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INTRODUCTION

1. Overview of the Essence of the Problem Discussed

Russians, unlike any other people, have a very simple and clear religion – Russia. It is stronger that Christianity or Communistic messianism. This belief is not burdened by pompous rituals and loud prayers, it is silent and unpretentious. But God, do not let anyone try the strength of our belief, he will be destroyed. And if we are meant to perish, we shall depart from this world with our enemies, as the Earth without Russia is meaningless.[1]

E. Myschkin

The Russian Federation, the largest country in the world today in terms of land size, lies between the Arctic and Pacific Oceans, and boarders twelve seas and the Caspian Sea-lake. The voice of Russian State in the maritime areas has recently become loud and demanding. Russia has staked claims over additional water and underwater spaces in many adjacent oceans/seas. In the contemporary world, where control over maritime spaces entitles the State with "ownership" of water and subsoil resources and, consequently, entails economic, territorial, strategic, political and military supremacy, many of Russia's claims and Russian State's legal behavior have raised anxiety among other States and the international community.

Russia's recent legal practice has been most considerable, intriguing, controversial and ambitious in the four maritime regions adjacent to the Russian Federation: the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov, and the Baltic Sea. For instance, in 2001 the Russian Federation was the first Arctic state to file a submission with the Commission on the Limits of Continental Shelf (hereinafter the "CLCS") pursuant to Article 76 (8) of the 1982 United Nations Convention on the Law of the Sea [2] (hereinafter "UNCLOS" or the "Convention"). In total, the claimed Russian extended continental shelf amounts to 460 000 square miles or 1.2 million square kilometers. The Russian submission to CLCS resulted in protests by many Arctic States, the world community, as well as parts of the Russian academia. The latter, led by the head of International Law Department of MGIMO University Professor A. N. Vylegzhanin, strongly propose that the Russian 2001 Submission should be withdrawn from the CLCS and that Russia should claim rights over the Arctic sector established in the Soviet period. Notwithstanding the opposition, the official Russian approach favors application of the UNCLOS to the Arctic. In response to the Russian 2001 submission, the CLCS has requested additional

[1] Е. Мышкин. Записки русского пенсионера. 1997–2007 г. Available online: http://www.doktor-otorinolaringolog.ru/new (20.02.2013).

[2] United Nations Convention on the Law of the Sea of 10 December 1982. Available online: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (18.09.2012).

scientific data, and currently Russia is collecting new material to ascertain its legal rights over the extended continental shelf in the Arctic.

Not less heated and ambiguous is the present legal situation in the Caspian Sea, where Russia, surrounded by new Caspian littoral States, has been striving to enter bi- and tripartite agreements on the division of the Caspian Sea and subsoil. In the region of the Black Sea and the Sea of Azov, Russia is in dispute with Ukraine over the border in the Kerch-Yenikalskiy Channel, with the balance inclining deeply to the side of Russian interests. Finally, the recent developments in the Baltic Sea have resulted in construction and operation of the Nord Stream gas pipeline, a Russian-German project that is hoped to result in enduring economic benefits for Russia and Germany and is considered to be politically and strategically dangerous to the rest of the Baltic States.

2. Formulation of the Research Questions

As an independent State in relation to other States, Russia is subject to international law. In order to legally justify its claims and legal in the maritime areas in the eyes of other States and the world community, Russia is relying on the international law of the sea. But how does contemporary Russia understand and apply international law of sea? The first goal of hereby research is to examine and analyze how Russia uses the framework and principles of the law of the sea to justify its claims and legal practices in some of the water reservoirs that wash Russian coasts and preoccupy world's legal and political minds.

In particular, this thesis analyzes current Russian legal claims, on-going debates and the State's practice in the already mentioned Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov, and the Baltic Sea. The choice of these maritime zones is justified by the following reasons: (i) the Russian Federation is a littoral State to all of the chosen water columns; (ii) all four regions bear significant importance for the rest of the world community, with the Arctic Ocean and the Caspian Sea being especially important for the world economy and energy resources, the Sea of Azov playing a decisive role as an essential transportation route in the region, and the Baltic Sea being one of the most intensely trafficked shipping areas in the world and constituting the only sea-route connection to the world ocean for most of the Baltic Sea coastal states; (iii) historically, Russia has enjoyed full or close to full dominion in all four regions, its presence and interests in the chosen areas has been long-lasting and extensive; (iv) at present, the Russian Federation has presented certain maritime claims or is involved in maritime disputes in each and every specified region; (v) Russian legal claims and state practice cannot be ignored by the international community, and the key to providing a proper, adequate and competent response to Russian claims lies in thorough analysis and understanding of Russia's legal position.

By choosing the Arctic Ocean and the three seas for discussion, this thesis does not attempt to be comprehensive about Russia's practice in the field of

international law of sea. In particular, the contested issue with land and maritime borders with Japan will not be dealt with here. Nevertheless, the presumption is that based on the cases of the Arctic Ocean and the three adjacent seas discussed in the thesis, something generally valid about the Russian practice in the field of international law of sea can be concluded.

The research on Russian legal practice and behavior patterns in the realm of the law of the sea is largely empirical and historical. Yet this thesis also aims to be theoretical to an extent because in the second part, the empirics drawn from the discussed oceans and seas will be connected to the international legal doctrine of state sovereignty. The hypothesis posed by the author as the second research objective of the thesis is that the "Great Powers" or former Empires like Russia tend to have an extensive concept of sovereignty, which determines their approach to the law of the sea and is reflected in their extensive claims over the seas and oceans. The international law of the sea is still in certain instances ambiguous enough to give a way to different interpretations or applications, so that the States with greater power can often get their goals under international law of sea. As such, Russia may be using the tools offered by the international law of the sea to justify its interests as determined by Russian extensive concept of sovereignty.

3. Arguments Set Forth for the Defense

In pursuance of research objectives as defined above, this thesis is divided into two parts. In the first, empirical part, the author proceeds from the notion that Russia's behavior patterns with respect to the law of the sea can be understood by a review of Russia's historical positions and contemporary claims, interests and legal policies in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov and the Baltic Sea, as well as an understanding of the reaction by other States, the international community and Russian legal experts themselves. Laying down the empirics of the chosen maritime areas is a value in itself, creating an overall picture of Russia's legal practice in its adjacent oceans/seas.

After assessing the landscape of Russia's legal past and present in the four maritime areas, the legality of Russian State practice in the light of universally recognized norms and principles of international law of the sea, especially the ones recognized in the Convention, is analyzed. The thesis examines the application of UNCLOS to Russian Territorial Sea, Exclusive Economic Zone (hereinafter also the "EEZ") and Continental Shelf in the Arctic Ocean as embedded in the subsequent domestic legislation and reflected in the correspondent State practice. Special attention is paid to the Northern Sea Route and the maritime boundary regime in the area. Regarding the Caspian Sea, the author researches arguments that Russia relies on when rejecting the application of UNCLOS to the Caspian basin, and the legal reasoning offered by Russian legal experts the State's "common sea, divided seabottom" approach to the Caspian

Sea. Russia's position is further compared to the position of other Caspian littoral states, unveiling and emphasizing the necessity for general cooperation in the region. The thesis introduces legal regimes of the region of Black and Azov Seas, and gives legal interpretation of Russia's position in the area. Finally, the thesis offers a historical insight into Russian domain over the Baltic Sea, and carries analysis of legality of Russian-German Nord Stream gas pipeline project in the light of UNCLOS and the domestic regulations of the littoral States. Closer attention is paid to current interests of the Russian Federation regarding the Baltic Sea, as having direct impact on the application of law of the sea by other Baltic littoral States, especially Estonia.

Furthermore, a comparative analysis of Russian approach to the law of the sea in various factual circumstances, *i.e.* the conditions of four oceans/seas, is drawn. But does it even make sense to look at what a Russian, US, Estonian and so on – *i.e.*, country-specific – approach to international law of the sea would be? The present author, naturally, joins forces with the authors who consider such concrete studies meaningful. In the words of Finnish Professor of International Law M. Koskenniemi, the contribution of a comparative study of international law is not to promote "thinking of the world no longer in terms of what Hegel used to call abstract universals but seeing all players as *both* universal and particular at the same time, speaking a shared language but doing that from their own, localizable standpoint."[3] This thesis aims to show how Russia "speaks" the universal language of the law of the sea from the position it has taken in the four researched maritime areas. Thus, considering each and every important aspect, the first part of hereby thesis purports to present an overview of Russia's legally relevant state practice and presented claims in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov, and the Baltic Sea, pursuing to draw conclusions on universality and homogeneity of Russian approach to UNCLOS.

For the purpose of the this research and in order to test the hypothesis stipulated above, the second part of the thesis presents analysis of Russia's maritime claims and policies in the light of the State's concept of sovereignty. The author proceeds from the assumption that Russia's current position of a leading power on international arena is the "echo" of Russian imperial past. Russia has perceived itself as an empire since 1550s, and was officially declared one at the time of Peter the Great. The urge to expand sovereign borders of the empire has influenced Russian historical growth over land onto the sea. Strong strive for sovereign, territorial and economic dominion resulted in the vast areas of land and sea under the reign of Russian Emperors, Soviet leaders and current power vertical. Russia's contemporary position of a "great and powerful dominion,"[4] a "Great Power" on international arena has been influenced by its historical development and imperial past. The hereby thesis presupposes that

[3] M. Koskenniemi. The Case for Comparative International Law. – Finnish Yearbook of International Law, 2009, Volume 20, page 4.

[4] Ф. Мартенс. Современное международное право цивилизованных народов. Издание пятое, дополненное и исправленное. С-Петербург, 1904, Том I, Вступление, page vii.

Russia's historical impetus to extend the limits of state sovereignty has determined the essence of Russia's concept of sovereignty, which, in turn, constitutes the foundation for the State's actions in the sphere of the law of the sea.

The sovereignty of states represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. The manner in which the law expresses the content of sovereignty varies, and indeed the whole of the law could be expressed in terms of coexisting sovereignties.[5] Another underlying assumption for the hypothesis posed in the course of hereby research is that the concept of sovereignty as historically perceived and applied by a state largely determines its position in domain of the law of the sea. So in order to achieve full and thorough understanding of Russia's position in the law of the sea, one needs to pay closer attention to the essence and components of the notion of sovereignty as conceived by the State. For this purpose, the thesis in its second part pays a closer look to the concept of sovereignty as elaborated by Russian legal experts and enacted in the Constitution of the Russian Federation, with a special emphasis on the notions of territorial, economic and national sovereignty.

Furthermore, in order to find theoretical and legal grounds for the connection of the concept of sovereignty to the state's position in the law of the sea, the author offers an insight into the history of development of the contemporary concepts of international law of the sea, which in its essence constitute a tug-of-war between sovereignty of the coastal State and the freedom of the high seas. This research focuses on how the concept of sovereignty has historically influenced the development of international law of the sea generally, what role did it have to play in the formation of its sources and main concepts and principles and how it is embedded in the contemporary regulation of the law of the sea. The sovereignty of state is deeply enacted into provisions of UNCLOS regarding the state's powers in the Territorial Sea, and bears important imprints on the state's sovereign right in the Exclusive Economic Zone and over the Continental Shelf.

