Developing International Law Teachings for Preventing Inter-State Disaccords in the Arctic Ocean

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According to the Statute of the International Court of Justice (ICJ), "the teachings of the most highly qualified publicists of the various nations" are applied by the Court as "subsidiary means for determination of rules of law"[1], and the word "publicists" here means "learned writers".[2] It is noted that though "the importance of legalistic writings [has] beg[u]n to decline", they still "have a useful role to play in stimulating thought about the values and well as pointing out the defects that exist within the system, and making suggestions as to the future".[3]

In this sense, the 2009 Berlin Arctic Conference has a practical significance. Preventing new inter-State disputes relevant to future economic activities in the Arctic Ocean is an *identified goal*, and that is confirmed by the contribution on "The Arctic in the Context of International Law" by Prof R. Wolfrum.[4] Additionally, this goal is certainly confirmed by a number of papers presented in many international forums, in particular the meetings of the "Arctic Transform" project[5]. Such papers seem to be useful, because basic relevant facts (including climate change in the Arctic[6]) need to be legally assessed.

The legalistic writings on the status of the Arctic and the Arctic Ocean are numerous, especially those by Russian and Canadian authors, and it would take a

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1 Art. 38 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

2 Malanczuk *Akehurst's Modern Introduction to International Law* (7th revised edn Routledge London 2003) 51.

3 Shaw *International Law* (6th edn CUP Cambridge 2008) 113.

4 See article by R. Wolfrum (in this volume).

5 See e.g. Bausch et al. 'Background Paper: Environmental Governance in the Marine Arctic' <http://arctic-transform.org/download/EnvGovBP.pdf> (30 June 2009); Arctic Transform 'Environmental Governance: Summary' <http://arctic-transform.org/download/EnvGovBP.pdf> (30 June 2009).

6 See e.g. Strategichesky prognoz izmeneniy klimata Rossiyskoy Federatsii na period do 2010-2015 gg. i ix vlijanija na otrasli economiki Rossii. Moskwa. Rosgidromet. 2005 (in Russian), 23-25, for the English version, see Federal Service for Hydrometeorology and Environmental Monitoring (Roshydromet) 'Strategic Prediction for the Period of Up to 2010-2015 of Climate Change Expected in Russia and its Impact on Sectors of the Russian National Economy' (2005) 20-22 <http://www.meteorf.ru/en_default.aspx> (30 June 2009).

considerable time just to list the relevant academic works.[7] Instead, this paper examines some thought-provoking teachings of qualified specialists in international law, including their publications specifically devoted to the Arctic Ocean regime, and provides relevant suggestions and observations as to the contemporary legal environment in the Arctic.

1. The *first suggestion* is that one should not *oversimplify* the international law applicable to the Arctic Ocean: it is by no means expressed only in the 1982 UN Convention on the Law of the Sea (UNCLOS).[8]

The Ilulissat Declaration of 28 May 2008[9], adopted by the five Arctic coastal States[10], provides that "an extensive international legal framework applies to the Arctic Ocean".[11] The Declaration does not specifically mention UNCLOS though it is certainly one of the components of that legal framework. The US Presidential Directive "Arctic Region Policy" of 9 January 2009 likewise does not specifically refer to UNCLOS: instead the Directive is to be implemented in a manner consistent, *inter alia*, "with customary international law as recognized by the United States…". [12] The "Basics of the State Policy of the Russian Federation in the Arctic for the Period to 2020 and a Further Perspective" adopted by the President of Russia on 18 September 2008 (promulgated on 30 March 2009 in the "Rossiyskaya Gazetta")[13] also makes reference to "international law" in general and not specifically to UNCLOS. In contrast to these documents, the Communication from the Commission to the European Parliament and the Council "The European Union

[7] Such lists have been published; see e.g. Efendiev 'Arcticheskie vodi' ('Arctic Waters') in Lazarev (ed.) *Sovremennoe mezhdunarodnoe morskoe pravo* (*Contemporary International Law of the Sea)* (Nauka Moscow (1974) (in Russian) 184-90; Timchenko 'Quo Vadis, Arcticum? The International Law Regime of the Arctic and Trends in its Development' (State University Press "Osnova" Kharkiv 1996) 76; Shaw *International Law* (6th edn CUP Cambridge 2008) 534; Kovalev/Zimnenko (eds.) *Mezhdunarodnoe pravo i natsionalnie interesi Rossii (International Law and National Interests of Russia)* (Vostok-Zapad Moscow 2007) (in Russian).

