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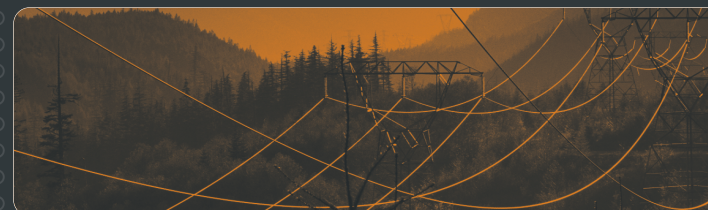
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of installations such as pipelines and in particular treatment of the risk arising from double taxation.

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To comply with its WTO commitments, the People's Republic of China promulgated the Regulation on the Administration of the Oil Product Market and the Regulation on the Administration of the Crude Oil Market at the end of 2006, which for the first time opened the door for foreign oil companies to enter the Chinese wholesale oil products market and broke the domination by the major Chinese state-owned companies of the distribution of crude oil in China.

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Alternative Approaches to the Delimitation of the Arctic Continental Shelf

DR IVAN V. BUNIK*

Timofeev, Vahrenwald & Partners LLP

LT Arctic Ocean; Continental shelf; Delimitation; Exploration; International law; Natural resources; Oil and gas production

The Arctic is a region around the North Pole. There are numerous definitions of the Arctic region. The boundary is generally considered to be north of the Arctic Circle (66° 33'N). The Arctic includes parts of Canada, Denmark (Greenland), Russia, the United States (Alaska), Iceland, Norway, Sweden and Finland. However, only five Arctic states are littoral to the Arctic Ocean (Canada, Denmark, Norway, Russia and the United States).

It is a well-known fact that the Arctic Continental Shelf contains a huge part of the world's undiscovered oil and gas resources. Unlike the Antarctic, which has a legal regime in accordance with the Antarctic Treaty of 1959, there is no international convention which provides for the Arctic regime. That is why an estimated thaw in the Arctic ice cover, combined with a search for energy supplies, is currently creating conflicts in the high north, bringing diplomatic problems not only between Arctic states but also involving non-Arctic states. For instance, a new report by Europe's top two foreign policy officials reports that the coming "scramble for resources" in the melting Arctic poses a potential political crisis for northern countries. The warning is contained in a briefing document about the expected impacts of global climate change, prepared for a summit of 27 European heads of government in Brussels this March.¹ This report, authored by the European Union's foreign policy chief, Javier Solana, and Europe's commissioner for

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1 R. Boswell, "Political crisis looms in Arctic", *National Post*, March 11, 2008, available at <http://www.nationalpost.com/news/canada/story.html?id=366098> [Accessed May 14, 2008].

external relations, Benita Ferrero-Waldner, points to "potential consequences for international stability and European security interests", as the retreat of Arctic ice makes shipping and oil and gas exploration a reality in the region. Noting the "rapid melting of the polar ice caps", the report contends that "the increased accessibility of the enormous hydrocarbon resources in the Arctic region is changing the geo-strategic dynamics of the region".

The EU report is the latest in a string of recent warnings about looming disputes over Arctic resources—including a prediction from former United States Coast Guard commander Scott Borgerson of possible armed conflict over Arctic sovereignty. Mr Borgerson outlined that conflict is possible not only between Arctic states (the United States, Canada, Russia), but also between them and non-Arctic states ("energy-hungry newcomers eyeing the north, such as China").² The European report suggested the possible need to "revisit existing rules of international law, particularly the Law of the Sea" to settle anticipated territorial disputes in the Arctic and elsewhere.

There is no doubt that five Arctic states littoral to the Arctic Ocean exercise the sovereignty over their internal waters and territorial seas and its resources. The coastal states also exercise sovereign rights over the Arctic Continental Shelf for the purpose of exploring it and exploiting its natural resources. The question concerning spatial limits of the specified rights still remains unresolved. Where are the limits of national jurisdiction of Arctic states in the Arctic Ocean?

The 1982 Convention and the Arctic Continental Shelf

Many scholars believe that the question may be solved by the provisions of the United Nations Convention on the Law of the Sea of 1982. The 1982 Convention provides that the area—seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction—has a legal regime under this Convention. The area and its resources are "the common heritage of mankind" (Art.136), and:

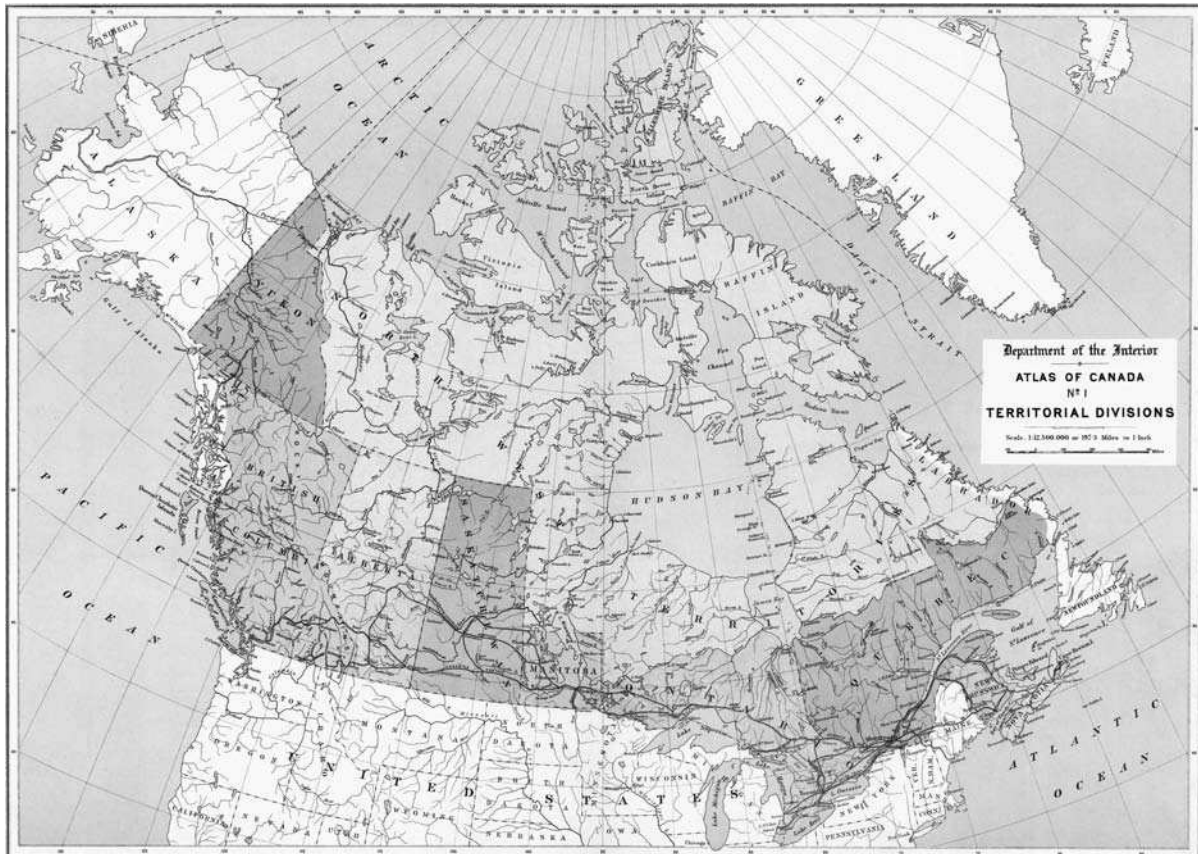
"... [N]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized" (Art.137).