Finally, Russia's position in the realm of law of the sea in the four chosen areas through the concept of the State sovereignty is analyzed. Pursuant to the assumption posed earlier that the concept of sovereignty is relevant and to a certain extent determines the State's, in our context Russia's, behavior in the realm of the law of the sea, the thesis examines whether Russia's understanding of sovereignty has shaped its approach to the law of the sea and the State's legal position in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov and the Baltic Sea; whether Russia can be said to have a specific understanding of sovereignty and "possessions"; whether Russia's approach to the law of the sea can be considered instrumental, and if so, what are its differences from other world's states. The thesis presupposes and proceeds to prove that Russian approach to the notion of sovereignty over seas and oceans

[5] I. Brownlie. Principles of Public International Law. Seventh Edition. Oxford University Press, 2008, page 289.

bears specific character, and offers a new meaning to Russian modernized, *extensive,* approach to the notion of sovereignty in maritime areas and its possible implications on other players on the international arena.

Additionally, the thesis gives certain considerations to Russia's legal practice under law of the sea in the light of rational choice theory and compares it to the behavior of another "Great Power," the United States. It is illustrated that the sovereignty of the Russian Federation over the seas and oceans is largely limited. Finally, emphasizing the great need for cooperation of states in the realm of the law of the sea, this research purports to prognosticate on the extent of damage that Russian *extensive* sovereignty over world oceans (resulting in its extensive supremacy over supplies of water- and subsoil resources) could bring to the Earth ecosystems and the future of following generations. Calling to the epigraph of this thesis, the words of famous Russian Professor of otorhinolaryngology E. N. Myschkin, the author gives an answer on whether the other states and the world community should be fearful of Russia's "clear and simple religion – Russia" in the domain of the law of the sea.

4. Description of Methods

In terms of methods of research, the first part of the thesis takes a historical, comparative and thus ultimately positivist approach. It is also largely inductive, aiming to establish what the Russian state practice in the concrete marine areas has been. The author wants to emphasize that the materials used in the thesis to map the factual circumstances are of both Russian and Western origin, which in the author's opinion bears a significant importance for creation of an objective and diverse picture of the scenery. Not so seldom, Western scholarly sources are relatively ignorant about specialized literature in the Russian language – and *vice versa*.

The second part of the thesis connects the empirics established in the first part with elements of international legal theory, in particular looking at how the much contested notion of State sovereignty has been and is understood both in the edifice of international law of sea generally and by Russia concretely. The argument in the second part and in the conclusions is not merely abstract-dogmatical, but connects the notion of state sovereignty with its actual usages in the law of sea and, ultimately, power relations. Such a methodological insight could be labeled as realist (as opposed to idealist-dogmatical which tends to regard international legal issues without duly taking into account the underlying power relations). The methodological advantage of such an approach is that – while it upholds to the notion that law is autonomous from politics – it is quite close to the actual facts of international relations, as far as the application of international law is concerned.

PART I. RUSSIA'S LEGAL POSITIONS IN THE FOUR SEAS

Chapter 1. The Position of the Russian Federation in the Arctic Ocean

1.1. Arctic Ocean. The Importance of the Region

Like the face of an alien planet, it stretches across the top of the world…its waters held captive by an ever-present mask of ice. It is the only ocean in the world that can be crossed on foot…but no man has ever dared to do so. Scores of ships have been mercilessly crushed by its guardian icefields…the same paradoxical masses of ice that benevolently provide island-size floating platforms for scientific research stations. Stirred slowly by storm winds and sea currents, this perpetually shifting jigsaw of drifting ice crumbles and merges, expands and contracts, like a restless, breathing beast.[6]
S. M. Olenicoff

The Arctic Ocean is a vast and unique body of water that differs significantly from the rest of the world. Located around the North Pole, the Arctic Ocean covers nearly 21 million square kilometers. The Northern Arctic Ocean borders five Arctic states – Russian Federation, Norway, Denmark, Canada and the United States (see Appendix 1). The latter became an Arctic state after the purchase of Alaska from the Russian Empire in 1867, a fact that plays a role in the historical division of the Arctic. Finland, Iceland and Sweden are also considered to be Arctic states as their mainland territory extends to the Arctic Circle. Because the coastline of these countries does not abut the Arctic Ocean, however, neither Finland, Sweden nor Iceland enjoy the rights to the territorial sea, exclusive economic zone or the continental shelf of the Arctic area.

For a very long period of time the Arctic has been one of the least discovered places on Earth, being of interest to polar explorers and a narrow ring of scientists only. However, starting from the second half of the twentieth century, following the discovery of substantial oil- and gas reserves in the Arctic, the region has become economically as well as militarily significant. In 2009 the U.S. Geological Survey estimated that this area, where some maritime boundaries remain at issue among the coastal states, contains some 30% of the world's undiscovered natural gas and about 13% of the world's undiscovered oil, mainly offshore under less than 500 meters of water.[7] Russian expert opinions on the amount of oil and gas in the maritime zones of Arctic countries estimate

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[6] S. M. Olenicoff. Territorial Waters in the Arctic: The Soviet Position. A Report Prepared For Advanced Research Projects Agency. R-907-ARPA, July 1972, page 3. Available online: http://www.rand.org/pubs/reports/2009/R907.pdf (20.02.2013).

[7] D. L. Gautier, K. J. Bird, R. R. Charpentier, D. W. Houseknecht, T. R. Klett, T. E. Moore, J. K. Pitman, C. J. Schenk, J. H. Schuenemeyer, K. Sørensen, M. E. Tennyson, Z. C. Valin, C. J. Wandrey. Assessment of Undiscovered Oil and Gas in the Arctic. – Science, 29 May 2009, Vol 324, No 5, 931, pages 1175–1179.

that there are about 20–46 milliards tons of oil and 0.5–1.5 trillion cubic meters of gas in the Russian marine Arctic area, about 5–8.5 milliard tons of oil and 3–4 trillion cubic meters of gas in the Norwegian Arctic area, 3.5–9.5 milliard tons of oil and 6.5–18.5 trillion cubic meters of gas in the Canadian Arctic area and 1–3 milliard tons of oil and 1–2 trillion cubic meters of gas in the US Arctic Area north of Alaska.[8]

The resources of the Arctic Ocean are of primary interest presently for two reasons. First, new drilling technologies make it easier to penetrate into previously inaccessible maritime areas. Second, excavation of the natural resources of the Arctic Ocean could soon become financially viable due to the thawing of the Arctic ice.[9] In August 2012, the National Snow and Ice Data Center at the University of Colorado at Boulder reported that the Arctic sea ice cover melted to its lowest extent in the satellite record, breaking the previous record low observed in 2007.[10] Some scientists expect to see an ice-free summer by 2030.[11]

Thus, the cost of extracting Arctic resources today is increasingly justifiable due to market realities. Growing demand, along with decreasing and undependable supplies in the Middle East, are conspiring to push energy prices upwards, which is encouraging exploration in the Arctic. Given the Arctic's vast supply of energy resources and the world's growing energy demands, it is neither surprising nor alarming that both Arctic and non-Arctic[12] nations are beginning to stake their respective claims.[13]

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[8] А. Вылегжанин. Совет по Изучению Производительных Сил при Президиуме РАН и МИНЭКОНОМРАЗВИТИЯ России. Научно-экспертный меморандум. «О возможности сохранения в качестве континентального шельфа России района «А» в пределах Российского Арктического сектора, утрачиваемого согласно представлению («заявке») России 2001 года». Новая редакция, 2012, page 10.

[9] A. Proelss, T. Müller. The Legal Regime of the Arctic Ocean. – Heidelberg Journal of International Law, 2008, 68, Nr 3, page 653.

[10] Media Advisory: Arctic Sea ice breaks lowest extent on record. 27 August 2012. Available online: http://nsidc.org/news/press/20120827_2012extentbreaks2007record.html (10.12.2012).

[11] E. Plantan. Rising temperatures. – The International Herald Tribune, 13 September 2012.

[12] Currently Singapore, China, India, Italy, Japan and South Korea, as well as the European Union, Greenpeace and the International Association of Oil and Gas Producers are queuing for various kinds of seat at the Arctic Council. Their applications – supposed to be ruled on in May 2013 – are the clearest signs of the growing geopolitical interest in the melting north. The Roar of Ice Cracking. Will Asian Countries Consolidate or Disrupt Arctic Stability? – The Economist, 02 February 2013. Available online: http://www.economist.com/news/international/21571127-will-asian-countries-consolidate-or-disrupt-arctic-stability-roar-ice-cracking (20.02.2013).

[13] A. W. Dowd. The Big Chill: Energy Needs Fueling Tensions in the Arctic. – The American Legion Magazine, 01 December 2011.

1.2. Arctic Ocean for Russia

The Russian Federation is one of the largest players, if not the largest player, in the Arctic. The importance of this Northern region for Russia has long been recognized by Russian decision makers. Writing on the turn of the twentieth century in his book on the northern ice ocean, admiral S. Makarov characterised the importance to be attached to Arctic water expanses: "If Russia is compared with a house, one must recognize that its façade faces the Northern Ice Ocean."[14] The length of the Russian Arctic coastline comprises about 16 000 kilometres and exceeds in length the coastlines of the other Arctic states.[15] The surface of the Russian Arctic, including its continental territories, is about six million square kilometers. It hosts a population of one million, which produces 20% of Russia's GDP, 22% of its exports, 90% of its nickel and cobalt, 60% of its copper, and 96% of its platinum. It comprises 15% of the Russian fishery. According to existing data, the part of the Arctic Ocean legally claimed by the Russian Federation contains between 25 and 30% of the world's anticipated oil, and especially gas, resources.[16] Approximately 70% of all undiscovered gas resources are located on Russian continental shelf in the Barents and Kara Seas. Out of all Arctic states, Russia is the first one to start discovery of hydrocarbon resources in ice-covered areas.[17]

Official Russian claims to the Arctic can be traced back to fourteenth century when Russian tsar Ivan the Terrible refused to satisfy the claims presented by England to grant the latter with an exclusive right of trade in the mouth of northern rivers.[18] Tsar's orders or ukases from 1616–1620 foresaw exclusive rights of the Russian Empire in certain Arctic areas. In 1821 Emperor Alexander I issued a decree to the Senate stating that "the right of trade, the right of fishing and whale hunting, as well as other industry on the islands, in the ports and bays and generally on the north-western cost of America…and around Aleut islands and alongside Siberian coast…is granted to Russian subjects only."[19] In regulations made under the decree, all foreign vessels were

[14] P. Wrangler, S. Makarov. On the exploration in the Nortern Ice Ocean, 1897, as mentioned by P. Palamarchuk in "International Legal Regime of the Seas of the Soviet Arctic Sector" (in Russian). – В. Менжинский, М. Славкин, Н. Ушаков (ред.). Международное право и международный правопорядок. Издательсвто ИГиП АН СССР, 1981, page 111.