[8] United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

[9] Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27-29 May 2008 <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (16 June 2009).

[10] 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.

[11] Ilulissat Declaration (note 9) para. 3.

[12] United States National Security Presidential Directive and Homeland Security Presidential Directive NSPD 66/HSPD 25 'Arctic Region Policy' (9 January 2009) <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm> (17 June 2009) ch I.B.

[13] 'Osnovi gosudarstvennoi politiki Rossiyskoi Federatsii v Arktike na period do 2020 goda i dalneishuju perspektivu' ('The Basics of the State Policy of the Russian Federation in the Arctic for the Period to 2020 and a Further Perspective') Utverzhdeni Presidentom Rossiyskoi Federatsii (adopted by the President of Russia) (18 September 2008) promulgated on 30 March 2009 in the "Rossiyskaya Gazetta".

and the Arctic Region" seems to emphasize the applicability of UNCLOS to the Arctic: according to this Communication, UNCLOS provisions "provide the basis for the settlement of disputes including delimitation".[14] It also states that "the EU should work to uphold the further development of a cooperative Arctic governance system based on the UNCLOS"[15] and proposes protecting "marine biodiversity in areas beyond national jurisdiction, including through the pursuit of an UNCLOS Implementing Agreement",[16] etc.

The most obvious alternative definitions of this extensive legal framework applicable to the Arctic Ocean are thus as follows:

a) It is comprised mainly of UNCLOS (1982), including Part XI thereof on the "Area" (the seabed beyond the limits of national jurisdiction) and the 1994 Agreement on Implementation of this Part[17]. Or, alternatively,

b) The legal status of the Arctic Ocean was settled long before UNCLOS was adopted in 1982, mainly on the basis of the national legislative approaches of the five Arctic coastal States and general consent to these national practices. That is, activities in the Arctic Ocean were governed before 1982 and are governed after UNCLOS's entry into force mainly by customary international law.

An extremely formalistic attempt to ignore these different assessments can be made by saying that UNCLOS as a whole is a part of customary international law – but this is not accurate, as will be shown below.

According to the paper provided by the Canadian Parliamentary Information and Research Service, "UNCLOS is not the only relevant source of law with respect to jurisdiction over maritime zones. It coexists with international customary law, which is sometimes similar and sometimes slightly different from what UNCLOS provides … Canada has asserted claims over the Arctic … The rules have evolved … 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".[18]

It is also noted that at the Third UN Conference on the Law of the Sea (1973-1982) it was the political will of some Arctic States, namely Canada, the USA and the USSR, not to apply UNCLOS (with its Part XI about a "common heritage" area) to the Arctic Ocean. As a Canadian international law specialist points out: "In looking to the Antarctic for inspiration and guidance, both from the perspective of similar physical conditions and from that of the Antarctic Treaty regime, leaders of the Arctic countries appear to have dismissed certain aspects of

[14] Commission of the European Communities 'Communication from the Commission to the European Parliament and the Council – the European Union and the Arctic Region' COM (2008) 763 final (20 November 2008) ch 4.

[15] Ibid.

[16] Ibid.

[17] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (done 28 July 1994, entered into force 28 July 1996) 1836 UNTS 41.

[18] Dufresne 'Canada's Legal Claims Over Arctic Territory and Waters' (6 December 2007) <http://www.parl.gc.ca/information/library/PRBpubs/prb0739-e.pdf> (30 June 2009).

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".[19]. And this point of view is shared by a number of Russian academic writers[20].