In this respect, it is very important to mention that rights of Arctic states over the Continental Shelf do not derive exclusively from the 1982 Convention, as is sometimes believed. There is a point of view substantiating the fact that the regime of Arctic Continental Shelf and maritime spaces is not subject primarily to the rules of the 1982 Convention. Arctic regime originated a long time before the negotiations were held on the Third Conference on the Law of the Sea.

For instance, in 1907, Canadian Senator P. Poirier, to protect the rights of Canada in the Arctic, made

2 P. O'Neil, "Arctic debate could result in armed conflict", *National Post*, March 18, 2008, available at <http://www.nationalpost.com/news/canada/story.html?id=340975> [Accessed May 14, 2008].

Figure 1



a long speech in which he proposed the following: a country whose possession today goes up to the Arctic regions will have a right, or should have a right, or has a right, to all the lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from the western extremity north. All the lands between the two lines up to the North Pole should belong and do belong to the country whose territory abuts up there.³ Senator Poirier's idea, by that time, had relevant grounds in the provisions of international treaties—for example, the Boundary Treaty of 1825 between Great Britain and Russia, and the Convention ceding Alaska to the United States of 1865. These treaties were sometimes used as a legal basis for the sector theory, since its provisions describe the western limit as follows:

“. . . [T]he western limit . . . passes through a point in Behring's straits on the parallel of sixty-five degrees 30 minutes north latitude . . . and proceeds due north, without limitation, into the same Frozen Ocean.”⁴

The Canadian Department of the Interior had published two maps—*Explorations in Northern Canada and Adjacent Portions of Greenland and Alaska* (1904) and *Atlas of Canada No.1, Territorial Divisions* (1906)—that used the 141st and 60th meridians as the Canadian boundaries. The first map extended those boundaries up to the North Pole, the second one as far north as

necessary to include all of the northernmost islands (see fig.1).

On June 1, 1925, the Canadian Parliament passed an amendment to the Northwest Territories Act of 1875, which required scientists and explorers who intended to work in the Northwest Territories to get licences and permits. Minister of the Interior, C. Stewart, who introduced the amendment to the Parliament, claimed Canadian sovereignty up to the North Pole. On July 19, 1926, a Canadian order-in-council which established the Arctic Islands Preserve was adopted. It used the sector configuration for the northern part of the Preserve. The same configuration was laid down in another order-in-council which was adopted on May 15, 1929 that introduced new game regulations.⁵

Currently, the Arctic sector is still delineated on all official Canadian maps, which can be easily found at the Government internet site <http://atlas.nrcan.gc.ca>.

Delimitation of the Arctic in accordance with sector principles is presented in *International Law: Chiefly as Interpreted and Applied in Canada*⁶ (see fig.2). It is well known that the teachings of the most highly qualified publicists of the various nations may be considered as subsidiary means for the determination of rules of law (Statute of the International Court of Justice Art.38). The reasonable modification to the aforementioned fig.2 would be to draw boundaries according to the