[15] A. Kovalev. Contemporary Issues of the Law of the Sea: Modern Russian Approaches. W. E. Butler (ed., transl.). Eleven International Publishing, 2004, page 178.

[16] J. Piskunova. Russia in the Arctic. What's lurking behind the flag? – International Journal, September 2010, Vol 65, No 4, page 853.

[17] И. Паничкин. Экономические оценки состояния и перспектив разработки морских нефтегазовых ресурсов Арктики. – Арктика: экология и экономика, 2012, Нр 3 (7).

[18] П. Паламарчук. Международно-правовой режим морей советского сектора Арктики. – В. Менжинский, М. Славкин, Н. Ушаков (ред.). Международное право и международный правопорядок. Издательсвто ИГиП АН СССР, 1981, page 113.

[19] А. Вылегжанин (Note 8), page 22.

prohibited except in the case of *force majeure,* from approaching within 100 Italian miles[20] of the coasts of Russian America.[21]

Russian rights to northern lands and waters were also reflected in the Russian-Swedish treaties from 1806 and 1826, Russian-American convention from 1824, Russian-English convention from 1824 and 1825.[22] The Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russians to the United States of America concluded on 30 March 1867 stated that lands lying east to the border established by the Treaty remain under sovereignty of the Russian Empire. The main aim of the 1867 Treaty was to define the limits of "the territory and dominion" ceded by Russia to the United States. The demarcation lines described in the Treaty were not state boundaries, but a cartographic device to simplify description of the lands concerned in the matter.[23] This act, as well as the following acts adopted by the USSR, aimed to prevent scientific and economic expansion by other states on lands and islands within the Russian Arctic sector.

1.3. Soviet-Russian Legal Regime[24] in the Arctic. Polar Sector Theory

The Russian legislation concerning Arctic started to develop in the beginning of twentieth century with a Note of the Russian Government of 20 September 1916 in which it was communicated that the islands of Henrietta, Jeanette, Bennett, Herald, Uedinenie, Novosibirsk, Wrangel, Novaia Zemlia, Kolguev, Vaigach, and others are part of Russia, comprise the territories of Russia "in

[20] Italian, or Roman mile, is estimated to be about 1,479 metres (4,851 feet or 1,617 yards).

[21] C. R. Symmons. Historic Waters in the Law of the Sea. A Modern Re-Appraisal. Martinus Nijhoff Publishers, 2008, page 71. The multiplicity of immediate protests to the ukase were enough to block any claimed Russian title outside three-mile limits off the Alaskan coast. As the result, the ukase was quickly and unilaterally withdrawn by Russia.

[22] The Conventions of 1824 and 1825 between Imperial Russia and England provided for a line of demarcation between the Russian and British North American territories that would extend beyond their respective Arctic coasts and would continue in its prolongation "as far as the Frozen Ocean". S. M. Olenicoff (Note 5), page 3.

[23] L. Timtchenko. The Russian Arctical Sectoral Concept: Past And Present. – Arctic. March 1997, Vol 50, No 1, page 30. Available online: http://pubs.aina.ucalgary.ca/arctic/Arctic50-1-29.pdf (13.09.2011).

[24] According to Russian professor A. L. Kolodkin, the term of "legal regime" in international law of the sea is direclty connected to the totality of state's rights and obligations for the use of the given maritime space. А. Колодкин. Мировой Океан. Международно-правовой режим. Основные проблемы. Москва, 1973, page 23. For the purpose of the given thesis, the author suggests to use the term "legal regime" as a totality of rights and duties of a coastal state together with rights and duties of other states in relation to the specific maritime zone in accordance with the international law.

view of the fact that their affiliation to the territories of the Empire has been generally recognized for centuries."[25]

The legal act which confirmed the affiliation to the Soviet Union of all lands and islands in the Northern Arctic Ocean was the Decree of the Presidium of the Central Executive Committee of the USSR "On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR" of 15 April 1926.[26] Under the Decree, "all lands and islands previously discovered and also lands and islands that might be discovered were proclaimed to be the territory of the Soviet Union,"[27] with its total polar area of around 5,8 million square kilometers. The broad reading of this decree was favored. Thus, the words "islands" and "lands" as used in the Decree were considered to mean not only the continental land. Was the will of the Soviet legislator to include into state territory not only the islands within the Arctic sector, but also the "lands" laying under water and ice? E. A. Korovin has interpreted the Decree as follows: the Decree speaks of state power within delimited Arctic sector over: a) the islands; b) ice-covered areas; c) marine areas, which are not ice-covered. The interpretation of the Decree, according to L. D. Timchenko, allows to spread the state's sovereignty not only over land areas of an Arctic sector.[28]

Having stated that, the Soviet Union established its rights to a sector of polar waters in the Arctic Ocean. In doing so the USSR followed the example of Canada that in 1925 adopted an amendment to its Northwest Territories Act, prohibiting foreign states from engaging in any activities within the limits of Canadian Arctic lands and islands without the special authorization of the Canadian Government. The principles indicated in the documents of Canada and the USSR of taking into account the special rights and interests of the Arctic states in the Arctic expanses contiguous to their shores found reflection in the so-called "sector theory," [29] according to which every Arctic state is entitled with specific rights in its national polar sector – a triangle territory with its footing on the coastline of the state and its borders falling on the meridians headed to the North Pole.[30]

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[25] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 178.

[26] *Ibid.,* page 178.

[27] А. Вылегжанин. Международно-правовые основы недропользования. Норма, 2007, page 124.

[28] L. Timchenko. Quo Vadis, Arcticum? – The International Law Regime of the Arctic and Trends in the Development. "Osnova", 1996 (Reference by A. Вылегжанин (Note 8), page 24).

[29] The Arctic sector theory is rightly associated with Canada for it was first publicly propounded by Pascal Poirier, a Canadian Senator, in 1907. Officialy, Senator Poirier's Arctic sector theory was a one-man idea, but it rapidly attracted attention disproportionate to the importance attached to it by Pourier himself. I. L. Head. Canadian Claims to Territorial Sovereignty in the Arctic Region. – McGill Law Journal, 1963, Issue 3, pages 202-203.

[30] В. Гуцуляк, Г. Шинкарецкая. Проблемы современного режима Арктики и интересы России. – Интернет-журнал online «Морское право», январь-февраль-март 2010, Nr 1, 24 March 2010. Available online: http://www.sea-law.ru/index.php?option=com_content&task=view&id=278&Itemid=76 (01.09.2012).

The proclamation of division of the Arctic based on the sectoral method was strongly opposed by the United States. Proceeding from its own strategic and other interests, the United States suggested that the adoption of the sector principle by all Arctic states may materially limit the possibilities for its naval forces in the Arctic. Moreover, the United States exerted constant pressure on Canada in order to modify the Canadian approach to the "sector theory" and thereby reduce the risk of a certain legal dependence of the United States on Canada in the Canadian Arctic sector.[31] Though Russians believe that Canada still supports the sectoral method of Arctic's division,[32] Canadians themselves assert that "since the sector theory achieved limited official government currency, and lacked support among the other Arctic States, the Canadian government hesitated to apply it to the waters and islands of the Arctic Archipelago,[33] and as a result it was denied any measure of general international acceptance."[34]

Notwithstanding the U.S. opposition, during almost whole twentieth century the geographical maps issued in the Soviet Union showed its polar sector between meridians 32°04'35" east longitude and 168°49'30" west longitude. It was considered that the use of distinct and clear borderlines determined by astronomic coordinates is quite logical in the Arctic if to consider difficulties arising with counting of islands that are already or might be discovered in this severe region with no permanent population and seldom visited by people.[35] As the Arctic Ocean in its substantial part constitutes ice coverage, it was viewed as a specific kind of state territory belonging to five Arctic countries that have divided it into polar sectors, whereas all land and islands as well as ice-covered

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[31] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 180.

[32] For instance, in an article published by two professors of St Petersburg State University, A. Sergunin and and V. Konyshev in 2012 on Canada's Arctic Strategy, the scholars write that "like Russia, Canada adheres to the sectoral concept of division of Arctic spaces, which is aimed at controlling the Arctic spaces up to the North Pole (*i.e.* a dividing line is conventionally drawn from the North Pole along the meridian to the extreme east and west points of the continental Arctic coast of Canada)". A. Sergunin, V. Konyshev. Canada's Arctic Strategy. – Russian International Affairs Council, 19 September 2012. Available online: http://russiancouncil.ru/en/inner/?id_4=836 (05.01.2013).

[33] In 1956 the Minister of Northern Affairs and Natural Resources of Canada, Jean Lesage, stated to the House of Commons (1956 *Debates*, House of Commons, Canada, vol. 7, 6955): "We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic Islands. There is no doubt about it and there are no difficulties concerning it… We have never upheld a general sector theory. To our mind the sea, be it frozen or in its natural liquid state, is the sea, and our sovereignty exists over the lands and over our territorial waters". Naval Operations in Arctic Waters Guide. Canada Arctic Waters: Sector Theory to Historic Waters. National Defence and the Canadian Forces. – Publications on Operational Law, 18 April 2012. Available online: http://www.forces.gc.ca/jag/publications/oplaw-loiop/slap-plsa-3/chap3-eng.asp (05.01.2013).

[34] *Ibid.*

[35] В. Гуцуляк, Г. Шинкарецкая (Note 30).

areas within the national sector belong to the state territory[36] over which the state exercises full sovereignty.[37] The Soviet position to apply sectoral division to the Arctic was grounded by firm belief of the Soviet legal scholars that an international-legal customary norm of dividing the Arctic into sectors between the five Arctic countries has been formed.[38] The purpose of sectoral division of the Arctic was laid in quite well-grounded aspirations of the Soviet Union to exclude from general law of the sea regulation the areas, the geographical and climate features of which make them especially important for these states.[39]

The described sectoral division of the Arctic, at the time it was done, did not cause any objections on the part of other, non-Arctic, states and was *de facto* accepted and operated so long as the development of science and technology did not allow states to embark upon the practical exploration and exploitation of the natural resources of the Arctic. Having regard to the intensification of interest in Russian Arctic sector by foreign states, the Russian Federation has attempted to consolidate its sovereignty over the Arctic sector in national legislation. In 1998 a draft federal law "On the Arctic Zone of the Russian Federation" was submitted to the State Duma of the Russian Federation. In accordance with the draft law, the Arctic zone was defined as the part of the Arctic under the sovereignty and jurisdiction of the Russian Federation. The draft virtually reiterated the 1926 Decree of the Central Executive committee[40] and was first and foremost aimed to establish specific regulation for economic, social, environmental and other activities in the area. However, the draft has not been adopted till today.

