctic Ocean»¹⁴. But the majority of contemporary authors are of the opinion that there is a high sea area in the central Arctic beyond the 200 miles Exclusive Economic Zones (Eez), despite the fact that most part of this area is covered by ice.

¹² Paul Arthur Berkman, Oran R. Young, *Governance and environmental change in the Arctic Ocean*, «Science», April, 17 2009, vol. 324, p. 340.

¹³ Donat Pharand, «Legal status of the Arctic regions», in Hugh Kindred (ed.), *International law: chiefly as interpreted and applied in Canada*, Toronto, Edmont Montgomery Publications, 2000, 6th ed., p. 425.

¹⁴ Andrei K. Zhudro, Iusuf K. Dzhavad, *Morskoe pravo (Law of the sea)*, «Transport Moskwa», Moscow, 1974 (in Russian), p. 20ff.

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Practical legal steps might be taken to develop new opportunities for international cooperation in Arctic High Seas:

– It is advisable to make use of the best environmental standards and the environmentally and economically best technologies in regulating future economic activity in the Arctic High Seas in order to protect the Arctic environment.

– Bearing in mind the possibility that new fishery opportunities may emerge as the ice melts in the Arctic, it may be useful to outline in advance a contemporary legal framework for the management of living resources in the Arctic High Seas.

– It is time for European, Canadian and Russian businesses to cooperate in creating economically attractive, mutually beneficial and environmentally safe transnational legal mechanisms for the unimpeded shipping of goods *via* the Northern Sea Route (along the Russian Arctic coast) from Western Europe to Japan or China or other Asian States and *vice versa*, and also *via* the Northwest Passage (along the Canadian coast). Both levels of international law – public and private¹⁵ – should be instrumentalized to reap the benefits of the Arctic Ocean as a huge transport resource.

Regional, bilateral and national levels of Arctic governance

The international customary law applicable to the Arctic has been formed over the centuries through regional, bilateral and national level. Continuous legal practice of Arctic States in the Arctic region and the responses thereto (including tacit agreement or acquiescence) by other States (not only Arctic States, certainly) are the core of this customary law. In this context, important legal factors to be taken into account are: a) legislative and treaty practice of Tsarist Russia, the USSR and the Russian Federation in the Arctic; b) legislative and treaty practice of Canada in the Arctic; c) relevant legislative and treaty practice of other Arctic coastal States; and d) acquiescence or consent with such practices on behalf of the majority of States from the XV to XX centuries, and the absence of relevant persistent objectors during this period¹⁶.

According to the Convention between Great Britain and Russia, 1825, the King of the United Kingdom of Great Britain and Ireland and the Emperor of Russia agreed upon the line of demarcation between the possessions of the parties in America. Of contemporary legal interest are the provisions of the Convention on the northern part of this demarcation line – the «Meridian Line of the 141st Degree, in its prolongation as far as the Frozen Ocean» (art. III of the 1825 Convention). It was the first sector boundary line (or Meridian Line) in the Arctic ever established by a legal act. Years later another bilateral treaty used a sector

¹⁵ As correctly observed, «international law depends to a great extent on ‘voluntarist’ devices, in the form of concessions by private law methods»; Ian Brownlie, *Principles of public international law*, Oxford, Oup, 1998, 5th ed., p. 255.

¹⁶ Malcom D. Evans, *International law*, Oxford, Oup, 2006, 2nd ed., p. 115.

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line – along a meridian in the direction to the North Pole. In accordance to the Convention Ceding Alaska, 1867, «His Majesty» the Emperor of Russia has agreed to cede to the United States «all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth». Again, the northern part of the line delimitating Usa and Russia possessions in the Arctic is described in the Convention as the meridian line (sector line): «[...] the meridian which passes midway between the islands of Krusenstern [...] and the island of Ratmanoff [...] and proceeds due North, without limitation, into the same Frozen Ocean» (art. I). In spite of this rather brave terminology («without limitations»), no State protested against 1867 Convention. These sector (meridian) lines are certainly not contemporary State boundaries of Canada, Usa or Russia. Nor are they *per se* – without additional agreement of the relevant States – lines delimiting continental shelves of the three Arctic coastal States: because in 1825 and in 1867 there was no institute of continental shelf in International law. Still, the sector boundaries in the Arctic established by the 1825 Uk-Russia Convention and by the 1867 Usa-Russia Convention remain today in force as *prima facie* boundaries of national jurisdiction.