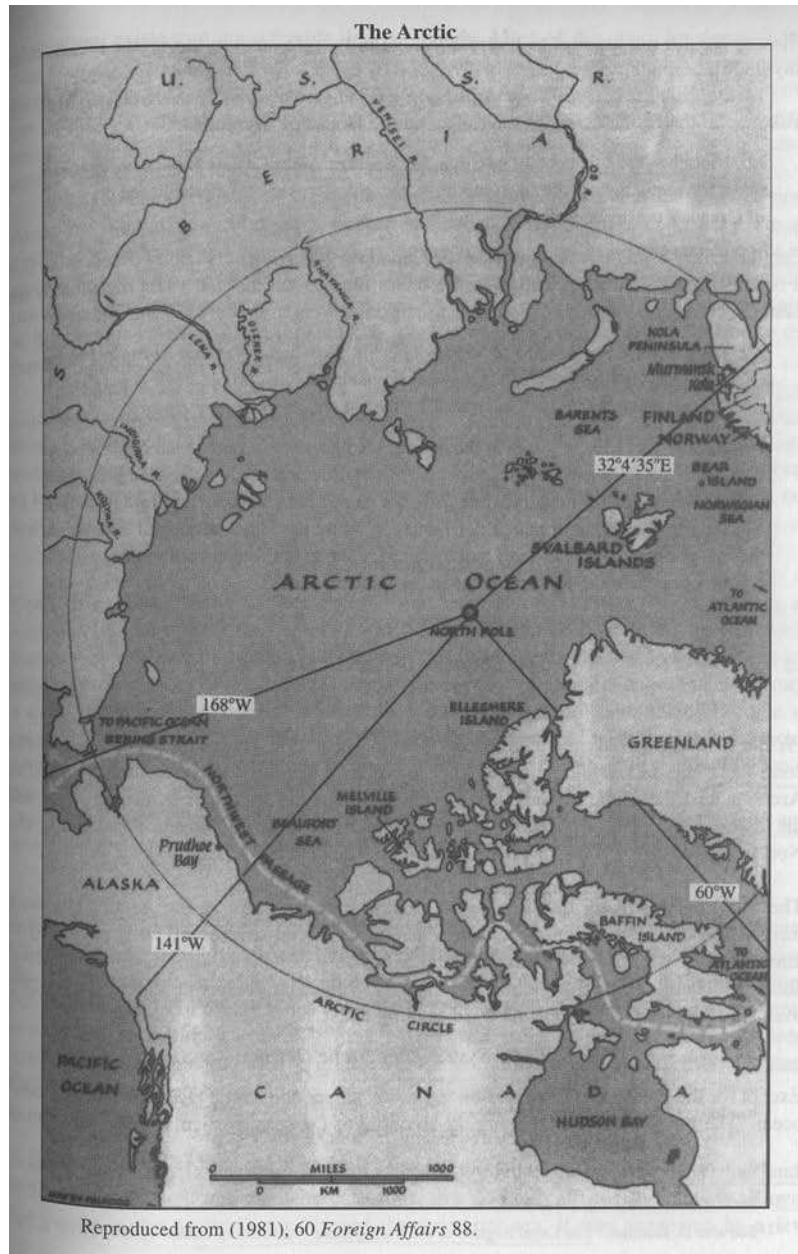
3 L. Timtchenko, "The Russian Arctic Sectoral Concept: Past And Present" (1997) 50(1) *Arctic* 29.

4 D. Pharand, *Canada's Arctic Waters in International Law* (Cambridge: University Press, 1988), p.22.

5 Timtchenko, "The Russian Arctic Sectoral Concept: Past And Present" (1997) 50(1) *Arctic* 29, 30.

6 H.M. Kindred (ed), *International Law: Chiefly as Interpreted and Applied in Canada*, 6th edn (Toronto: Routledge Cavendish, 2000), p.422.

Figure 2



agreed international boundaries (e.g. under the 1920 Treaty of Spitsbergen).

The Canadian position has relevant grounds in its international treaties (provisions concerning definition of Canadian territory); for example, Art.3 of the 1995 Agreement between the Government of Canada and the Government of the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital stipulates:

“... (a) [T]he term ‘Canada’ used in a geographical sense, means the territory of Canada, including: (i) any area beyond the territorial seas of Canada which, in accordance with international law and the laws of Canada, is an area within which Canada may exercise rights with respect to the seabed and subsoil and their natural resources; (ii) the seas and airspace above every area referred to in subparagraph (i) in respect of any activity carried on in connection with the exploration

for or the exploitation of the natural resources referred to therein.”

In the 1997 Agreement between the Government of Canada and the Government of Chile, the Canadian territory is defined as:

“... the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources.”

Let us compare it to the definition of Chilean territory:

“... the land, maritime, and air space under its sovereignty, and the exclusive economic zone and the continental shelf over which it exercises sovereign rights and jurisdiction in accordance with international law and its domestic law” (Annex 44.1).

The term “exclusive economic zone”, introduced by the 1982 Convention, underlines the applicability of this Convention to maritime spaces under Chile’s jurisdiction.

The 1993 North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America 1993, defines the Canadian and United States’ territories alike:

“. . . [W]ith respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources; with respect to the United States, . . . (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.”

For instance, if a particular state prefers the application of its domestic law and not international convention, it could claim that “domestic law” should be considered as “international custom”—the evidence of a general practice accepted as law (Statute of the International Court of Justice Art.38).

In December 2007, the Canadian Parliament published a study entitled “Canada’s Legal Claims Over Arctic Territory and Waters”. It was prepared by the Law and Government Division’s Dr Robert Dufresne. Dr Dufresne emphasised that coastal states have various sets of rights in relation to the waters that surround them. International law regulates the questions of the extent of the various maritime zones, as well as the more or less extensive sets of rights that attach to each. What is discussed here reflects, in a simplified form, what the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides.

UNCLOS rules are relevant in relation to Canada’s maritime boundaries and jurisdiction over Arctic waters. Canada was a key player in the elaboration of UNCLOS, which it ratified in 2003.

However, argued Dr Dufresne, two important caveats add layers of complexity to this picture. First, UNCLOS is not the only relevant source of law with respect to jurisdiction over maritime zones. It co-exists with international customary law, which is sometimes similar and sometimes slightly different from what UNCLOS provides. This cohabitation of treaty and customary rules is important in two regards:

- UNCLOS does not deal with every dimension of the law of the sea. When an issue is not covered in UNLCOS or when a provision specifically leaves the question regulated by general international law, other sources of international law, such as customary law, come into play.
- Treaties are binding only on their signatories. Customary international law remains important to dealings with non-signatories of UNCLOS, the United States being the only polar state in this situation (though there is ongoing talk of its ratification of UNCLOS).

Secondly, complexity arises out of the length of time during which Canada has asserted claims over the

Arctic and the fact that the rules have evolved during that period. Canada’s claims predate UNCLOS and its ratification by Canada. It is natural for claims of sovereignty over a region to rest on long-term considerations and to be asserted over a somewhat prolonged period. Given that the rules changed during that period, older Canadian claims must necessarily be looked at while keeping in mind that UNCLOS (or similar) rules did not always apply.⁷

It is important to mention that when Canada ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 2003, it attached a declaration excluding from adjudication:

“. . . disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles”.