That does not mean that States which are parties to UNCLOS, including Russia and Canada, are not free to extend UNCLOS rules to ice-covered areas or the subice seabed of the Arctic Ocean. As the International Court of Justice (ICJ) put it, there is nothing "to prevent the parties to a convention … from extending the rules contained in that convention to aspects which it is less likely that customary international law might govern. In that event, however, the text of the convention must be read with caution … [o]nly 'general conventions', including, *inter alia*, the conventions codifying the law of the sea to which the two States are parties, can be considered … Such conventions must, moreover, be seen against the background of customary international law and interpreted in its light"[21].The legal regime of the Arctic and of the Arctic Ocean is thus not covered only by the international law of the sea[22] and certainly not only by UNCLOS.

2. The *second suggestion* is that one should not *underestimate the international customary law* applicable to the Arctic as formed before and after the adoption of UNCLOS in 1982.

Art. 38 ICJ Statute lists customary law as one of the main sources of international law. It is an authentic expression of the needs and values of the community of States; it is "a dynamic source of law in the light of the nature of the international system"; the existence of customary rules "can be deduced from the practice

[19] Morrison 'Coming In from the Cold War: Arctic Security in the Emerging Global Climate: A View from Canada' Ocean Development and International Law 23 (1992) 49; see also Perelet/Kukushkina/Travnikov 'Problemi obespechenia ekologicheskoy bezopasnosti i upravlenija v Arktike (Economicheskie i pravovie aspekti)' ('Problems of Ensuring Ecological Security and Management in Arctic [Economic and Legal Aspects]') Rossiyski Ezhegodnik Mezhdunarodnogo prava (Russian Yearbook of International Law) (2000) 153-69.

[20] Kovalev/Zimnenko (note 7) 54; Granberg 'Doclad Soveta po izucheniu proizvoditelnih sil' ('Report of the Council for Research of Productive Forces'), Rossiyskaja Academia Nauk (Russian Academy of Sciences), 30 nojabria 2007 (30 November 2007) (in Russian), Moscow, SOPS 75-76. Pushkareva/Skuratova 'International Discussion (Round Table) "Arctic Subsoil and International Law" held at the MGIMO-University MFA Russia' Moscow Journal of International Law 71 (2008) 283-86.

[21] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) [1984] ICJ Rep 246, 290-91.

[22] In most Russian textbooks on international law, see e.g. Kovalev/Chernichenko (eds.) *Mezhdunarodnoe pravo* (Omega-1 Moskwa 2006); Kolosov/Krivchikova (eds.) *Mezhdunarodnoe pravo* (Mezhdunarodnie otnoshenia Moskwa 2005) Ignatenko/Tiunov (eds.) Mezhdunarodnoe pravo (Norma Moskwa 2006); Shestakov (ed.) Mezhdunarodnoe pravo (Uridicheskaja literatura Moskwa 2005) etc., a chapter devoted to the Arctic is not in the part on international law of the sea. The same approach is reflected, for example, in Shaw *International Law* (4th edn CUP Cambridge 1997) 363-64; Edward D Brown seems to share the same approach: there is no single document on the Arctic in this volume, see Brown *International Law of the Sea* vol. 2 *Documents, Cases, and Tables* (Dartmouth Aldershot 1994).

and behavior of States"[23], the latter element is to demonstrate that such a practice is accepted by States as law (*opinio juris* of States).[24]

The legal regime of the Arctic Ocean was never and is not now a static body of customary rules. The applicable international customary law has been formed over the centuries through continuous legal acts by Arctic coastal States and the responses thereto (including tacit agreement or acquiescence) by other States (not only Arctic States). 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; and c) acquiescence or consent with such practices on behalf of the majority of States from the 15th to 20th centuries, and the absence of relevant "persistent objectors" during this period.[25]

It is with the advent of global warming and the "ecologization" of legal thinking that the Arctic Ocean has been widely recognized by many non-Arctic States as a vital world ecosystem and as a major potential additional resource space. As for the Arctic States, some of them have long expressed their primary interest in, and responsibility for, such spaces and resources, as asserted in academic writings on international law.[26]

The two Arctic States with the longest coastline in the Arctic Ocean are Russia and Canada. And in fact they may refer to a number of findings of the International Court of Justice on interpretation of international customary law as applicable to the continental shelf:

- "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".[27]

- "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal

[23] Shaw *International Law* (6th edn CUP Cambridge 2008) 73.