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[36] А. Ковалев. Международно-правой режим Арктики и интересы России. Международное публичное и частное право: проблемы и перспективы. Liber amicorum в честь профессора Л. Н. Галенской. Издательский Дом Санкт-Петербургского Государственного Университета, 2007, page 224.

[37] This view was expressed already in 1928 by Soviet legal scholar V. L. Lakhtine, who published in 1928 a monograph entitled "Prava na severnye polyarnye prostranstva" [Rights over the Arctic Regions]. According to Lakhtine, undrifted ice should be equated to the land territory, *i.e.*, be included in the sovereign part of a sectoral state. Drifted ice and ice-free waters, including territorial seas, had to be under the limited sovereignty of the northern coastal states. Lakhtine interpreted the provisions of the 1926 Decree quite broadly, including in the sphere of state sovereignty lands, islands, undrifted ice, and even the air space above a sector, *i.e.,* above the high seas. Lakhtine repeatedly referred to international law but did not back up his position with any specific norms and principles of that law. Nevertheless, some Soviet legal scientists took his interpretation of the 1926 Decree as a point of departure for analyzing the legal regime of the Arctic, except for Lakhtine's viewpoint with respect to air space above a sector. L. Timtchenko (Note 23), page 30.

[38] А. Вылегжанин (Note 27), pages 124-125.

[39] А. Ковалев (Note 36), page 224.

[40] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 182.

1.4. Scholarly and State Approaches to the Russian Arctic Sector

In recent decades the sector method for the delimitation of national interests of Arctic states in the Arctic, according to which the sovereignty of these states extends to the entire spatial sphere of the Arctic, has been subject to criticism in the Russian legal doctrine of international law.[41] For instance, the Russian legal scholar S. Vinogradov states with respect to the sectoral concept:

> "the controversial practice of states does not permit [us] to speak of a norm of the customary law formed on the basis of the sectoral theory. In this connection the "narrow" interpretation is preferable, according to which the sovereignty of a coastal state may be spread only over lands and islands but not over the whole Arctic space adjacent to the shore of respective state."[42]

K. A. Bekyashev and M. E. Volosov note that "in reality none of the well-known acts contain statements concerning the extension of the entire Arctic of the supremacy of countries contiguous to the Northern Arctic Ocean."[43] In his article on "Nature Protection in the Arctic: Recent Soviet Legislation" published in 1992, Professor E. Franckx writes that despite different approaches of various Soviet legal scholars and the official Soviet position,

> "one appears to support the idea that the Arctic sector lines represent the State boundaries of the Soviet Union. Instead, the idea was put forward by some that the normal rules of the international law of the sea are to apply in the region, adapted to some extent to take account of the specific features of the area."[44]

Thus, it is generally believed that in the future when working out and adopting a treaty establishing the legal regime of the Arctic, one should proceed from the fact that the maritime expanses of the Northern Arctic Ocean are by their legal status subdivided into those same water categories as the water expanses of the entire World Ocean, the legal regime of which is provided in the 1982 United Nations Convention on the Law of the Sea.

However, there are legal scholars (*e.g.* I. N. Bartsits) who still believe that strict adherence to international law, including the Convention does not deprive Russia of arguments under the sectoral method. The main argument in favor of the sector method is that neither UNCLOS nor anyone else has explicitly cancelled the applicability of the sectoral division of Arctic territories. "Russia can confirm its Arctic sector analogically to the Decree from 1926 as there are no legal grounds to erase these borderlines from the world map", writes I. N.

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41 *Ibid.,* page 179.

42 L. Timtchenko (Note 23), page 31.

43 К. Бекяшев, М. Волосов. Международное публичное право. Практикум. Москва, 2000, page 140.

44 E. Franckx. Nature Protection in the Arctic: Recent Soviet Legislation. – The International and Comparative Law Quarterly, 1992, Volume 41, No 2, page 371.

Bartsits.[45] More specifically, the proponents of the sectoral method believe that Article 234 of UNCLOS, stating that "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas", does not deny sectoral division of the Arctic and, moreover, entitles the coastal states to give Arctic areas a "special status".

Additionally, prominent Russian legal scholar Professor A. N. Vylegzhanin, the head of International Law Department of MGIMO University, refers to the opinion expressed in the article by Professor E. Franckx from 1992, stating that

> "it may suffice in this respect to draw attention to the curious inclusion in the annex to issue 1 of the 1986 Notices to Soviet Mariners, entitled "Legal Acts and Regulations of the USSR State Organs on the *Questions of Navigation*" of a reprint of the 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."[46]

According to Vylegzhanin, the Decree of 1926 remains a valid legal act of Russian legislature today.[47] Furthermore, the proponents of sectoral theory (*e.g.* D. N. Dzhunusova) believe that without Russia's explicit consent, other states have no right to expore and exploit resources within the limits of Russian polar sector.[48] Scholars supporting application of the Convention to the Arctic (like K. Bekyashev) reply that as follows from the Decree of 1926, Russia is not entitled neither to jurisdiction nor sovereignty over the areas outside its territorial waters.[49]

The official Russian state position reflected in the State Arctic Policy does not count on doctrinal divergences of Russian legal scholars in approach to the legal regime of the Arctic, and tends to abandon the sectoral theory. According to the Russian State authorities, it should be underlined that the USSR had never officially laid claims to the waters beyond the limits of national jurisdiction within its sector.[50] Neither the USSR nor Russia have exercised effective control over the aquatorium of the "sector"; Russian border guards have not protected its borders. Current Russian international actions are based on UNCLOS. In abandoning the "sector method", the Russian State is con-

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[45] И. Барциц. Российский Арктический сектор: правовой статус. Available online: http://www.rau.su/observer/N12_00/12_15.htm (06.09.2012).

[46] E. Franckx 1992 (Note 44), page 372.

[47] А. Вылегжанин (Note 8), page 26.

[48] К. Бекяшев. Арктика и морское право. Трибуна, 29 November 2012. Available online: http://www.tribuna.ru/other_sections/coal/arktika_i_morskoe_pravo/ (20.02.2013).

[49] *Ibid.*

[50] L. Timtchenko (Note 23), page 32.

sidered to lose sovereign rights over approximately 1.7 million square kilometers of its Arctic area.[51]

1.5. Application of UNCLOS to Russian Arctic. Baselines

Having based its legal claims in the Arctic on UNCLOS, Russia has established the baselines for measurement of the limits of maritime zones, the territorial sea of 12 nautical miles and the exclusive economic zone of 200 nautical miles.

In establishing Arctic baselines Russia has proceeded from normal and straight baselines and has proclaimed certain bays as its historical waters. Legal scholars believe that in doing so Russia has allowed itself large discrepancies relative to the traditional criteria for various sections of the coast.[52] These include basepoints established on sand, which may be drying, without installations, on drying rocks without installations, possibly at sea, and on single or a few islands or rocks far to sea and at large angles to the general direction of the coast. Straight baselines are established along relatively smooth coasts not deeply indented or cut into, or if so, by only one indentation or on one or a few more small islands doubtfully fringing. Though many of these enclosures by straight baselines and closing lines certainly fail the traditional criteria for establishing straight baselines and basepoints as well as the traditional criteria for enclosing bays, due to the moderate state practice that is largely unopposed by other states, Russian practice with regard to the establishment of straight baselines and closing lines in the Arctic, opposed only by the United States, cannot be said to be inconsistent with international law.[53]

1.6. Legal Regime of the Russian Territorial Sea in the Arctic

According to Article 2 of UNCLOS, the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the *territorial sea*. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention (Article 3, UNCLOS). Sovereignty of a state over the territorial waters[54] means that the state has *legislative competence*[55] in its territorial waters. Also, the

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[51] А. Ковалев (Note 36), page 225.

[52] R. D. Brubaker. The Legal Status of the Russian Baselines in the Arctic. – Ocean Development and International Law. 1 July 1999, Volume 30, Number 3, page 218.

[53] *Ibid.,* page 218.

[54] *Infra.,* section 7.2.

[55] Churchill and Lowe call it "legislative jurisdiction". R. R. Churchill, A. V. Lowe. The Law of the Sea. Thrid Edition. Juris Publishing, Manchester University Press, 1999, page 92.

coastal state enjoys *jurisdictional competence*[56] in its territorial sea, although the exercise of that competence is subject to various restrictions.

Already at the time of the Soviet Union it was unilaterally announced that the territorial waters of the USSR, including those of the Arctic, have an extent of 12 nautical miles from the coastline of the USSR.[57] Russia's current position has not departed from this announcement, and considers the belt of 12 nautical miles as measured from its Arctic baselines to be Russian territorial sea in the Arctic. This notion is enacted into national legislation on federal level.

Thus, the Constitution of the Russian Federation[58] holds that "the territory of the Russian Federation shall include the territories of its subjects, inland waters and territorial sea, and the air space over them" (Article 67(1)). According to the current version of Federal Act on the Internal Maritime Waters, Territorial Waters and Contiguous Zone of the Russian Federation,[59] the territorial sea of the Russian Federation is the sea belt adjacent to the land territory or internal maritime waters, whose breadth is 12 nautical miles measured from the baselines referred to in article 4 of the Federal Act (Article 2 (1)). The outer limit of the territorial sea is the State border of the Russian Federation (Article 2 (3)). The sovereignty of the Russian Federation extends to the territorial sea, the airspace over it and also its seabed and subsoil, with recognition of the right of innocent passage of foreign ships through the territorial sea (Article 2 (4)). Sovereignty of the Russian Federation over its territorial seas is restricted by the right of innocent passage granted to foreign ships, foreign warships and other government ships for the purpose of traversing the territorial sea without entering internal maritime waters or calling at a road stead or port facility outside internal maritime waters; and proceeding to or from internal maritime waters or a call at such road stead or port facility, which must be continuous and expeditious (Article 10).

1.6.1. Northern Sea Route

An interesting deviation from the traditional territorial sea concept is contained in the Article 14 of the abovementioned Federal Act on the Internal Maritime Waters, Territorial Waters and Contiguous Zone of the Russian Federation, stating that

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[56] According to Churchill and Lowe, "enforcement jurisdiction". R. R. Churchill, A. V. Lowe (Note 55), page 95.

[57] S. M. Olenicoff (Note 6), page iv.

[58] Конституция Российской Федерации. Принята всенародным голосованием 12 декабря 1993 года. Available online: http://www.constitution.ru/ (15.08.2011).

[59] Федеральный закон о внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации N 155-ФЗ. Принят Государстенной Думой 16 июля 1998 года. Available online: http://law.kodeks.ru/egov/index?tid=0&nd=901714424&prevDoc=9014668 (15.08.2012) (In Russian). Available online: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf (15.08.2012) (In English).