It is notable that the International Law Commission (Ilc), while considering in 1950 the concepts of continental shelf and regime of the high seas, observed:

«Dès 1916, l'idée du 'plateau continental', c'est-à-dire la prolongation sous-marine du territoire continental, apparaît de deux côtés différents, en Espagne et en Russie. En Espagne l'océanographe Odon de Buen insiste sur la nécessité d'un élargissement de la zone territoriale, de manière à y englober la totalité du plateau continental; il justifie son opinion en faisant remarquer que le plateau continental est la zone d'élection des principales espèces comestibles. Le 29 septembre de la même année le gouvernement impérial russe émet une déclaration, notifiant aux autres gouvernements, qu'il considère comme faisant partie intégrante de l'Empire "les îles Henriette, Jeanette, Bennett, Herald et Ouyedinie", qui forment avec les îles Nouvelle-Sibérie, Wrangel et autres, situées près de la côte asiatique de l'Empire, une extension vers le Nord de la plate-forme continentale de la Sibérie. Cette thèse fut reprise par le gouvernement de l'Union des républiques socialistes soviétiques dans un mémorandum du 4 Novembre 1924»¹⁷.

And indeed as noted in academic writings and confirmed by documents, the Arctic legislation of Russia can be traced back to the *Ukases* (Orders) of the Tsars of Russia of the XV–XVI centuries¹⁸, the Decree of the Russian Senate of 1821¹⁹, and the Note issued by the Russian Ministry of Foreign Affairs in 1916²⁰,

¹⁷ Un Ilc, *Documents of the second session including the report of the Commission to the General Assembly*, vol. II, 1950,

¹⁸ *Ukases (Orders) of the tsars of Russia of the XV-XVI centuries, Sbornik russkogo istoricheskogo obshestva*, St. Petersburg, Tom. 38, 1883 (in Russian), p. 112.

¹⁹ *Decree of the Russian Senate of 1821, Polnoe sobranie zakonov rossiyskoi imperii*, 1875, Tom. XXXVII (in Russian), p. 903.

²⁰ *Note issued by the Russian Ministry of Foreign Affairs in 1916*, «Pravitelstvennyi Vestnik», St. Petersburg, 1916, p. 183 (in Russian).

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to mention but a few sources²¹. The boundaries of the Russian Arctic sector were legally established in 1926 under national legislation²², thus confirming the eastern boundary defined in the Convention on the Cession of Alaska concluded between the Usa and Russia in 1867²³.

The political will of Canada as it relates to the Arctic sector can be traced back to 1907, and the sector boundaries were established according to Canadian legislation in 1925²⁴. Years later, the Ilc referred in a positive light to the Canadian legal position:

«Le sénateur canadien Poirier, “père” du système des secteurs, disait devant le Sénat d’Ottawa le 20 Janvier 1907: “Nous n’avons qu’à ouvrir notre géographie pour voir que la chose est toute simple [...] Cette méthode écarterait les difficultés et elle supprimerait les causes de différends ou de conflits entre les États intéressés. Tout État limitrophe des régions polaires étendra simplement ses possessions jusqu’au Pôle Nord”»²⁵.

According to Canadian and Russian legislation²⁶, an Arctic sector is formed by an Arctic State’s coast (bordering the Arctic Ocean) and two meridians of longitude drawn from the easternmost point and from the westernmost point of such a coast to the North Pole. Within such a triangular sector, an Arctic State may regard as its territory, all «islands and lands». The first term – islands – also includes rocks. The term lands, according to some authors, includes submerged and ice-covered lands²⁷. Other authors reject such a broad interpretation, saying that the word lands in Canadian and Russian legislation means also islands²⁸. It is asserted that within such an Arctic sector, the Arctic coastal State has jurisdiction with regard to the protection of the fragile Arctic environment²⁹. The majority of contemporary authors recognize that the limits of the Arctic sectors established