[24] Malanczuk *Akehurst's Modern Introduction to International Law* (7th revised edn Routledge London 2003) 39.

[25] Evans *International Law* (2nd edn OUP Oxford 2006) 115.

[26] Kulebjakin 'Pravovoi regim Arktiki' ('Legal Regime of the Arctic') in: Blishenko (ed.) *Mezhdunarodnoe morskoe pravo* (*International Law of the Sea)* (Universitet Druzhba Narodov Moskwa 1988) (in Russian) 135 ff.; the contribution of the Soviet Union to developing Arctic technologies was recognized even in US law: "[M]ost Arctic-rim countries, particularly the Soviet Union, possess Arctic technologies far more advanced than those currently available in the United States" Arctic Research and Policy Act of 1984, Pub L No 98-373, 98 Statutes at Large 1241 (1984) section 102(a) (10).

[27] North Sea Continental Shelf Cases (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*) [1969] ICJ Rep 3, 22.

State already has dominion, – in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea".[28]

- "There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline".[29]

Canada and Russia may also rely on historic title in international law as applicable to the Arctic. According to the Canadian Ocean Act (1996), Canadian "baselines are the outer limits of any area, other than the territorial sea of Canada, over which Canada has a historical or other title of sovereignty".[30] As was correctly observed at this conference, the concept of historical titles has been considered by the International Law Commission. The concept of historical title is reflected both in the Geneva Conventions of 1958[31] and in UNCLOS.[32]

Some authors (L. Boucher, G. Smedal, V. Durdenevsky) underline a link between the concept of historical title and the concept of "Arctic polar sectors".[33] 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 espè-

[28] Ibid. 31.

[29] Ibid. 49-50.

[30] Oceans Act, SC (1996) ch 31 (Canada) Section 5 (3) "Baselines where historic title".

[31] Convention on the Territorial Sea and the Contiguous Zone (done 29 April 1958, entered into force on 10 September 1964) 516 UNTS 205; Convention on the Continental Shelf (done 29 April 1958, entered into force 10 June 1964) 499 UNTS 311; Convention on the High Seas (done 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Convention on Fishing and Conservation of the Living Resources of the High Seas (done 29 April 1958, entered into force 20 March 1966) 559 UNTS 285; Shukairy *Territorial and Historical Waters in International Law* (Research Center, Palestine Liberation Organization Beirut 1967); Nechaev 'Status istoricheskih vod (Doktrina i praktika)' ('Status of Historical Waters [Teachings of International Law Specialists and Practice of States]') in: Lazarev (ed.) *Okean, tehnika, pravo* (*Ocean, Technology, Law)* (Uridicheskaja Literatura Moskwa 1972) (in Russian).

[32] Savaskov 'Istoricheskie vodi v mezhdunarodnom prave' ('Historical Waters in International Law') in: Zhudro (ed.) *Morskoe pravo i mezhdunarodnoe torgovoe moreplavanie* (*Law of the Sea and International Shipping)* (Transport Moskwa 1987) (in Russian) 29-42.

[33] Efendiev 'Arcticheskie vodi' ('Arctic Waters') (note 7) 185-88; according to Oppenheim "Lindley … sees no reason why the North and South Polar regions should not be susceptible of acquisition by occupation … Lakhtine … regards it as a rule of positive law that they belong in principle to the Polar State within whose 'region of attraction' they are situated. States asserting sovereignty in Arctic … by reference to the sector principle claim territories defined by the coast-line and the meridians drawn from the extreme points of that line." Oppenheim *International Law* vol. 1 *The Law of Peace* (Lauterpacht ed., 6th edn Longmans, Green and Co London 1947) 508.

ces 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 Ouyedinenie´, 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".[34]

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 15th–16th centuries,[35] the decree of the Russian Senate of 1821,[36] and the Note issued by the Russian Ministry of Foreign Affairs in 1916,[37] to mention but a few sources.[38] The boundaries of the Russian Arctic sector were legally established in 1926 under national legislation[39], the eastern boundary was defined even earlier: in the Convention on the Cession of Alaska concluded between the USA and Russia in 1867.[40]

The political will of Canada as it relates to the Arctic sector can be traced back to 1907, and the sector boundaries were legally established in 1925.[41] 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

[34] UN ILC 'Documents of the Second Session Including the Report of the Commission to the General Assembly' (1950) vol. II UNYBILC 49.