> "navigation on the waterways of the Northern Sea Route, the historical national unified transport line of communication of the Russian Federation in the Arctic, including the Vilkitsky, Shokalshy, Dmitry Laptev and Sannikov straits, shall be carried out in accordance with this Federal Act, other federal laws and the international treaties to which the Russian Federation is a party and the regulations on navigation on the watercourses of the Northern Sea Route approved by the Government of the Russian Federation and published in Notices to Mariners."[60]

The Northern Sea Route (NSR) is the Russian name for what is often known outside Russia as the North-East Passage (NEP), a sea route running between the 65th and 74th parallels that is considered the shortest maritime way from Europe to Asia and American ports in comparison to traditional waterways. The peculiarity of the NSR lies in the fact that it does not have a single and fixed lane. Within the same destination (east-west or west-east), the lane may move to different latitudes from year to year or even within the same navigation period.[61] Thus, NSR may include waterways outside the limits of the Russian Arctic territorial sea and exclusive economic zone, but despite this fact the Russian Federation has declared NSR its national transportation route. The fact that some areas of the transportation route lie within the high seas does not, in Russian opinion, influence the integrity of this transport communication, as the vessel sailing the NSR cannot get to the high seas without previous passage through Russian waters. Huge importance is also awarded to historical developments of both the Soviet and Russian state not only in research, navigation and equipment of the NSR as a transportation route, but also in adjacent areas of the Arctic. The totality of the factors listed above allows Russia to consider the NSR as its national communication route with following exclusive rights to regulate the use of the passage.[62] Moreover, representatives of the Russian academic community propose the enactment of a federal law on the Northern Sea Route.[63]

Consideration of the NSR as the Russian national passage explains the fact that for a long period of time Russia took all possible steps to close the NSR to foreign navigation. For the first time the NSR was opened for international navigation in 1967; however, there were no foreign vessels that accepted the offer. The idea for international transit flows was stimulated by the Murmansk Initiatives in 1987,[64] when it was mentioned that the USSR was ready to

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[60] Федеральный закон о внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации (Note 59).

[61] Л. Повал. Международно-правовые проблемы раздела экономических пространств Арктики. Norge.Ru. Available online: http://www.norge.ru/artcitclov/ (20.02.2013)

[62] В. Гуцуляк, Г. Шинкарецкая (Note 30).

[63] С. Гуреев, И. Зенкин, Г. Иванов (ред.). Международное морское право. 2-е издание. Норма Инфра-М, 2011, page 235.

[64] On 1 October 1987 in Murmansk, the Soviet leader M. S. Gorbachev delivered a speech devoted chiefly to the problems of the Arctic and their solution. The world's mass media called this speech "the Murmansk Initiative" of the Soviet Union because it contained a

provide icebreakers for piloting foreign ships.[65] Currently, navigation rules in the NSR are specified according to Russian legislation, international agreements of the Russian Federation and Navigation Rules along the NSR ratified by the federal executive body authorized by the Government of the Russian Federation and printed in a Notice to Mariners.[66]

1.6.2. Legal regime of the NSR

NSR Navigation Rules start with the provision of UNCLOS (Article 234, "Ice-covered areas"), entitling the coastal States with the right to unilaterally adopt and enforce non-discriminatory laws and environmental regulations in their exclusive economic zones where ice coverage and particularly severe climate conditions cause exceptional hazards to navigation, and where pollution could cause major harm to the ecological balance[67]. The Russian regulations set out that all vessels wishing to enter the NSR (including all areas within Russian 200 nautical miles EEZ) should give notifications to the Russian authorities beforehand. They must also submit an application for guiding, and pay a set fee to use the route – often referred to as the 'ice-breaker fee'. Russia's mandatory ice-breaker fees are high, and the fees are not directly linked to actual services rendered. For instance, during light summer ice conditions, an ice-strengthened vessel may be able to navigate the NSR unescorted, but will still have to pay a full ice-braker fee.[68] Foreign vessels passing the NSR are to follow orders from Russian authorities and are obliged to have on board a certificate on proper financial provisions for civil liability in case of pollution.

According to the Maritime Doctrine of the Russian Federation 2020 that has been approved by Russian President V. Putin on 27 July 2001,[69] the NSR will remain a national maritime transport system. Also, in 2008 further work on the current "Foundations of Russian Federation State Policy in the Arctic through

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series of wide-ranging proposals for regional security and cooperation in the Arctic, which marked a real breakthrough in the Soviet approach to this region. For the first time in several decades, the USSR decided to lift the "iron curtain" over its Arctic areas and called for international cooperation in many fields in the North.

65 A. Skaridov. Northern Sea Route: Legal Issues and Current Transportation Practice. – M. H. Nordquist, T. H. Heidar, J. N. Moore (ed.). Changes in the Arctic Environment and the Law of the Sea. Martinus Nijhoff Publishers, 2010, page 294.

66 *Ibid.,* page 289

67 *Ibid.,* page 295

68 C. L. Ragner. 'Den norra sjövägen'. In Hallberg, Torsten (ed), Barents – ett gränsland i Norden. Stockholm, Arena Norden, 2008, pages 114-127. English translation available online: http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf (30.08.2012).

69 Морская Доктрина Российской Федерации на Период до 2020 года. Утверждена Приказом Президента Российской Федерации от 27 июля 2001 года Нр 1387. Available online: http://federalbook.ru/files/OPK/Soderjanie/OPK-7/VI/Morskaya% 20doktrina.pdf (15.10.2012) (In Russian). Available online: http://www.oceanlaw.org/ downloads/arctic/ Russian_Maritime_Policy_2020.pdf (15.10.2012) (In English).

2020 and beyond"[70] was announced. According to the document adopted, Russia is to turn its Arctic lands into a main strategic resource base by 2016–2020. Moreover, the Special Forces under supervision of the Federal Security Service will be organized to provide security in the Russian part of the Arctic Ocean taking into account different military and political environmental conditions. Just recently, Russian President V. Putin has stressed the importance of Russian navy presence in the Arctic: "the Navy is an instrument for defending our national economic interests, including in regions like the Arctic, which holds a rich concentration of bio-resources, as well as deposits of hydro-carbons and other natural resources,"[71] he said. The Russian policy regarding the NSR area is based on the fact that it is a promising region for the mining and energy industries. Thus, copper and nickel production performed year-round due to northern shipping provides Russia with three billion dollars per year in export income.[72]

Other countries have more or less accepted Russia's *de facto* control of the NSR waters, and have not challenged the regime Russia has put in place. The only exception is the US. The United States has argued that the NSR is an international passage governed by Articles 34 to 45 in Part III of UNCLOS. Briefly, these provisions grant the vessels of all states freedom of navigation and overflight without impediment, termed "transit passage" in "straits used for international navigation". Thus, the United States Arctic Strategy specifically holds that

> "Freedom of the seas is a top national priority. Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits. Preserving the rights and duties relating to navigation and overflight in the Arctic region supports our ability to exercise these rights throughout the world, including, through strategic straits".[73]

Coastal states enjoy much less control over passage through international straits than they do over passage through the territorial sea. In particular, to protect the environment in international straits, coastal states may only adopt and apply

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[70] Основы государственной политики Российской Федерации в Арктике на период до 2020 года и дальнейшую перспективу. Утверждено Президентом Российской Федерации Д. Медведевым 18 сентября 2008 года. Пр – 1969. Available online: http://www.rg.ru/2009/03/30/arktika-osnovy-dok.html (29.10.2012) (In Russian). Available online: http://icr.arcticportal.org/index.php?option=com_content&view= article&id=1791%3Afoundations-of-the-russian-federations-state-policy-in-the-arctic-until-2020-and-beyond&catid=45%3Anews-2007&Itemid=111&lang=en (29.10.2012) (In English).

[71] Battle for Arctic key for Russia's sovereignty – Rogozin. RT, 04 December 2012. Available online: http://rt.com/politics/arctic-sovereignty-rogozin-resources-250/ (10.12.2012).

[72] A. Skaridov (Note 65), page 303.

[73] A. Cohen. Russia in the Arctic: Challenges to U.S. Energy and Geopolitics in the High North. – S. J. Blank (ed.). Russia in the Arctic. Strategic Studies Institute, 2011, page 27.

regulations "giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances."[74]

The Russian Federation rejects these arguments, and continues to treat the NSR as its own national transportation route governed by national legislature. Further development of Arctic transportation system as proposed by Russia foresees maintenance of the NSR as a "unified national transportation route", provision of stable and safe functioning of the NSR in the interests of regional and state economy, transit, international, state and regional shipping, as well as northern drop-off of goods, protection of priority of Russian fleet and consolidation of Russian safety on the Arctic.[75]

Presently, the perspective state policy on Arctic transportation system is laid down in the Federal Law on Amendments in Certain Legal Acts of Russian Federation in regard to State Regulation of Commercial Shipping in the Area of the Northern Sea Route[76] adopted on 28 July 2012. The Federal Law establishes, *i.a.,* that passage through the Northern Sea Route, a historically formed national transport communication of the Russian Federation, is conducted in accordance with customary principles and norms of international law, international treaties of the Russian Federation, the abovementioned Federal Law, other federal acts and any other normative legal acts issued on the basis of them. The Federal Law offers the Russian definition of the Northern Sea Route,[77] and stresses the importance of shipping safety and marine nature pollution minimization and protection.[78] The law establishes new headquarters for the NSR located in Moscow that will set forth tariffs and regulations regarding "navigation safety and the prevention, reduction, and control of pollution in the marine environment".[79] Administration of the Northern Sea Route is believed to become important in the coming years as more cargo ships

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[74] L. A. La Fayette. Oceans Governance in the Arctic. – The International Journal of Marine and Coastal Law. Martinus Nijhoff Publishers, 2008, 23, Page 545.

[75] В. Половинкин, А. Фомичев. Перспективные направления и проблемы развития Арктической транспортной системы Российской Федерации в веке. – Арктика: экология и экономика, 2012, Нр 3 (7), page 75.

[76] Федеральный закон Российской Федерации о внесении изменений в отдельные законодательный акты Российской Федерации в части государственного регулирования торгового мореплавания в акватории Северного морского пути N 132-ФЗ. Принят Государственной Думой 3 июля 2012 года. Available online: http://www.rg.ru/2012/07/30/more-dok.html (30.10.2012).

[77] According to the definition offered by the Federal Law from 28 July 2012, the NSR is an area adjacent to Russian northern coastline, comprising the internal waters, territorial waters, contiguous zone and exclusive economic zone of the Russian Federation, and bordered from the east by the line of demarcation of borders with United States and parallel to Cape Dezhnev in Bering Strait, from the west by meridian of Cape Zhelaniya till the archipelago of Novaya Zemlya, by the eastern coastline of the archipelago of Novaya Zemlya and western borders of the straits Matochkin Shar, Karskiye Vorota, Yugorskiy Shar.

[78] В. Половинкин, А. Фомичев (Note 75), Page 76.