Canadian authors argue that there is “no doubt, the latter dimension was partly aimed at disputes over Arctic waters”.⁸

In January 2002, Canada reacted officially to the Russian submission. First, it declared itself unable “to determine whether it agrees with the Russian Federation’s Arctic continental shelf submission without the provision of further supporting data”. It specified that its inability to comment at this stage should be viewed as neither rejection nor acceptance of the Russian claim. Moreover, it maintained that it considered the Russian submission and the Commission’s response thereto without prejudice to the question of the delimitation of the boundary between Canada and Russia’s continental shelves.⁹

Since Canada and Russia are states with opposite coasts (and do not have adjacent coasts), a reasonable conclusion would be that the Canadian position is not to create an Area of the Common Heritage of Mankind in the central part of the Arctic Ocean, and to delimit the Arctic Shelf directly between Arctic states, either by sector method or equidistance method (with or without taking into account special circumstances, e.g. the Canadian Arctic sector western boundary—according to Art.6 of the Geneva Convention on the Continental Shelf 1958).

The legal foundation of Canadian claims to its Arctic sector was examined by Russian lawyers. In pursuing this goal, authors focused on the legal grounds, establishing Canadian rights in its sector and thus endorsed by the Government of Canada. Several groups of such legal claims were singled out. The first group is comprised of historical titles, taking its origin in 1906–1907. They are manifested by Canada’s laws on Arctic territories, such as the

7 R. Dufresne, “Canada’s Legal Claims Over Arctic Territory and Waters” (Parliamentary Information and Research Service: Law and Government Division, December 6, 2007). Library of Parliament, <http://www.parl.gc.ca/information/library/PRBpubs/prb0739-e.htm> [Accessed May 13, 2008].

8 R. Dufresne, “Controversial Canadian Claims over Arctic Waters and Maritime Zones” (Parliamentary Information and Research Service: Law and Government Division, January 10, 2008). Library of Parliament, <http://www.parl.gc.ca/information/library/PRBpubs/prb0747-e.htm> [Accessed May 13, 2008].

9 Canada: Notification regarding the Submission made by the Russian Federation to the Commission on the Limits of the continental shelf, February 26, 2002, UN Doc. CLCS.01.2001.LOS/CAN.

Northwest Territories Act (as amended in 1925). As for the second group, it is represented by the consent of the international community concerning the special laws on navigation in Arctic waters and regulations, imposed by Canada. The third group of legal grounds consists of the claims based on international law and particularly on international treaties, substantiating Canada's rights in the Arctic under the international law. The authors, after an in-depth legal analysis, arrived at the conclusion that Canada's Arctic policy, which pursues Canada's national interests, is in full accordance with the contemporary international law.¹⁰

Dr Leonid Timtchenko, while studying the sector theory, summarised applicable doctrinal views of Soviet international lawyers, enabling him to come to the conclusion that most Soviet scholars, describing the legal status of the seas and waterways to the north of the Union of Soviet Socialist Republics (USSR), took as their point of departure the sector theory and/or justified the special rights of the Soviet Union in northern waters with additional grounds (the concept of the "closed sea", the doctrine of historic waters).¹¹

The 1926 Decree of the Presidium of the USSR Central Executive Committee "On the Proclamation of Lands and Islands Situated in the Arctic Ocean as Territory of the USSR" delineated boundaries of the Russian Arctic sector. Its text stipulated that:

"All lands and islands, both discovered and which may be discovered in the future, which do not comprise at the time of publication of the present decree the territory of any foreign state recognized by the Government of the USSR, located in the northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole between the meridian 32°04'35" E. long. from Greenwich, running along the eastern side of Vaida Bay through the triangular marker on Cape Kekurskii, and the meridian 168°49' 30" W. long. from Greenwich, bisecting the strait separating the Ratmanov and Kruzenstern Islands, of the Diomedede group in the Bering Sea, are proclaimed to be territory of the USSR" (Sobranie Zakonov SSSR, 1926, No.32, s.203).

E.A. Korovin and S.V. Sigrist interpreted the Arctic sector theory and the 1926 Decree as legal grounds for including the ice expanses and surrounding seas in the sphere of Soviet jurisdiction.¹² At the same time, V.L. Lakhtine indicated that ice-free internal polar seas, gulfs and bays that belonged under a limited coastal state jurisdiction would be subject to the right of innocent passage. While analysing the applicability of sector theory in modern conditions, Dr Timtchenko cited E. Franckx, who wrote:

10 A.N. Nikolaev and I.V. Bunik, "The Canadian Arctic Sector: the Title under International Law" (2007) 1 *Moscow Journal of International Law* 65.

11 Alex G. Oude Elferink and Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (New York: Martinus Nijhoff, 2001) pp.276–278.

12 E.A. Korovin, "SSSR i polyarnye zemli" (1926) 3 *Sovetskoe pravo* 43; S.V. Sigrist, "Sovetskoe pravo v poliarnykh prostranstvakh" (1928) 13 *Rabochii sud* 982. The legal status of ice areas was also studied in S.B. Kaye, "Territorial Sea Baselines along Ice-covered Coasts: International Practice and Limits of the Law of the Sea" in (2004) 35 *Ocean Development and International Law* 75; S.B. Boyd, "The Legal Status of the Arctic Sea Ice: A Comparative Study and a Proposal" (1984) 22 *Canadian Yearbook of International Law* 98.

"Even today, it could be argued that some doubt remains [in relation to the sector concept]. It may suffice in this respect to draw attention to the curious inclusion in the annex to issue 1 of the 1986 Soviet Notices to Mariners, entitled 'Legal Acts and Regulations of the USSR State Organs on Questions of Navigation' of a reprint of this 1926 Decree 'On the Proclamation of Lands and Islands Located on the Northern Arctic Ocean as Territory of the USSR'. The inclusion of the sector decree in a maritime law context is somewhat unusual and even inappropriate, unless it is indicative of the fact that the sector still serves a purpose in Soviet maritime law."¹³

An interesting and incontestable fact is that at the Third Conference on the Law of the Sea, negotiations were held directly between Arctic states.¹⁴ There seemed to be no agreed will of Denmark, Canada, the United States, Norway and the USSR to yield a part of their continental shelves to the Area of the Common Heritage of Mankind. It is possible to refer to publications of A. Morrison, a Canadian lawyer. During 1983–1989, Mr Morrison served as a minister (counsel) to the Permanent Mission of Canada to the United Nations. In particular, he pointed out that:

". . . [I]n looking to the Antarctic for inspiration and guidance, both from the perspective of similar physical conditions and from that of the Antarctic Treaty regime, the leaders of the Arctic countries appear to have dismissed certain aspects of that regime, having reached an unspoken agreement that the path of 'common heritage' followed in the case of the Antarctic Treaty is not one they wish to follow."¹⁵

He underlined significant differences between the legal regime of the Arctic and the legal regime of the Antarctic.