[35] Ukases (Orders) of the Tsars of Russia of the 15th-16th centuries (Sbornik Russkogo istoricheskogo obshestva. Tom 38. St. Petersburg, 1883 (in Russian) 112.

[36] Decree of the Russian Senate of 1821 (Polnoe sobranie zakonov Rossiyskoi Imperii, 1875, Tom XXXVII) (in Russian) 903.

[37] Note issued by the Russian Ministry of Foreign Affairs in 1916 (Pravitelstvenniy Vestnik. St. Petersburg 1916) (in Russian) 183.

[38] Durdenevskiy 'Problema pravovogo regime poliarnih oblastei' ('Problem of Legal Regime of Polar Regions') Vestnik Moskovskogo gosudarstvennogo universiteta (Review of Moscow State University) 7 (1950); 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) (Convention between Great Britain and Russia, [signed at St. Petersburgh, 28 (16) February 1825]). The text of the convention 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 (*2nd edn Little, Brown and Company Boston 1947); Russian translation: *Mezhdunarodnoe pravo, kak ono ponimaetsja i primeniaetsja Soedinennimi Shtatami* (Inostr. lit. Moscow 1950) 60-61.

[39] Postanovlenie Prezidiuma Centralnogo Ispolnitelnogo Komiteta SSSR (Decree of the Presidium of the Central Executive Committee of the USSR) of 15 April 1926, printed in Durdenevskiy (ed.) Mezhdunarodnoe pravo (izbrannie dokumenti) (*International Law [selected sources])* part 1 (Voennoe izdatelstvo Moskwa 1955) (in Russian) 210; the boundary line provided by the Convention of 1867 (note 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).

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

[41] Pharand 'Legal Status of the Arctic Regions' in: Kindred (ed.) *International Law: Chiefly as Interpreted and Applied in Canada* (6th edn Edmont Montgomery Publications Toronto 2000) 424-25.

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 Etats intéressés. Tout Etat limitrophe des régions polaires étendra simplement ses possessions jusqu'au pôle nord'".[42]

According to Canadian and Russian legislation,[43] such a 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 lands.[44] Other authors reject such a broad interpretation, saying that the word "lands" in Canadian and Russian legislation means "islands"[45]. It is asserted that within such an Arctic sector, the Arctic coastal State has jurisdiction with regard to the protection of the fragile Arctic environment[46]. The majority of contemporary authors recognize that the limits of the Arctic sectors established by Canadian and Russian laws are not State boundaries; as is asserted by some authors, but rather 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 approaches[47]. It has thus been correctly stated by prominent authors that:

> "In the Arctic, no true regional regime has been developed notwithstanding the common problems confronting Arctic States. Instead, 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 20th century, they were adopted by each Arctic State, in its own way, to its own northern waters".[48]

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[42] UN ILC 'Documents of the Second Session Including the Report of the Commission to the General Assembly' (note 34) 107.

[43] According to Canadian (The Northwest Game Act, 1906; The Northwest Territories Act, 1925) and Russian legislation (Postanovlenie Prezidiuma Centralnogo Ispolnitelnogo Komiteta SSSR ot 15 aprelia 1926), such a 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.

[44] Barsegov *Arktika: interesi Rossii i mezhdunarodnie uslovia ih realizatsii* (*The Arctic: Russian Interests and International Environment)* (Nauka Moskwa 2002) (in Russian) 10-15.

[45] Kolodkin 'Arktika' ('The Arctic') in: Kuznetsov/Tuzmuhamedov (eds.) *Mezhdunarodnoe pravo* (*International Law*) (Norma Moskwa 2007) (in Russian) 608-11.