[79] M. Bennett. Russia roards ahead in race to develop Arctic shipping route. Alaska Dispatch, 15 January 2013. Available online: http://www.alaskadispatch.com/article/ russia-roars-ahead-race-develop-arctic-shipping-route (20.02.2013).

ply the route, making the headquarters a potentially powerful office. Thus, president Vladimir Putin is continuing to centralize power, especially Arctic policymaking, to Moscow, the city located hundreds of miles from the coastline that is going to administer the north.[80]

1.7. Russian Regulation of Exclusive Economic Zone in the Arctic

The EEZ is a zone extending up to 200 nautical miles from the baseline, within which the coastal state enjoys extensive sovereign rights in relation to natural resources and related jurisdictional rights, and third states enjoy the freedom of navigation, overflight by aircraft and the laying of cables and pipelines.[81] The formulation of UNCLOS Article 55 unambiguously describes the legal status of the economic zone as a zone which is distinct from the territorial sea and to which sovereignty of the coastal state does not extend. The EEZ must be regarded as a separate functional zone of a *sui generis* character, situated between the territorial sea and the high seas.

Being a part of what one may call the zone of national jurisdiction, which excludes an expanse of full sovereignty, that of internal waters and the territorial sea, the EEZ constitutes a zone of economic sovereignty. In the EEZ a coastal state has *sovereign rights* for the purpose of exploration, exploitation, and preservation of natural resources, and also possesses jurisdiction with respect to marine scientific research and preservation of the marine environment.[82]

Having established the baselines and the territorial sea in the Arctic Ocean, Russia has also claimed its rights to the exclusive economic zone. In order to apply the Convention, on 17 December 1998 the Russian Federation has adopted the Federal Act on Exclusive Economic Zone of the Russian Federation,[83] which has no limitations on its applicability in the Arctic Ocean. The cited Act states that "the exclusive economic zone of the Russian Federation is a maritime area beyond and adjacent to the territorial sea of the Russian Federation with a specific legal regime established by this Federal Act,

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[80] *Ibid.*

[81] The concept of EEZ is one of the youngest institutions of the international law of the sea having emerged in the early 1970s and having been codified by UNCLOS (Articles 55–75). The EEZ is a reflection of the aspiration of the developing countries for economic development and their desire to gain greater control over the economic resources off their coasts, particularly fish stocks. The concept of the EEZ may be viewed a representing a precarious compromise notion between sovereignty and freedom. Today more than 40% of the ocean space in which the most valuable resources are located is under the jurisdiction of coastal states through their EEZs and continental shelf claims.

[82] *Infra.,* section 7.2.2.

[83] Федеральный закон об исключительной экономической зоне Российской Федерации N 190-ФЗ. Принят Государственной Думой 18 ноября 1998 года. Available online: http://femida.info/11/fzoiezrf005.htm (15.08.2012) (In Russian). Available online: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf (15.08.2012) (In English).

the international treaties to which the Russian Federation is a party and the norms of international law" (Article 1 (1)). Also, the Act explicitly states that "the outer limit of the territorial sea constitutes the inner limit of the exclusive economic zone" (Article 1(2)), meaning that the breadth of the EEZ cannot factually reach 200 nautical miles, and constitutes, in general, 188 nautical miles. In the zone with this breadth, the EEZ regime applies.[84]

In the EEZ, including those stretching into the Arctic Ocean, the Russian Federation shall exercise sovereign rights for the purpose of exploring, exploiting, commercializing, conserving and managing living and non-living resources as well as sovereign rights for the purpose of exploring the seabed and its subsoil and exploiting mineral and other non-living resources; also the exclusive rights to authorize and regulate drilling on the seabed and in its subsoil for all purposes and to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures (Article 5 (1.1) – Article 5 (1.4) of the Federal Act on Exclusive Economic Zone of the Russian Federation). The state is also entitled to jurisdiction over marine scientific research; the protection and preservation of the marine environment from pollution from all sources; the laying and operation of submarine cables and pipelines of the Russian Federation (Article 5 (1.5) herewith).

According to the Federal Act on EEZ, the Russian Federation shall exercise sovereign rights and jurisdiction in the exclusive economic zone, guided by economic, commercial, scientific and other interests, in accordance with the procedures defined by this Federal Act and the international treaties to which the Russian Federation is a party (Article 5 (2)). The living and non-living resources of the exclusive economic zone shall be under the jurisdiction of the Russian Federation; the regulation of activities related to the exploration and exploitation (commercialization) of these resources and their protection shall be within the competence of the Government of the Russian Federation (Article 5 (4)).

1.8. Russian Federation's Legal Regime of the Arctic Continental Shelf

1.8.1. Concept of the Continental Shelf in Brief

As the majority of on-going international disputes in the Arctic concentrate on the question of delimitation of Arctic continental shelf and establishment of outer continental shelf of the Arctic countries, a proper understanding of the concept of continental shelf is essential for further development of this thesis. Therefore the author finds it necessary to briefly introduce the legal meaning of continental shelf before proceeding to the Russian claims over continental shelf in the Arctic.

[84] С. Гуреев, И. Зенкин, Г. Иванов (Note 63), page 158.

From the international legal point of view, the continental shelf is understood to be the area of the seabed, including the subsoil thereof, extending from the outer boundary of the territorial sea throughout the entire extension of the natural continuation of the land (mainland or island) territory of states up to the limits determined by international law, over which the coastal state exercises sovereign rights for the purposes of the exploration and exploitation of its natural resources (UNCLOS Article 76 (1)).

Under UNCLOS Article 76 (1), the continental shelf can be established to the outer edge of the continental margin, *or* to a distance of 200 nautical miles 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. It is a rule of customary international law that the areas of the seabed which lie beyond the physical continental margin are included into the coastal state's continental shelf as long as they are within the 200 miles from the coast. Where the continental margin (as consisting of the shelf, slope and rise, but excluding deep ocean floor with its oceanic ridges) extends beyond 200 miles, the *outer limit* of the continental shelf is determined by the application of complex test known, after it architects, as the "Irish formula"[85] (so called *extended* or "*outer*" *continental shelf*).

The intention of UNCLOS Article 76 is that the outer limits of the continental shelf should become permanently fixed so as to exclude any future expansion of national jurisdiction into the international seabed area constituting the common heritage of the mankind. In order to avoid disputes over the limits of the shelf, the Commission on the Limits of the Continental Shelf (CLCS) has been established.[86] Thus, UNCLOS Article 76 requires the coastal state to submit information on the limits of the continental shelf beyond 200 nautical miles to the CLCS. The latter can verify whether that entitlement along the shelf does or does not exist according to the provisions of the Convention. CLCS shall make recommendations to the coastal state on matters related to the establishment of the outer limits of the continental shelf. In case where the coastal state establishes the outer limits on the basis of the CLCS recommendations, they are final and binding. Hence, defining the outer limits of the continental shelf does not affect the rights of other states to recognize, accept or acquiesce in the outer limits assigned in a submission to the CLCS. Outer limits, based on the recommendations of the CLCS, cannot be invoked against another

[85] The limit is either connecting points not more than sixty miles apart, at each of which points the thickness of sedimentary rocks is at least one per cent of the shortest from such point to the foot of the continental slope, or a line connecting points not more than sixty miles apart, which points ate not more than sixty miles from the slope. In each case the points referref to are subject to a maximum seaward limit: they must be either within 350 miles of the baseline or within 100 miles of the 2 500-metre isobath. See UNCLOS Article 76 (4); Article 76 (5); R. R. Churchill, A. V. Lowe (Note 55), page 149.

[86] C. Johnson, A. G. O. Elferink. Submissions to the Commission on the Limits of the Continental Shelf in Cases of Unresolved Land and Maritime Disputes. The Significance of Article 76 (10) of the Convention on the Law of the Sea. – D. Freestone, R. Barnes, D. M. Ong (ed.). The Law of the Sea, Progress and Prospects. Oxford University Press, 2006, page 162.

state when shelf delimitation between states is still under consideration. In these cases, any continental shelf limit will only be finalized with the delimitation of the boundaries between the states.[87]

Originally it was thought that there would only be a small number of nations with extended continental shelves submitting claims to the CLCS. But with increasing resource scarcity, advancing technology, and the multipolar state of international politics, this has not been the case. The recent wave of continental shelf delimitation claims has been a surprise, least of which to the CLCS itself, which with a staff of only twenty-one has announced that it will not be able to rule on all pending claims until after 2030.[88]

The basic principle determining the rights of the coastal state over the continental shelf outside the state's territorial waters is that the shelf is not regarded as a part of the territory of the coastal state, but the state enjoys *sovereign rights* over this territory. "Sovereign rights" of a coastal state over the continental shelf mean that the coastal state is entitled to explore the shelf and exploit all natural resources[89] such as oil, gas, sedentary species. The rights of the coastal state also include the right to construct and authorize the use of artificial islands and installations and structures used for economic purposes, and the right to authorize drilling of the shelf.[90]

1.8.2. Russian Regulation of the Continental Shelf

In 1916 the Russian Empire, substantiating its sovereign rights to certain islands in the Northern Arctic Ocean (Henrietta, Uedinenie, and others), declared that those islands are a continuation northward of the Siberian continental platform.[91] The Russian state has been using the argument of "natural prolongation of the land territory" long before it was codified in the international law of the sea. The Soviet Act "On Continental Shelf of the USSR" did not include direct references to the 1958 Geneva Convention on the Continental Shelf,[92] but the

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[87] M. Weber. Defining the Outer Limits of the Continental Shelf Across the Arctic Basin: the Russian Submission, States' Rights, Boundary Delimitation and Arctic Regional Cooperation. – The International Journal of Marine and Coastal Law. Martinud Nijhoff Publishers. 2009, 24, page 654.

[88] S. Shackelford. Was Selden Right?: The Expansion of Closed Seas and its Consequences. – Stanford Journal of International Law. 2011, Volume 47, No 1, pages 33–34.

[89] Note that *non*-natural resources such as ship wrecks are not included.

[90] *Infra.,* section 7.2.3.

[91] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 87.

[92] The Convention on the Continental Shlef, adopted at Geneva on April 26, 1958, by the United Nations Conference on the Law of the Sea, represents the first great effort to determine by an act of international legislation the scope of the continental shelf doctrine in international law. The Convention, *i.a.,* laid down the principle that the coastal state exercises sovereign rights over the continental shelf for the purposes of exploration and exploitation of it natural wealth.

established delimitation principles were in essence based on Article 6 of the latter.[93]

Under the Constitution of the Russian Federation,[94] "the Russian Federation shall possess sovereign rights and exercise the jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation according to the rules fixed by the federal law and the norms of international law" (Article 67 (2)). This constitutional definition grants that the regimes of the continental shelf and EEZ fall within the competence of the Russian Federation, not its subjects. The same competence division is supported by Article 71 (n) therein, in accordance to which the jurisdiction of the Russian Federation includes *i.a.* determination of the status and protection of the state border, territorial sea, air space, exclusive economic zone and continental shelf of the expenditures.