Indeed, there are no rules of the 1982 Convention applicable to the Arctic Shelf. The Vienna Convention on the Law of Treaties of 1969 provides for the significance of the supplementary means of interpretation, including the preparatory work of the Treaty and the circumstances of its conclusion, in order to confirm the meaning or determine the meaning (Art.32).

Arctic Continental Shelf and International Court of Justice

The legal nature of the Continental Shelf, as interpreted by the International Court of Justice (ICJ), was studied by Professor Alexander N. Vylegjanin. In his monograph, he cited different ICJ decisions proving that states' rights over the Continental Shelf derive primarily from customary international law, and not from specific international treaties (e.g. the 1982 Convention).¹⁶

13 E. Franckx, "Nature Protection in the Arctic: Recent Soviet Legislation" (1992) 41 *I.C.L.Q.* 366.

14 M.H. Nordquist (ed.), *United Nations Conference on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff, 1991) p.393.

15 A. Morrison, "Coming in from the Cold War: Arctic Security in the Emerging Global Climate: A View from Canada" (1992) 15 *Disarmament* 49.

16 A.N. Vylegjanin, *Decisions of the International Court of the United Nations on disputes on delimitation of sea spaces* (Moscow: Yuridicheskaya literatura, 2004), pp.49–54.

Thus, in 1969, the ICJ stated that:

“... [T]he doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea. . .” (ICJ Reports 1969, p.51)

According to the ICJ:

“... The doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is ‘exclusive’ in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent” (ICJ Reports 1969, p.22).

“The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics. . .” (ICJ Reports 1969, p.51).

“... At a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any sea-bed area possessing a particular relationship with the coastline of a neighboring State, whether or not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as ‘continental shelf’. This widening of the concept for legal purposes, evident particularly in the use of the criterion of exploitability for determining the seaward extent of shelf rights, is clearly apparent in the records of the International Law Commission and other *travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf” (ICJ Reports 1982, p.45).

“While the 200-metre limit was chosen partly as corresponding approximately to the normal outer limit of the shelf in the physical sense, the definition of the outer limit of the shelf by reference to the possibility of exploitation of the sea-bed is clearly open-ended, and emphasizes the lack of identity between the legal

concept of the continental shelf and the physical phenomenon known to geographers by that name” (ICJ Reports 1982, pp.45–46).

“... Since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial” (ICJ Reports 1985, p.35).

“... A dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State’s rights over the continental shelf are both appurtenant to and directly derived from the State’s sovereignty over the territory abutting on that continental shelf” (ICJ Reports 1978, p.36).

“... It is solely by virtue of the coastal State’s sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial régime—the territorial status—of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law” (ICJ Reports 1978, p.36).

“... Exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State’s legal title” (ICJ Reports 1982, p.61).

“... The coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law” (ICJ Reports 1982, p.61).

Alternate approaches to delimitation of the Arctic Shelf

All five Arctic states are participant to the Geneva Convention on the Continental Shelf of 1958. Article 1 of the 1958 Convention provides that the term “continental shelf” is used as referring: (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; or (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Due to the development of science and technology, the United States, being participant to the 1958 Convention, is entitled to unilaterally exploit the Arctic Continental Shelf's natural resources in areas situated far beyond 200 nautical mile (nm) limits, envisaged by Art.76 of the 1982 Convention. Adhesion by the United States to the 1982 Convention would definitely undermine the United States' national strategic interests in the Arctic region.

Russia, Canada, Norway and Denmark are also participant to the 1982 Convention. Article 76 establishes a rather cumbersome procedure to delineate spatial limits of the Continental Shelf (i.e. 200nm, 350nm). The difficulties may arise because technical terms, used in stipulated text, are more of geology than of law. Article 76 gives definition of the Continental Shelf, as well as criteria for its delineation (the Continental Shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. Information on the limits of the Continental Shelf beyond 200nm from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal state to the Commission on the Limits of the Continental Shelf set up on the basis of equitable geographical representation. The Commission shall make recommendations to coastal states on matters related to the establishment of the outer limits of their Continental Shelf. The limits of the Shelf established by a coastal state on the basis of these recommendations shall be final and binding).

The last clause of Art.76 stipulates that:

“... [T]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”

Article 83 of the 1982 Convention provides that the delimitation of the Continental Shelf between states with opposite or adjacent coasts shall be affected by agreement on the basis of international law, as referred to in Art.38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

International legal aspects of establishment rights over the Arctic Continental Shelf can be considered from two alternative points of view. According to the first approach, the legal position of the Arctic state in substantiating its rights in the Arctic is based only on the rules of the 1982 UN Convention on the Law of the Sea. According to the second approach, it is suggested to consider the cumulative impact of all applicable sources of international law and historically established rights of Arctic states, which have emerged long before the adoption of the 1982 Convention.