[46] Nikolaev/Bunik 'Mezhdunarodnopravovie obosnovsnia prav Kanadi v arkticheskom sektore' ('International Legal Base of Canada's Rights in its Arctic Sector') Moscow Journal of International Law 65 (2007) (in Russian) 12-14.

[47] Melkov (ed.) *Mezhdunarodnoe pravo* (*International Law)* (RIOR Moskwa 2009) (in Russian) 420-23.

[48] Rothwell/Joyner 'The Polar Oceans and the Law of the Sea' in: Elferink/Rothwell (eds.) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Nijhoff The Hague 2001) 1.

It is asserted in a number of academic writings that there has been no documentary evidence of protests on behalf of the world community against such legislative approaches adopted by Russia and Canada, as manifested from the 16th to the early 20th century.[49] This has caused some later authors to consider that the relevant *opinio juris* has been formed.[50] They also refer to the long practice of observance by foreign States of Russian legislation on the Sevmorput (Northern Sea Route) and Canadian legislation on the Northwest Passage.[51]

Interesting enough – though, partly disputable – are the observations of the ILC on the "analogy" between the sector theory and the notion of continental shelf: "Un autre point de contact paraît exister entre la théorie du secteur et celle du PC (plateau continental). Quels sont les objets des droits de l'Etat d'attraction: s'appliquent-ils non seulement aux terres et aux glaces fixes, mais aussi à la mer? On voit l'analogie de la situation à ce point de vue avec celle du PC".[52]

Thus, as is asserted in the legal literature, the tacit agreement or acquiescence (or at least the absence of persistent protests) in the 16th–20th centuries on the part of the majority of the world States to Russian and Canadian Arctic policy and legislation and relevant legal practice was a reality. Since the 20th century such legislation – at least in its environmental component – has been applied and is applicable today to the environmental protection of the continental shelf areas of the two countries in the Arctic Ocean[53]. However, it cannot be denied that it has been possible to identify one "persistent objector" to such legislation and legal practice – at least since the disintegration of the USSR in 1991.[54]

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[49] Palamarchuk 'Pravovoi regim morei sovetskogo sektora Arktiki' ('Legal Regime of Seas in the Soviet Sector of the Arctic') in: Ushakov (ed.) *Mezhdunarodnoe pravo i mezhdunarodniy pravoporjadok* (*International Law and International Legal Order)* (IGPAN Moskwa 1981) (in Russian) 111-31.

[50] Barsegov (note 44) 24-31.

[51] Kovalev/Zimnenko (note 7) 185; see also Institut Arktiki i Antarktiki *75 let s nachala izuchenia i osvoenia Severnogo Morskogo Puti (75 Years Since the Start of Studying and Developing the Northern Sea Route)* (Institut Arktiki i Antarktiki St. Petersburg 2008) 27 ff.

[52] UN ILC 'Documents of the Second Session Including the Report of the Commission to the General Assembly' (note 34) 107.

[53] Nikolaev/Bunik (note 46) 4-32; the authors write in this context about Arctic "regional custom"; as is noted, with reference to the Asylum Case (*Asylum Case [Colombia/Peru] [1950]* ICJ Rep 266, 266-77), "a particular custom, of a regional or even bilateral nature, may exist between some States, thus constituting *lex specialis vis-à-vis* other rules of general international law … particular customs are opposable to third States particularly if the regional or bilateral practice was not objected to and did not affect the enjoyment of rights of third States under general customary law"; Rama-Montaldo 'Universalism and Particularisms in the Creation Process of International Law' in: Yee (ed.) *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Nijhoff Leiden 2009) 146.

[54] See e.g. United States Department of State, Office of Ocean Affairs, Bureau of Oceans and International Environmental Scientific Affairs 'Limits in the Sea No. 112: United States Responses to Excessive National Maritime Claims' (9 March 1992) <http://www.state.gov/documents/organization/58381.pdf> (1 July 2009); according to the Russian Federal Act on Internal Waters, the Territorial Sea and Contiguous Zone (17 July 1998), see <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf> (15 July 2009), the Northern Sea Route is "a na-

3. The *third suggestion* is that there are interests common to the EU 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 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."[55] 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"[56]. 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 EEZ zones, despite the fact that this area is covered by ice.