In order to conform to the principles of the Convention, which under the Constitution form a component part of Russian legal system, Federal Law on the Continental Shelf of the Russian Federation[95] was adopted in 1995. Under the Law, the continental shelf of the Russian Federation comprises the seabed and subsoil of the submarine areas situated beyond the territorial sea of the Russian Federation throughout the natural prolongation of its land territory to the outer edge of the continental margin (Article 1). Russian Federal Law on the Continental Shelf is applicable to the Arctic area without any specific limitations. However, differently from UNCLOS, Russian Federal Law on the Continental Shelf does not state the 200-mile limit of the continental shelf finding the limit on the very end of the continental margin.

According to the abovementioned Federal Law, the Russian Federation exercises sovereign rights over the continental shelf for the purpose of exploring the continental shelf and exploiting its mineral and living resources; the exclusive rights to authorize and regulate drilling on the continental shelf for all purposes and to construct, to authorize and regulate the erection, operation and use of artificial islands, installations and structures; also jurisdiction with respect to marine scientific research; protection and conservation of the marine environment; the laying and use of submarine cables and pipelines.

It should be noted that the right of the coastal state to conduct drilling on the seabed is an exclusive right as directly connected to the sovereign rights of the coastal state to explore and exploit the continental shelf. Jurisdiction of the coastal state over laying of cables and pipelines is restricted, because in its

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[93] С. Гландин. Современный международно-правовой режим континентального шельфа Российской Федерации. Диссертация на соискание ученой степени кандидата юридических наук. Институт государства и права РАН Центр международно-правовых исследований, 2007, page 49.

[94] Конституция Российской Федерации (Note 58).

[95] Федеральный закон о континетнальном шельфе Российской Федерации N 187- Ф3. Принят Государственной Думой 25 октября 1995 года. Available online: http://femida.info/11/fzoksrf001.htm (15.08.2011) (I) Available online: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf (15.08.2012) (In English).

realization one needs to consider the right of all States to lay cables and pipelines in the high seas.[96] Article 5 of the Federal Law on the Continental Shelf establishes that the Russian Federation exercises sovereign rights and jurisdiction over the continental shelf in pursuit of economic, trade, scientific and other interests in accordance with the procedures established by this Federal Law and the rules of international law. In the exercise of its sovereign rights and jurisdiction over the continental shelf the Russian Federation shall not interfere with navigation and other rights and freedoms of other states recognized in accordance with the generally accepted principles and rules of international law (Article 5).

Russia occupies the one-seventh of the world's landmass and has the most extensive coastal zone in the world. As such it has always shown a considerable interest in the question of the continental shelf. According to the Russian Maritime Doctrine[97], one of the main objectives of the national maritime policy is realization and protection of sovereign rights over the continental shelf of the Russian Federation for the exploration and exploitation of its resources. Thus, the question of the delimitation of Russian continental shelf beyond 200-miles limit is of utmost importance for Russian current and future legal and political practice.

1.9. Russian Extended Continental Shelf Claims under UNCLOS

In 2001, recognizing the legal certainty and legitimacy that the Commission on the Continental Shelf process would bring to its rights over the extended continental shelf, the Russian Federation became the first state to file submission with the CLCS pursuant to Article 76 (8) of UNCLOS.[98] In total the claimed Russian extended continental shelf amounts to 460 000 square miles or 1.2 million square kilometers (by comparison, Australia's extended shelf is 2.5 million square kilometers). It will amount to possibly the largest Arctic claim. In the submission, Russia extended the outer limit to the geographical North Pole and far into the central Arctic Ocean Basin along the potentially oil and gas-rich Lomonosov and Alpha-Mendeleev Ridges. This is about the size of Texas, California, and Indiana combined.[99]

Additionally, Russia has demonstrated a readiness to waive its rights over a part of the Arctic seabed behind the established extended continental shelf within the area of Russian polar sector. In this respect, Russia has proposed

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[96] С. Гуреев, И. Зенкин, Г. Иванов (Note 63), page 158.

[97] Морская Доктрина Российской Федерации на Период до 2020 года (Note 69).

[98] Commission on the Limits of the Continental Shelf. Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Russian Federation. Available online: http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus.htm (07.10.2012).

[99] K. Isted. Sovereignty in The Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations. – Journal of Transnational Law & Policy. 2008–2009, 343, page 359.

creation of international seabed as "common heritage of mankind" on account of the seabed of its polar sector.[100]

At a very basic level, states mapping the continental shelf beyond 200 nautical miles are attempting to show how far out their land mass extends underwater, by locating what the Convention calls "the outer edge of the continental margin". To do so, a state must first demonstrate that the areas mapped are appurtenant to the State's continental land mass.[101] If it satisfies this test of appurtenance, the state may then locate the edge of the continental margin.[102] The test of appurtenance is especially relevant in the Arctic Ocean, where the Russian Federation, Denmark, and Canada are each attempting to show that the Lomonosov Ridge is a natural prolongation of its respective land mass. The Russian Federation, in its submission to the CLCS in 2001, asserted some degree of appurtenance of the Lomonosov Ridge to its continental land mass. In its 2002 recommendation responding to Russia's 2001 submission, the Commission requested "a number of points of clarification" as well as more data with respect to the Central Arctic Ocean, and recommended that Russia revise its submission accordingly for later consideration.[103]

In addition, five states – Canada, Denmark, Japan, Norway, and the United States – filed responses to the Secretary General's published executive summary of the Russian submission. Canada and Denmark tersely commented that more information was needed to make a recommendation regarding the delineation of the Russian extended continental shelf, while carefully reminding the Commission of its obligation under UNCLOS to make recommendations without prejudicing the claims of bordering countries.[104] Norway and the U.S. were not as subtle. The U.S. Notification rejected out of hand any possibility that the Lomonosov Ridge could be a natural prolongation, even though the ridge will not be of any direct significance to any possible U.S. submission. The U.S. Notification stated summarily that "[t]he ridge is a freestanding feature in the deep, oceanic part of the Arctic Ocean basin, and not a natural component of the continental margins of either Russia or any other State."[105] It also questioned Russian assertions with respect to the nature of the Alpha-Mendeleev Ridge.

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[100] Ю. Малеев. Континентальный шельф России в Арктике: управление и использование без борьбы. – Международное право / International Law. 2009, 1(37), page 114.

[101] *Ibid.,* page 259.

[102] *Ibid.,* page 264.

[103] *Ibid.,* page 268.

[104] Canada: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf. CLCS.01.2001.LOS/CAN. 26 February 2002. Available online: http://www.un.org/depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__CANtext.pdf (07.09.2012). Denmark: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf. CLCS.01.2001.LOS/DNK. 26 February 2002. Available online: http://www.un.org/depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__DNKtext.pdf (07.09.2012).

[105] United States of America: Notification regarding the submission made by the Russian Federation to the Commission on the Limits of the Continental Shelf. U.N. Ref.

Notwithstanding the international disputes, Russia has continued to gather data in the Central Arctic Ocean, in hope to support its position that the Lomonosov Ridge is a natural prolongation of the Russian land territory. To gather this data, Russia launched the Arktika-2007 Expedition to take samples of the Lomonosov Ridge at the points of its conjugation with the Laptev Sea and the East Siberian Sea. In February 2007, the Russian polar explorer and member of the Duma, A. N. Chilingarov carried off the technically stunning feat of using a two Mir manned mini-submersibles to plant a titanium Russian Federation flag at a depth of some 4200 meters at the geographic North Pole.[106]

Russia's gambit accelerated a media obsession with the Arctic. In the more than two years since Russia's North Pole adventure journalists and scholars have come to describe the Arctic's future in alarmist terms. These reports include warnings of "a race for control of the Arctic", and a "coming anarchy" in which states will "unilaterally grab" as much territory as possible to secure new sources of oil and natural gas. Some describe the Arctic as the site of "an armed mad dash" and a potential source of a future armed conflict, likely involving the United States and Russia.[107] The extensive interest of the media was even more heated by numerous emotional commentaries presented by the representatives of the Arctic countries, especially Russia. For instance, after the Arctic 2007 expedition, A. N. Chilingarov formulated the key point of Russian policy in the Arctic. Russia's position is that the Arctic belongs to Russia and that Russia will not give the Arctic to anyone![108]

Despite the fact that A. N. Chilingarov's stunt was an impressive and daring technical achievement, it carried no legal significance. In particular, viewed from the legal perspective, planting a country's flag on the bottom of the sea could, if at all, only be regarded as expression of attempted occupation if the respective seabed area were to be considered a *terra nullius* not covered by

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CLCS.01.2001.LOS/USA. 18 March 2002. Available online: http://www.un.org/depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf (07.09.2012).

[106] Just recently, A. N. Chilingarov has published an article on brief memories from 2007 expedition to the seabottom of the North Pole. According to the article, the expedition was a great achievement of Russian science and technics. "We were able to crush the ice, to come to the North Pole and on a submarine machine engineered by ourselves dive to the seabottom of our planet", writes Chilingarov. "This achievment proves that Russia was and is the world leader of polar discoveries". However, Chilingarov confesses that the samples of soil taken from the seabed of the Arctic Ocean "helped a little to gain direct or even indirect proofs that can be used in Russian Sumbimmison to the CLCS". А. Чилингаров. О погружении на дно Северного Ледовитого океана в географической точке Северного полюса. – Арктика: экология и экономика, 2012, Нр 3 (7).

[107] M. Becker. Russia and the Arctic: Opportunities for Engagement Within the Existing Legal Framework. – American University International Law Review. 2010, Volume 25, issue 2, page 226.

[108] A. Skaridov. Russian Policy on the Arctic Continental Shelf. Changes in the Arctic Environment and the Law of the Sea. – M. H. Nordquist, T. H. Heidar, J. N. Moore (ed.). Changes in the Arctic Environment and the Law of the Sea. Martinus Nijhoff Publishers, 2010, page 489.

public international law to date.[109] However, according to the Article 77 (3) of UNCLOS, "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation". Under no circumstances may the flag planting be considered as occupiable no man's land. Rather, it signalled Russia's intention and ability to continue pressing a legal claim to a significant portion of the continental shelf beneath the Arctic Ocean.[110] As has been stated by Russia's former Minister of Natural Resources, Y. P. Trutnev,[111] the analysis of samples taken from the ridge showed that the Lomonosov Ridge is part of the structural continuation of the Siberian continental platform, and the North Pole belongs to Russia.[112]

In 2010 Russia launched an expedition "Shelf-2010" carried out by scientific-expeditious vessel "Akademik Fedorov" escorted by an atom ice-breaker "Jamal". Its main purpose was to gather materials and pictures of the relief of the Arctic sea floor for the further work on delimitation and reasoning of the limits of outer continental shelf of the Russian Federation needed to file a specified submission to the CLCS.[113] On June 23, 2011 "Akademik Fedorov" departed for a new expedition to explore the Arctic continental shelf. It is expected that Russia will submit its findings to the CLCS by December 2013 and filed to the Commission in 2014.[114] The head of Russian Federal Agency on Subsoil Exploitation, A. Popov, recently expressed an opinion that relying on the results of 2010–2012 Arctic expeditions, Russia will be able to confirm to the CLCS its rights to 1.2 million square kilometers of continental shelf.[115] However, experts do not see that the "fight" shall necessarily end in favor of Russia. If other countries pretending on development of the Arctic shelf will argue against Russia, they would need to prove that the continental shelf area under question belongs to natural prolongation of their mainland territory.[116]

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[109] A. Proelss, T. Müller (Note 9), page 655.