The Russian executive authorities chose the first alternative (based only on Art.76 of the 1982 Convention, being ratified by a Federal law and enforced by Russia in 1997). In 1997, the Government of the Russian Federation adopted Decision No.717 “On the procedure for the endorsement of the lists of geographical co-ordinates of the points determining the outer boundary lines of the continental shelf

of the Russian Federation”. For the purposes of implementing the Federal Law on the Continental Shelf of the Russian Federation, the Government of the Russian Federation provided, inter alia, that:

- the Ministry of Natural Resources and the Ministry of Defence shall provide for the conduct of the works for the collection of geodetic, scientific and technological data and other materials, providing a basis in accordance with the legislation of the Russian Federation, the generally recognised principles and norms of the international law and the international treaties of the Russian Federation, for the geographical co-ordinates of the points determining the outer boundary lines of the Continental Shelf of the Russian Federation;
- the Ministry of Natural Resources and the Ministry of Defence, upon the approval of the Federal Security Service, shall submit to the Ministry of Foreign Affairs the proposals on the lists of the geographical co-ordinates of the points determining the outer boundary lines of the Continental Shelf of the Russian Federation as established in accordance with the 1982 Convention, including the indication of the initial geodetic data (“the lists of co-ordinates”);
- the Ministry of Foreign Affairs, jointly with the Ministry of Natural Resources, shall forward the proposals of the lists of co-ordinates and the materials required for the justification thereof to the Commission on the Limits of the Continental Shelf for the purpose of obtaining recommendations on the issues of the establishment of the outer boundaries of the Continental Shelf of the Russian Federation;
- the Ministry of Natural Resources and the Ministry of Defence, upon the approval of the Ministry of Foreign Affairs and the Federal Security Service, shall submit to the Government the proposals on the lists of co-ordinates including the materials and recommendations;
- the Ministry of Defence shall publish the lists of co-ordinates in the Notices to Mariners endorsed by the Government; and
- on the basis of the lists of co-ordinations endorsed by the Government, the Ministry of Defence and the Federal Agency on Geodesy and Cartography shall issue maps including the indication of the outer limits of the Continental Shelf of the Russian Federation. The scale of the maps shall be set proceeding from the need to establish precisely these boundaries.

The Ministry of Natural Resources and the Ministry of Foreign Affairs of Russia prepared and sent to the Commission on the Limits of the Continental Shelf, a submission (dated December 20, 2001) concerning the outer limit of its Continental Shelf. The submission outlined corresponding arguments in favour of the declared legal position of Russia and its submission to the Commission on the Limits of the Continental Shelf.

When substantiating the necessity of such a measure, the authors of the submission set forth the following argument: Russia is a party to the 1982 UN Convention on the Law of the Sea and it is obliged to fulfil all obligations under this Convention, including those prescribed by Art.76. Most likely, governmental

officials decided that the submission had to be made in 2001 when the Commission was chaired by a Russian geologist.

At the round table session held in the Council of Federation of the Russian Federation (the upper house of the Russian Parliament) in 2005, the decision to make a Russian submission, and the content of that submission, were criticised by advocates of the approach based on historical titles. Thus, Professor Sergei A. Gureev criticised the fact that:

“. . . [T]he Ministry of natural resources of Russia had spent considerable financial assets for the organization and carrying out researches of a structure of the bottom of the Arctic ocean. Some results of that research has been gratuitously handed over to the UN Commission on the Limits of the continental shelf.”

He also came to the conclusion that:

“. . . [T]he approach chosen in 2001 by the then leadership of the Ministry of natural resources and the Ministry of Foreign Affairs was not legally optimum and erroneous from the point of view of strategic interests of Russia in the Arctic.”

This was not optimal, since the historically established national interests of the Russian state in the Arctic became the issue for the discretion of the newly created Commission. It was erroneous for the following reasons: first, in 2001, the Russian Federation was not obliged to make a submission to the Commission on the Limits of the Continental Shelf, nor to disclose for the Commission corresponding natural-scientific data about the bottom of the Arctic Ocean. Secondly, Russia, having made such a submission, has declared for the first time at the official international level the limitation of its rights in the Arctic sector—which limits were established in the current legislation, namely in the Decree of the Presidium of the Central Executive Committee of the USSR of April 15, 1926; in virtue of the international legal institute estoppel, our country (following the Commission’s recommendation) will not be in the position to claim any sovereign rights over the Continental Shelf in the Arctic sector of Russia in the area exceeding the area specified in the submission. Thirdly, Russia has designated for the first time its readiness to extend the jurisdiction of the International Seabed Authority over the bottom of the Arctic (this does not obviously correspond to the long-term interests of Russia). Fourthly, other Arctic states, first of all the United States (which is not a party to the 1982 Convention) and Canada (a state party to the 1982 Convention) have not limited the limits of their Continental Shelves in the Arctic according to the procedures provided by Art.76 of the 1982 Convention. It enables the United States, in particular, to declare at any time that its Continental Shelf in the Arctic considerably exceeds the area stipulated by the 1982 Convention clauses. Fifthly, according to international law, the rights of Russia to a Continental Shelf in the Arctic exist *ab initio*, *ipso facto*, and not owing to a legal document, including the 1982 Convention. This basic rule of international law is confirmed by the UN International Court of Justice, which as far back as 1969 noted that the rights of a coastal state to the Continental Shelf exist “*ipso facto* and *ab initio*”. Furthermore, it

is necessary to consider that the second largest Arctic state—Canada—continues to consistently strengthen the national legislative regulation in the Canadian Arctic sector, in implementation of the law of 1925 (with a view of, first of all, protection of the environment), and also plans to improve surveillance and control facilities in its sector.¹⁷

The criticism of the Ministry of Natural Resources and the Ministry of Foreign Affairs of Russia in connection with the actions undertaken in 2001 is also supported by the Vice-President of the scientific-advisory council of the Maritime Collegium of the Government of the Russian Federation, Professor Voytolovsky, who stated:

“More recently the Russian Federation [voluntarily] self-limited its natural resources claims in the Arctic (see newspaper “Izvestiya”, on April 17, 2002), having short-sightedly disposed of the Russian reserve. Canada, for example,—within its Arctic sector . . . is not going to give up anything to any international body. It is not clear what we have gained by such a ‘self-limitation’ in the Arctic, which was done in a hurry. But it is obviously clear what we have lost. The reason of such a hurry is not clear either.”¹⁸

Figure 3 shows the part of the Arctic Continental Shelf which is considered by Russian executive authorities to become a part of the Area of the Common Heritage of Mankind.

The Russian submission has provoked official statements from other Arctic states.

The United States indicated that the Russian submission “has major flaws as it relates to the continental shelf in the Arctic”, and has made references to scientific data, noting that:

“. . . [I]n the aforementioned scientific respects there are substantial differences between the Russian submission on the one hand and others in the relevant scientific community on the other hand, regarding key aspects of the proposed submission, based on reports in the open, [and] peer-reviewed scientific literature.”