What 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, American 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 pri-

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tional unified transport line of communication" of Russia (Art. 14). According to Canada the Northwest Passage is not a strait used for international navigation; Canadian Minister Allan MacEachen noted: "As Canada's North West Passage is not used for international navigation and since Arctic Waters are considered by Canada as being international waters, the regime of transit passage does not apply to the Arctic" (Pharand *Canada's Waters in International Law* [CUP Cambridge 1988] 215); but the US Presidential Directive "Arctic Region Policy" of 9 January 2009 (note 12) provides for a different legal qualification: "The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation" (ch III.B.5). At stake here is a regulatory regime of transit. From an economic point of view Russia and Canada are interested in increasing the number of foreign ships passing through these routes. But for environmental reasons they prefer to rely on national environmental legislation and enforcement.

[55] Pharand (note 41) 425.

[56] Zhudro/Dzhavad *Morskoe pravo* (*Law of the Sea)* (Transport Moskwa 1974) (in Russian) 20 ff.

vate[57] – should be instrumentalized to reap the benefits of the Arctic Ocean as a huge transport resource.

4. The *fourth suggestion* is that legal positions as expressed by different specialists in international law demonstrate different assessments of the status of the Arctic Ocean bed beyond 200 miles from the baselines. It is really "a hard case".[58]

It is noted, for example, that it is in the economic interest of the USA for the four other Arctic States to confine their continental shelves by limits established according to the 1982 UN Convention on the Law of the Sea (by 200, 350 miles or otherwise).[59] 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 not considered by the US as a part of customary international law.[60] 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 "unlimited" – according to one of the rules of the Convention on the Continental Shelf of 1958, "to where the depth of the superjacent waters admits of the exploitation of the natural resources"[61] of submarine areas. It is thus not surprising that the recent announcement by the US side that the US continental shelf extends to 600 miles to

[57] As correctly observed, "international law depends to a great extent on 'voluntarist' devices, in the form of concessions by private law methods …". Brownlie *Principles of Public International Law* (5th edn OUP Oxford 1998) 255.

[58] Young *Creating Regimes: Arctic Accords and International Governance* (Cornell University Press Ithaca 1998) 29.

[59] Kovalev/Zimnenko (note 7) 65-69.

[60] 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, 103rd Congress, 2nd Session, Senate Treaty Document 103-39 (US Government Printing Office Washington 1994); the message 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". But the Senate did not react positively and did not give its consent to US accession to the Convention and to ratification of the Agreement. As some US 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 U.S. 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" 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) (US Government Printing Office Washington 1994) 3.

[61] Art. 1 Convention on the Continental Shelf (note 31).

the north of Alaska (without respecting relevant UNCLOS mechanisms) did not give rise to criticism in the legal literature.

It is interesting in this context to consider the Notice, addressed on 9 May 2006, to the President of Russia by a US company – United Oil and Gas Consortium Management Corp.[62] The Notice was also addressed to the UN General Assembly, the UN International Seabed Authority, to all "Governments of the countries surrounding the Arctic Ocean" and "to the Peoples of the World". According to this paper, the US company "hereby claims as a responsible oil and gas development agent «the common heritage of all mankind» and additionally … 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 entire Arctic Ocean Common area beyond the United Nations defined exclusive economic zone (EEZ) of the Arctic Ocean's surrounding countries … for a period of 150 years from the date of this notice".

In spite of this attempt to establish rights on the Arctic seabed on the basis of the Convention on Continental Shelf of 1958 and the US national deep-sea mineral legislation of 1980, two out of the four Arctic coastal States – parties to UNCLOS (Norway and Russia) – are continuing procedures to limit their continental shelf in the Arctic Ocean according to the 1982 UNCLOS provisions (Art. 76), thus inviting other Arctic coastal States to form the Area in the Arctic Ocean. However, as noted, according to customary international law, Canada and Denmark (as well as any other Arctic coastal States) are not obliged to do so.[63] Moreover, the Area in the Arctic Ocean can be delineated only by all five Arctic coastal States. But one of them – the USA – is not a party to UNCLOS. And this fifth Arctic coastal State cannot delineate the limit between its continental shelf and the Area according to Art. 76 without being a party to UNCLOS.