²¹ V. Durdenevskiy, *Problema pravovogo regime poliarnih oblastei (Problem of legal regime of Polar regions)*, «Vestnik Moskovskogo gosudarstvennogo universiteta», Review of Moscow State University, 1950, 7; the western boundary of the Canadian Arctic sector is formed by the Convention of 1825 concluded between Russia (for Alaska) and Great Britain (for the dominion of Canada). The text of the Convention, signed at St. Petersburg on February, 28 (16) 1825, does not say that this boundary extends to the North Pole though it may be interpreted in this way: «dans son prolongement jusqu’à la Mer Glaciale». These conventional words are stressed in the Russian translation of Hyde, *International law chiefly as interpreted and applied by the United States*, Boston, Brown and Company, 1947, 2nd ed.; Russian translation: *Mezhdunarodnoe pravo, kak ono ponimaetsja i primenjaetsja Soedinennimi Shtatami*, Moscow, Inostr. lit., 1950, pp. 60-61.

²² *Postanovlenie prezidiuma centralnogo ispolnitelnogo komiteta Sssr* (decree of the presidium of the Central Executive Committee of the Ussr) of April, 15 1926, printed in V. Durdenevskiy (ed.), *Mezhdunarodnoe pravo (izbrannie dokumenty) (International law [selected sources])* part 1, Moscow, Voennoe izdatelstvo, 1955) (in Russian) p. 210; the boundary line provided by the Convention of 1867 (n° 40) extends to the North ‘without limits’: «Remont en ligne direct, sans limitation, vers le Nord jusqu’à ce qu’elle se perde dans la Mer Glaciale» (Art. 1).

²³ Convention Ceding Alaska between Russia and the United States (signed 30 March 1867, entered into force 20 June 1867), (1867) 134 Cts 332.

²⁴ Pharand, *Op. cit.*, pp. 424-425.

²⁵ Un Ilc, *Op. cit.*, p. 107.

²⁶ An Act, respecting the Northwest Territories, 1906; The Northwest Territories Act, 1925. The latter provides for territories, islands and possessions. Russian legislation (*Postanovlenie Prezidiuma Centralnogo Ispolnitelnogo Komiteta Sssr*, 15.04.1926) use similar terms.

²⁷ G. Barsegov, *Arktika: interesi Rossii i mezhdunarodnie uslovja ih realizatsii (The Arctic: Russian interests and international environment)*, Moscow, Nauka, 2002, pp. 10-15 (in Russian).

²⁸ Anatolij Kolodkin, *Arktika («The Arctic»)*, in Kuznetsov, Tuzmuhamedov (eds.), *Mezhdunarodnoe pravo (International Law)*, Moscow, Norma, 2007, pp. 608-611 (in Russian).

²⁹ Nikolaev Bunik, *Mezhdunarodnopravovoe obosnovsnia prav Kanadi v arkticheskom sektore (International legal base of Canada’s rights in its Arctic sector)*, «Journal of International Law», 2007, 65 (in Russian), pp. 12-14.

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by Canadian and Russian laws reflect, according to the customary legal order, the boundaries of primary interests and responsibilities of the Arctic coastal States for the rule of law in the Arctic Ocean through their national legislative approaches³⁰. As noted:

«While sector claims were asserted for administrative convenience, they were also symbolic and allowed for a comparatively uncontested territorial division of parts of the Arctic»³¹.

In this context the statement of the Canadian Prime Minister seems to be in full accordance with the applicable international law:

«Canada's sovereign rights over the continental shelf in the Arctic follow from Canada's sovereignty over the adjacent islands, and again there is no dispute on this matter. No country has asserted a competing claim to the resources in question; no country has challenged Canada's claim on any other basis and non can do so under international law. Foreign companies carrying out exploration activities on the Continental Shelf in Canada's Arctic operate under permit and license and in so doing expressly recognize Canada's sovereign rights»³².

It has thus been correctly stated that:

«In the Arctic, [...] the law of the sea for the polar North has been applied through national approaches. That is, the government of each Arctic State considers, adopts and implements through its own legislative means those legal rules and norms that it feels best serve its national interests within the context of its polar seas. Thus, as concepts and principles of ocean law emerged and evolved throughout the XX century, they were adopted by each Arctic State, in its own way, to its own northern waters»³³.