The Government of the United States proposed “further consideration and broad debate before any recommendation is made by the Commission”.¹⁹

Norway made references to the existence of the “area under dispute”:

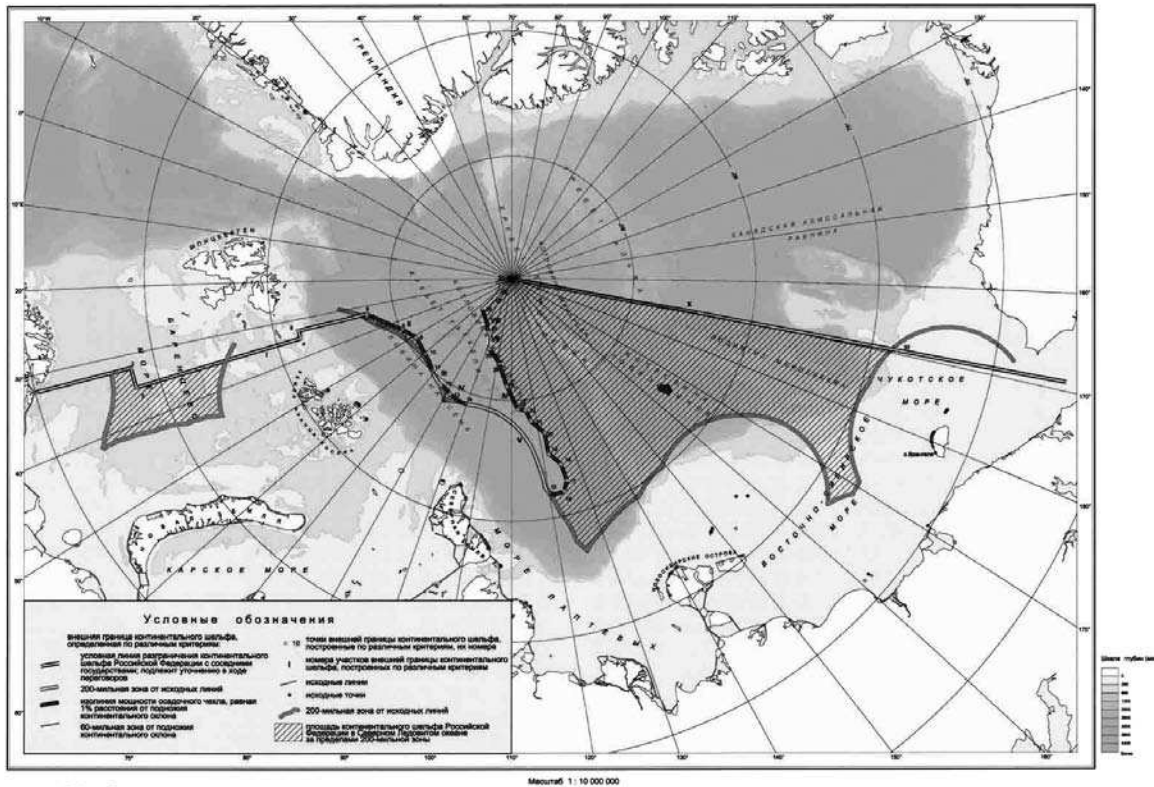
“The final location of that point has not yet been determined. This will be done following consultations between the Russian Federation and Norway . . . The unresolved delimitation issue represents, as stated above, a ‘maritime dispute’ for the purposes of rule 5 (a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf. Accordingly, the actions of the Commission shall, in accordance with UNCLOS Annex II, article 9, not

17 S.A. Gureev and I.V. Bunik, “Need for legal confirmation of exclusive rights of Russia in the Arctic” (Report to the Commission on national sea politics of the Council of Federation, 2005).

18 G.K. Voytolovsky, “Theory and practice of sea activities”, (2005) 5 *SOPS* 222.

19 United States: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf, March 18, 2002. UN Doc. CLCS.01.2001.LOS/USA.

Figure 3



Map 2

prejudice matters relating to the delimitation of the continental shelf between Norway and the Russian Federation.”²⁰

Denmark pointed out that it was:

“... not able to form an opinion on the Russian submission. A qualified assessment would require more specific data. Such absence of opinion at this moment does not imply Denmark’s agreement or acquiescence to the Russian Federation’s submission.”

Denmark stated that:

“... [I]n accordance with the United Nations Convention on the Law of the Sea, 1982, including its Annex II, and the Rules of Procedure of the Commission on the Continental Shelf, in particular Annex I thereto, the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts. Consequently, the Russian Federation’s submission and the Commission’s recommendations are without prejudice to the delimitation of the continental shelf between Denmark/Greenland and the Russian Federation.”²¹

As was mentioned earlier, Canada also referred to the fact that:

20 Norway: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf, April 18, 2002. UN Doc. CLCS.01.2001.LOS/NOR.

21 Denmark: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf, February 26, 2002. UN Doc. CLCS.01.2001.LOS/DNK.

“Canada is not in a position to determine whether it agrees with the Russian Federation’s Arctic continental shelf submission without the provision of further supporting data to analyse and that Canada’s inability to comment at this point should not be interpreted as either agreement or acquiescence by Canada to the Russian Federation’s submission.”

The Permanent Mission of Canada to the United Nations also noted that:

“... [T]he Russian Federation submission on the limits of its continental shelf beyond 200 miles to the Commission on the Limits of the Continental Shelf and any recommendations by the Commission in response are without prejudice to the question of delimitation of the continental shelf between Canada and the Russian Federation.”

The notifications of states participant to the 1982 Convention may be evidence of the Arctic states’ intention to delimit the Arctic Shelf between only themselves, using Art.83 of the 1982 Convention and applicable customary international law, and not to follow the Commission’s recommendations under Art.76 of the 1982 Convention, thus creating in the Arctic Ocean the Area of the Common Heritage of Mankind, and bringing to the dispute conflicting interests of more than 150 state participants to the 1982 Convention.