There are a number of publications in Russia suggesting that, for the Arctic Ocean, emphasis should be placed not on Art. 76 UNCLOS (delineation between the continental shelf and the Area), but on Art. 83 (delimitation of the continental shelf between States with opposite or adjacent coasts) and customary international law. They argue that if the seabed of the Arctic Ocean is delimited between the five Arctic coastal States, legal stability will be achieved more easily in the Arctic and the environmental interests of the world community will be better taken into account.[64]

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[62] Notice (addressed on 9 May 2006, to the President of Russia by United Oil and Gas Consortium Management Corp) on file with the author.

[63] Voitolovsky 'Arktika: nereshennie problemi ('Arctic: Unresolved Problems') Morskoy Sbornik 3 (2009) (in Russian) 43-55; the author doesn't consider in his article the relationship between Arts. 76 and 83 UNCLOS.

[64] Gureev/Bunik 'O neobhodimosti podtverzhdenia i pravovogo zakreplenia iskluchitelnih prav Rossii v Arctike' ('Legal Confirmation of Russian Rights in the Arctic') in: Popov (ed.) *Morskaja deiatelnost Rossiyskoi Federatsii* (*Marine activity of the Russian Federation)* (Sovet Federatsii Moskwa 2005) 162-63; different methods of delimitation are suggested: equidistant lines, sector lines, or a combination of the two. It is interesting that the "persistent objector" to a sectoral delimitation of the Arctic seabed – the USA – is the only Arctic State whose Arctic sector (to the north of Alaska) is formed

To sum up, the legal status of the Arctic Ocean bed beyond 200 miles from the baselines is qualified in a number of different ways in academic writings:

- as a continental shelf to be delimited between Arctic coastal States according to Art. 6 Convention on the Continental Shelf (in relation to the USA) or according to Art. 83 UNCLOS (in relation between the other four Arctic coastal States); or

- as a continental shelf to be delimited between such States plus the Area to be delineated according to Art. 76 UNCLOS. Or

- as a legal dichotomy – a) for States Parties to UNCLOS – as a continental shelf to be delimited between the Arctic coastal States (possibly plus the Area to be delineated); and b) for USA and other States non-Parties to UNCLOS 1982 – as a continental shelf to be delimited between the Arctic costal States (possibly plus the bed of the high seas) – according to the Conventions of 1958 on the Continental Shelf and on the High Seas.[65]

Conclusion. The intention to prevent new international disaccords in the Arctic is already reflected in the Ilulissat Declaration of 28 May 2008. In this Declaration, the five Arctic coastal States note that the extensive international legal framework which applies to the Arctic Ocean "provides a solid foundation for responsible management" of the Arctic Ocean "by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions"[66], based on international law. It may be suggested that such responsible management may be realized first in areas where potential disaccords are minimal, namely as concerns the management of living resources in the Arctic High Seas and environmental protection in these areas. The specific legal basis for the management of non-living resources of the Arctic seabed may be precisely ascertained at a later stage, when delimitation of the continental shelf between Arctic coastal States with opposite and adjacent coasts has been completed. For both these areas there exists a basis for the realistic, comprehensive, accurate and cautious doctrinal assessment and legal advice relevant to the contemporary Arctic legal environment. Since the international law applicable to the Arctic Ocean is dynamically developing it is very receptive to new legal ideas, which contribute to preventing new international disaccords in the Arctic Ocean.

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by two international treaties: that is by two meridian lines, one provided by the Convention of 1867 (note 40) and the other by the Convention of 1825 (note 38). And if the US position is that these meridians are limits of the US shelf to the north of Alaska, that would mean that the US Arctic shelf is significantly larger than the result of hypothetical equidistant delimitation.

[65] Convention on the Continental Shelf and Convention on the High Seas (note 31).

[66] Ilulisaat Declaration (note 9) para. 4.