As asserted in a number of academic writings there has been no documentary evidence of protests on behalf of the world community against legislative approaches adopted by Russia, Canada and Usa as manifested from the XVI to the early XX century³⁴. This has caused some later authors to consider that the relevant *opinio juris* has been formed³⁵.

The first regional international agreement of the five Arctic coastal States – Agreement on the Conservation of the Polar Bears – was signed in Oslo in 1973. The five Arctic States provided in art. I of the Agreement that «taking of polar bears shall be prohibited except as provided» in the Agreement, that is for

³⁰ Melkov (ed.), *Mezhdunarodnoe pravo (International law)*, Moskow, Riop, 2009, pp. 420-423 (in Russian).

³¹ Donald R. Rothwell, *The Polar regions and the development of international law*, Cambridge, Cambridge University Press, 1996, pp. 4-5.

³² Barry G. Buzan, Danford W. Middlemiss, «Canadian foreign policy and the exploitation of the seabed», in Barbara Johnson, Mark Zacher, *Canadian foreign policy and the law of the sea*, Vancouver, University of British Columbia Press, 1977, pp. 1-51.

³³ Donald R. Rothwell, Christopher C. Joyner, «The Polar Oceans and the law of the sea», in Alex G. Elferink and Doanld R. Rothwell (eds.), *The law of the sea and polar maritime delimitation and jurisdiction*, The Hague, Nijhoff, 2001, p. 1.

³⁴ Petr G. Palamarchuk, «Pravovoi regim morei sovetskogo sektora Arktiki» («Legal regime of seas in the Soviet sector of the Arctic»), in Ushakov (ed.), *Mezhdunarodnoe pravo i mezhdunarodny pravoporjadok (International law and international legal order)*, Moskow, Igpan, 1981 (in Russian), pp. 111-131.

³⁵ Barsegov, *Op. cit.*, pp. 24-31.

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scientific, conservation purposes, by local people using traditional methods and in other exceptional cases as indicated (art. III).

Agreement on Cooperation and Maritime Search and Rescue in the Arctic

Another important regional Arctic agreement is a recent document of the eight Arctic States – members of the Arctic Council – that is Agreement on Cooperation and Maritime Search and Rescue in the Arctic, of 2011. The objective of the Agreement is «to strengthen aeronautical and maritime search and rescue cooperation and coordination in the Arctic» (art. 2). The Agreement provides for the delimitations of the aeronautical and maritime search and rescue regions (para 1 of the Annex). It provides that such a delimitation «is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction» (art. 3).

However, it is remarkable that in the High North such delimitations or boundaries of the regions follow the meridian boundaries provided by bilateral conventions and national legislation of Canada and Russia mentioned above.

Aeronautical and maritime search and rescue operations within each of the areas are conducted on the basis of: the International Convention on Maritime Search and Rescue, 1979; the Chicago International Civil Aviation Convention, 1944; the 2011 Agreement of eight Arctic States.

Such a combination of regional and global applicable rules is an optimal legal model in the Arctic severe environmental peculiarities.

While there are delimited areas of responsibility for the parties under the Agreement, it also provides for cooperation and coordination in the field of aeronautical and maritime search and rescue in the Arctic.

For this purpose, the Agreement provides for competent authorities of the parties and agencies which are responsible for aeronautical and maritime search and rescue. The list of relevant rescue coordination centers is also provided.

So the regional level of regulation of economic activities in the Arctic Ocean is linked with bilateral and national regulation. Optimal adaptation of applicable rules of universal conventions to peculiar Arctic realities also takes place mainly at regional level. Today it is fed by the law documents created by relevant regional institutional structures such as the Arctic Council and the Barents Euro-Arctic Council and others³⁶.

Norway-Russia model of management of transboundary hydrocarbon resources

The Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 2010 has entered into force in 2011. According to the Treaty the

³⁶ *Common concern for the Arctic*, Copenhagen, Anp, 2008: 750, p. 166; Michael Byers, *Who owns the Arctic?*, Vancouver, D&M Publishers Inc., 2010, pp. 15-16, 125; *The European Union and the Arctic. Policies and actions*, Copenhagen, Anp 2008: 729, pp. 17-25.