It appears that Russia’s submission leads into a legal dead end, because Russia and the Commission on the Limits of the Continental Shelf cannot create an area bilaterally—that is to say, without agreement by other Arctic states participant to the 1982 Convention and the United States, being participant to the 1958 Geneva Convention.

The question was debated during an international "round-table" discussion "Subsoil of Arctic and International Law" (held in Moscow, MGIMO (University), March 27, 2008). The conference was attended by international lawyers, including representatives of leading Russian universities (MGIMO of the MFA of Russia; Moscow State Lomonosov University; Moscow State Law Academy; Peoples' Friendship University of Russia), economists (including representatives of the energy sector industry), diplomats from Russia, Canada, Norway and the United States (initially, the official representative of Danish Embassy confirmed his arrival, but eventually did not manage to take part in the discussion).

The Chairman (Professor Vylegjanin) underlined that declarations made during round-table discussions should be considered like a speaker's personal doctrinal views unless otherwise stated.

Topics for discussion were proposed by Professors Gureev and Nikolaev, Dr Pushkareva and Dr Bunik. Speakers outlined two alternative approaches to the determination of the regime of Arctic subsoil, situated in the High North:

- these subsoils belong only to the Arctic states' continental shelves; or
- Arctic states have to yield parts of their shelves to the Area.

The speakers pointed out that there are not only rules of treaty law applicable to the status of the Arctic; there are also rules of the customary international law.

When we speak about the applicability of Art.76 of the 1982 Convention, several problems need to be addressed. The first problem is the question: why do we have to prefer the application of Art.76, providing for the delimitation of boundaries between the Arctic states and the international area, and not Art.83, which allows delimitation of boundaries only between the Arctic States?

It is evident that if the boundaries are agreed directly between the Arctic states, there may be no necessity to delimit the boundaries according to Art.76; it is important also to remember that the United States is not party to the 1982 Convention and is not obliged to delimit the boundaries between the US Continental Shelf and the International Area of the Common Heritage of Mankind.

The obvious common economic interest of the Arctic states is not to give up parts of their continental shelves in the High North to the International Seabed Authority. International law contains several legal grounds for delimitation of the Arctic Ocean only between the Arctic states.

Analysis of ICJ judgments clearly shows that general international law is mainly a customary international law. In this respect, it is not reasonable to ignore the national legislation and general practice of the Arctic states (especially Canada and Russia), including the sector principle, applied by Canada from 1904 and Russia from 1926, the existing bilateral treaties; for example the Boundary Treaty of 1825 between Great Britain and Russia, and the Convention ceding Alaska to the United States of 1865, the Canadian aforementioned bilateral agreements.

Article 83 of the 1982 Convention provides that the delimitation of the Continental Shelf between states with opposite or adjacent coasts shall be affected by agreement in order to achieve an equitable solution. Since one Arctic state (the United States) is not party to the 1982 Convention, therefore, Art.6 of the Geneva Convention on the Continental Shelf of 1958 may be applied. This article deals with the principle of equidistance, and all Arctic states are parties to this Convention. It appears that in this case, the North Pole will be part of the Danish Continental Shelf (see fig.4). Meanwhile, we should take into account that this article also refers to the special circumstances.

Indeed, the creation of a common heritage area in the Arctic Ocean does not correspond to the interests of the Arctic states. The Convention of 1982 did not provide rules for the legal regime of the Arctic Ocean, leaving this question to the discretion of five Arctic states. The Arctic has to be delimited through negotiations between the Arctic states. Another approach (enabling all states and parties to the 1982 Convention to rush to the Arctic) will lead to eventual conflicts.

Figure 5 presents the area of possible confrontation. The "Notice of Arctic Ocean Commons Area Exclusive Oil and Gas Resource Exploration, Development and Extraction Rights Claim" was already directed to all parties involved by the United Oil and Gas Consortium Management Corp in 2006. For instance, the management mailed its Notice to Russian President Vladimir Putin, proposing to "encourage Russia's oil and gas companies to participate in the Consortium", to "file the notice to various affected departments" and informing about the development of a "viable plan to help alleviate the global energy emergency".

The Notice's text proves the possibilities of possible conflicts, since the Consortium claimed itself "as a responsible oil and gas development agent of the 'common heritage of all mankind'" and, additionally, to have:

". . . the sole and exclusive exploration, development and extraction rights to the oil and gas resources of the Arctic Ocean Commons seafloor and subsurface contained within the entire Arctic Ocean Common Area beyond the United Nations defined exclusive economic Zone of the Arctic Ocean's surrounding countries . . . for a period of 150 years from the date of the notice."

Conclusion

There are many factors that may lead lawyers to the conclusion that "the polar areas are unique, thus the principles of boundary delimitation applied in non-polar regions are not applicable".²² Apparently, it is in the best interests of the Arctic states to co-operate in solving the problem with delimitation of the Arctic Shelf, so as not to allow the Arctic to become an area fraught with grave international conflict, involving many states and corporations.

²² D.R. Rothwell, *Maritime Boundaries and Resource Development: Options for the Beaufort Sea* (Canadian Inst. of Resources Law, 1988).

Figure 4



Figure 5



There is no reason to create the Area of the Common Heritage of Mankind in the central part of the Arctic Ocean. Thus, there is no need to make submissions to the Commission on the Limits of the Continental Shelf. The Arctic Shelf shall be delimited directly between the Arctic states, based on common international law, Arts 1 and 6 of the 1958 Geneva Convention and Art.83 of the 1982 Convention. In this case, Russia's early submission may be withdrawn, because the limits of the Shelf established by a coastal state shall be final and binding only after they are established by a coastal state on the basis of the Commission's recommendations (Art.76 of the 1982 Convention).

Arctic states could also take into account the contemporary practice of joint-development schemes

for trans-boundary mineral resources, although this practice is generally not favoured by energy sector companies. Arctic states should have a primary interest and responsibility for the protection of the Arctic environment. There are possible solutions (e.g. to create a regional legal regime, absorbing the best environmental world practice and taking into account the Arctic's peculiar climatic conditions, as well as to harmonise environmental legislation applicable to the High North).

In the current situation, the United States, Canada, Russia, Denmark and Norway ought to be companions and not rivals.