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parties have defined geodetic lines which constitute the delimitation line between maritime areas of Norway and Russia in the Barents Sea and the Arctic Ocean (art. 1). Each party shall abide by this maritime delimitation line and shall not claim or exercise any sovereign rights or coastal State jurisdiction in maritime areas beyond this line (art. 2).

If a hydrocarbon deposits extends across the delimitation line, the parties shall apply Annex II to the Treaty – Transboundary Hydrocarbon Deposits.

The term hydrocarbon deposits is not used neither in Un Convention on the Law of the Sea of 1982 nor in Geneva Maritime Conventions of 1958. So, this term, according to art. 31 of the Vienna Convention on the Law of Treaties, 1969, shall be interpreted «as accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose». That means, in particular, that Annex II to the Norway-Russia Treaty of 2010 is not applicable to all transboundary mineral resources, for example, to hard mineral resources. Even in case when a deposit of such resources is crossed by the delimitation line provided by the Treaty.

If the existence of a hydrocarbon deposit on the continental shelf of one party is established and the other party is of the opinion that the said deposits extends to its continental shelf, the latter party may notify the former party and shall submit the data on which it bases its opinion. So, according to the Treaty, such a notification is a right, but not an obligation of a party. If however such a right is realized, than comes the obligation – to submit the relevant data.

So, according to the Treaty, of legal significance is an opinion of either party as to the existence of a transboundary hydrocarbon deposit. If such an opinion (supported by relevant data) is submitted, the parties are obliged to initiate discussions on the extent of the hydrocarbon deposit and the possibility for exploitation of the deposit as a unit. The party which initiates such discussions is under obligation to «support its opinion with evidence from geophysical data and/or geological data, including any existing drilling data». Both parties «shall make their best efforts to ensure that all relevant information is made available for the purpose of these discussions».

The contribution of Russia as to revealing such relevant information will be potentially bigger than that of Norway, bearing in mind the huge data base on Arctic mineral resources accumulated in the former Ussr. According to professor Arbatov, for example, researches of the Ussr carried out in 1980 show that Hydrocarbon province of Fedinskaya is assessed as 3 billion tons of calculated fuel³⁷. And some of the hydrocarbon deposits of the Fedinskaya province is crossed by the delimitation line provided by the Treaty.

On the other hand, Norway has a much better experience of rational and ecologically sustainable management of transboundary hydrocarbon continental shelf deposits on the basis of international agreements.

³⁷ A.A. Arbatov, *Energy statistic file* (in Russian) – Council for Research of the productive forces (Sops). Presidium of the Russian academy of sciences (unpublished paper).

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With such a balance of important contributions of the parties performance of the Treaty may be very promising and for advantage of both parties.

According to the Treaty, there are two levels of bilateral interaction in hydrocarbon resources management – that is an intergovernmental level and a private-law level.

In addition to what was mentioned above, an important intergovernmental obligation of any party is to reach the Unitization Agreement at the request of the other party in cases provided by the Treaty. Such cases include: if the hydrocarbon deposit extends to the continental shelf of each of the parties and the deposit on the continental shelf of one Party can be exploited wholly or in part from the continental shelf of the other party, or the exploitation of the hydrocarbon deposit on the continental shelf of one party would affect the possibility of exploitation of the hydrocarbon deposit on the continental shelf to other party.

Any party can exploit any hydrocarbon deposit which extends to the continental shelf of the other party only as provided for the Unitization Agreement. This is an intergovernmental instrument to be agreed upon by the parties in the future, though its essential components are already defined by the parties in Annex II to the Treaty.

Among such components are: a definition of the transboundary hydrocarbon deposit and its geographical, geophysical and geological characteristic; the obligation of the parties to grant individually all necessary authorizations required by their respective national laws for the development and operation of the transboundary hydrocarbon deposits; the obligation of the parties to establish a Joint Commission for consultations between the parties on issues pertaining to any planned or existing unitized hydrocarbon deposit; the obligation of the parties to require the relevant legal persons holding rights to explore for and exploit hydrocarbons on each respective side of the delimitation line to enter into the Joint Operating Agreement.

The latter represent a private-law legal instrument for regulation of exploitation of the transboundary hydrocarbon deposits as a unit. The parties of the Joint Operating Agreement are not Norway and Russia, but legal persons which have rights to explore and exploit hydrocarbons according to national legislation of Norway and Russia. So these may be legal persons of the third countries. Such an instrument should to be in accordance with the Unitization Agreement. A Joint Operating Agreement is to be approved by both parties in order to be legally valid.

The legal persons holding the rights to exploit a transboundary hydrocarbon deposit as a unit upon the request of the parties are to appoint unit operator «as their joint agent». Such an appointment of, and any change of, the unit operator is subject to prior approval by the parties.

Of special importance for bilateral interaction both on intergovernmental level (parties) and private-law level (legal persons) are such a component of the

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Unitization Agreement as the «obligation of the parties to consult with each other with respect to applicable health, safety and environmental measures that are required by the national laws and regulations of each party». Since applicable national laws and regulations of the parties are different and the primary object of such national regulations is the same (transboundary hydrocarbon deposit as a unit), one may forecast that such consultations may not be always easy.

Questions may also arise as to the performance of other Treaty provisions – the obligation of each party «to ensure inspection of hydrocarbon installations located on its continental shelf and hydrocarbon activities carried out thereon in relation to the exploitation of a transboundary deposit, the obligation of each party to ensure inspectors of the other party access on request to such installations, and to relevant metering systems on the continental shelf or in the territory of either party». This is an important component of the legal mechanism of management of transboundary hydrocarbon deposits in the Arctic Ocean.

Conclusions

The Arctic Ocean remains to be an object of global, regional, bilateral and national regulation by law. Historically, global level of legal regulation of economic activity in the Arctic Ocean was underdeveloped. Severe climate conditions, fragile environment and other natural peculiarities of the Arctic region were better taken into account at regional, bilateral and national levels. With possible melting of the Arctic ice cap in future, however, there are possibilities that global level of regulation will be better developed, in particular, for shipping and environmental purposes in the Arctic High Seas. New possibilities for shipping through the Arctic Ocean from Atlantic to Pacific and *vice versa* are a coming reality. Global regulation of shipping and protection of the environment in the Arctic High Seas are already in demand, but regional *lex specialis* is developing for a transition period of melting ice cap in the central Arctic Ocean.

A useful approach in developing effective governance for a changing Arctic is to draw a clear distinction between the overlying water column and the sea floor. The Arctic sea floor as areas of continental shelves of the five Arctic coastal States is to be delimited by relevant bilateral agreements. Bilateral level of regulation is also in demand for management of transboundary mineral resources. The Norway-Russia Treaty of 2010 is a good legal model for such management, though as it was shown a number of additional bilateral instruments are to be developed in line with the Treaty, especially those which will be relevant to coordinated or joint exploitation of oil and gas units, which are crossed by the delimitation line. The successful performance of the Treaty of 2010 and in particular of Annex II to the Treaty is connected with responsible cooperation both at intergovernmental and legal persons levels and with a professional legal, environmental and technical advice from both sides.

La Fondation Jean Monnet pour l'Europe

La Fondation Jean Monnet pour l'Europe a été créée en 1978 par Jean Monnet, Père de l'Europe communautaire. Il lui a donné, avec son nom, l'ensemble de ses archives, bientôt rejointes par celles de Robert Schuman et d'autres bâtisseurs. Ces archives constituent les racines historiques de l'Union européenne. Jean Monnet lui a enfin confié la mission

- d'organiser cette mémoire pour la rendre accessible aux étudiants, aux enseignants, aux chercheurs, aux responsables d'institutions publiques et d'activités privées ainsi qu'aux citoyens intéressés, afin de contribuer par la connaissance du passé, à l'éclairage du présent et à la préparation de l'avenir;
- de faire rayonner cette mémoire à l'échelle de l'ensemble de l'Europe et des continents et pays d'outre-mer. Les moyens utilisés à cette fin sont l'édition de Cahiers rouges, des colloques, des expositions, Internet et, récemment, des émissions de télévision allant des chaînes locales aux grands mass médias.



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