[110] M. Becker (Note 107), page 226.

[111] Y. P. Trutnev has served on post of Minister of Natural Resources of the Russian Federation till 22 May 2012, when he was appointed the Presidential Aide of the Russian Federation.

[112] M. Rajabov. Meltng Ice and Heated Conflicts: a Multilateral Treaty as a Preferable Settlement for the Arctic Territorial Disputes. – Southwestern Journal of International Law. 2009, Vol 15, page 427.

[113] Экспедиция «Шельф-2010» освежит конкуренцию среди приарктических стран. - Информационный портал «RIA Новости», 22 October 2010. Available online: http://ria.ru/arctic_news/20101022/288254902.html (30.10.2012).

[114] Новая экспедиция по уточнению границ шельфа России в Арктике. – Информационный портал «ИноСМИ.RU». Available online: http://inosmi.ru/infographic/20110704/171577630.html (30.10.2012).

[115] Результаты геологоразведочных экспедиций в Арктике дают шанс закрепить за РФ 1,2 млн кв км шельфа. – Агенство Экономической Информации «Прайм», 24 October 2012. Available online: http://www.1prime.ru/news/0/%7BC114A8A4-9F79-416E-AE45-C982F1F56B8A%7D.uif (30.10.2012).

[116] И. Наумов. Арктику поделят вдоль и поперек. – Независимая Газета, 26 October 2010. Available online: http://www.ng.ru/economics/2010-10-26/4-arctic.html (30. 10.2012).

Not only are Russian media and politicians making emotional arguments of ownership over the Arctic, the corresponding national policy is laid down in the abovementioned "Foundations of Russian Federation State Policy in the Arctic through 2020 and beyond" [117] as approved in 2008. The strategy clearly emphasizes the region's importance to Russia's economy as a major source of revenue, mainly due to energy production and profitable maritime transport. According to the Russian Arctic strategy paper, Russia plans to document its claims over the territory lying beyond its current economic zone before the end of 2010, and to establish the outer borders of its Arctic zone by 2015 in order to "exercise on this basis is Russia's competitive advantages in the production and transport of energy resources." If Russia's diplomatic efforts succeed, by 2020 the Arctic will become "one of the Russian Federation's leading strategic resource bases, allowing for the solution of problems of socio-economic development."[118]

However, some scholars led by well-respected Professor G. M. Melkov have criticized Russian Arctic Policy embedded in the Foundations as being contrary to Russian interests and the principles of Ilulissat Declaration and serving U.S. interests and goals. [119] Professor Melkov provides six reasons to consider Foundations of Russian Federation State Policy in the Arctic contrary to Russian interests.

First, as Professor Melkov says, the Foundations clearly aim to create a "common heritage area" in the Arctic, which shall lead to internationalization of the region – something that US, not Russia, strives for. Second, the Foundations completely cross out the Ilulissat Declaration signed by the Russian Government and that does not foresee creation of international seabed (as subject to the International Seabed Authority) in the Arctic. Third, Melkov believes that turning the Arctic into "zone of peace and cooperation" is contrary to Russian interests as it shall result in increased presence of NATO states in the area. Fourth, Professor Melkov ascertains that no delimitation of Russian Arctic boundaries as provided by the Foundations is necessary, as the boundaries were clearly established by Soviet Decree from 1926. Fifth, Melkov questions why there is no reference to the legitimate Soviet Decree from 1926 in the Foundations. Finally, the Professor believes that no "advertisement" of the FSB [Федеральная служба безопасности] presence in the Arctic is necessary in the Foundations as the FSB functions in the area are derived from completely legal grounds previously and duly established by the correspondent authorities. Therefore, Professor G. N. Melkov concludes that the Foundations

[117] Основы государственной политики Российской Федерации в Арктике на период до 2020 года и дальнейшую перспективу (Note 67).

[118] D. Trenin. The Arctic: A Front for Cooperation not Competition. The Arctic. A view from Moscow. Carnegie Endowment for International Peace, 2010, page 9.

[119] Г. Мелков. Континентальный шельф и основы государственной политики России в Арктике. – Национальные интересы, 2009, No 3.

of Russian Federation State Policy in the Arctic were written in haste by "diletants having no knowledge on nuances of international law."[120]

Recent Russian legislative developments in the Arctic include a draft federal law on the Arctic zone of the Russian Federation[121] published on 23 Janury 2013 Russian Ministry of Regional Development. The draft law defines Russia's Artic zone that includes the entire Murmansk region; Yamal-Nenets Autonomous Area; Chukotka Autonomous Area; and a few municipalities and districts of Karelia, Arkhangelsk region (including islands), Sakha, Komi, and the Krasnoyarsk region; as well as all internal and territorial waters, the EEZ and the continental shelf. According to the proposed bill, the Ministry of Regional Development will become an authorized federal body to be in charge of the Russia's Arctic. The bill ensures state support for development of transport, industrial, and energy-related infrastructure, scientific and innovative activities, implementation of the national investment policy, and labour relations and social benefits.[122] On the international level, the bill establishes legal regime for Russian legal entities and individuals residing on the Svalbard archipelago.[123] Those Russians who are legally registered on Svalbard have a right for development of the continental shelf of the archipelago, reads the document. The bill prohibits any interference of other states into commercial activities of Russian individuals and legal entities if those activities do not violate international treaties signed by Russia.[124] The draft is believed to guarantee normative, legal and institutional conditions for continuous stable economic development of Russia's Arctic zone and creates the basis for further elaboration of Arctic legislation.[125]

1.10. Scholarly and State Approaches to the Russian Official Position Concerning Outer Limits of CS

Not only has the Russian 2001 Submission to the CLCS caused tensions between Arctic countries, it also has initiated controversial disputes in Russia on both academic and governmental levels. As follows, the 2001 Submission was viewed as the first official deviation by the Russian Federation from previously applied Arctic sector theory. The very fact of an initiative expressed by a subject of international law (its body) to refuse from what it has been

[120] *Ibid*.
[121] Проект федерального закона Об Арктической Зоне Российской Федерации от 23 января 2013 года. Available online: http://docs.pravo.ru/document/view/29693690/30396019/ (20.02.2013).
[122] Bill on Russian Arctic drafted. Barentsnova, 23 January 2013. Available online: http://barentsnova.com/node/2213 (20.02.2013).
[123] *Ibid.*
[124] *Ibid.*
[125] Tenzor Consulting Group. Разработан проект закона «Об Арктической зоне РФ», 14 January 2013. Available online: http://lawfirm.ru/pr/index.php?id=4678 (20.02. 2013).

considering "its own" under 1926 legislation and the Convention of 1982 has been considered unusual,[126] to say the least.

The 2001 Submission to CLCS has caused negative reaction from many authoritative Russian experts. In April 2008, the Scietific Expert Council of the Maritime Board of the Russian Federation Government [Научно – экспертный Совет Морской Коллегии Правительства Российской Федерации] lead by prominent maritime experts A. G. Granberg and G. K. Voitolovskiy was convened in order to elaborate an alternative position of the Russian Federation. The resolution of the Council concluded that

> "in the priod since 2001 to 2009 the CLCS had not shown any progress on Russian submission. In other words, the path chosen by the Russian Federation is not only unprofitable, but constitutes a legal dead-end. The position does not contribute to the interests of Russian state and does not count on negative consequences that internationalization of the Arctic Ocean shall entail."[127]

The Council suggested that Russia should stop its actions on voluntary limitation of Arctic continental shelf falling under the jurisdiction of the Russian Federation, and take actions to delimit the continental shelf by and between all Arctic states in accordance with 1958 Continental Shelf Convention and UNCLOS.[128]

Furthermore, this alternative position was developed and elaborated in the scientific-expert memorandum prepared by the Council on Studies of Productive Efficiency by Russian Academy of Sciences and Ministry of Economic Development of the Russian Federation [Совет по Изучению Производительных Сил при Президиуме РАН и МИНЭКОНОМРАЗВИТИЯ России] in 2012 for the Administration of the President of the Russian Federation (hereinafter the Memorandum). According to the preamble of the Memorandum (edited by Professor A. N. Vylegzhanin), the latter has been prepared using the publications and expert opinion of the leading Russian maritime and international law experts: academic A. G. Granberg, Professor I. N. Bartsits, Professor G. M. Veljaminov, Professor G. K. Voitolovskiy, Professor A. N. Vylegzhanin, Professor S. A. Gureev, Professor A. A. Kovalev, Professor V. I. Kulebyakin, Professor Y. N. Maleev, Professor G. M. Melkov, Professor P. V. Savasskov, doctor jur candidate I. V. Bunik, doctor jur candidate A. M. Oreshnikov, doctor jur candidate B. P. Shapovalov, doctor jur candidate E. F. Pushkarev.[129] Proceeding from the high rankings of the legal scholars listed as authors of the

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[126] Ю. Малеев (Note 100), page 114.

[127] Г. Войтоловский. Нерешенные проблемы Арктического морепользования. Вестник МГТУ, 2010, Volume 13, Nr 1, page 101.

[128] *Ibid.,* page 101.

[129] А. Вылегжанин (Note 8).

Memorandum, one can conclude that the document presents the standpoints prevailing amongst the majority of Russian academic community.

Thus, in the Memorandum the experts have expressed an opinion that having delimited its continental shelf under Article 76 of UNCLOS, Russia has explicitly created competitive advantages for the United States in the region. In situation where Russia has delimited its undoubted continental shelf to 200 nautical miles as provided in the Convention (though Russian Federal Law on the Continental Shelf does not provide for this 200 nautical miles limit), has taken the burden of proof when establishing the limits of outer continental shelf, has agreed to create an international seabed area as the "common heritage of mankind" and has agreed to pay contributions from exploitation of the outer continental shelf beyond 200 nautical miles, the United States still considers itself unbound by the Convention and the rules provided in it.[130] The Council takes the stand against creation of described advantages in favor of the United States,[131] considering that the outer limits of the Russian Arctic continental shelf should be established by customary international law, while emphasizing the historical legal grounds in the region.[132]

In the expert Memorandum, Professor Vylegzhanin and others distinguish three existing legal positions concerning Russian outer continental shelf. According to the first position, the Arctic should be legally equaled to the Indian Ocean, meaning that the Arctic is one of the subjects of UNCLOS application. This approach was favored at the time when Russian Submission to the CLCS was composed and filed, entailing Russian decision to limit its Arctic continental shelf for the purpose of creation of "common heritage of mankind". However, the authors of the Memorandum believe that in this position the international law applicable to the Arctic would be limited exclusively to Article 76 of the Convention. Under this position, the disputed area of Russian outer continental shelf may not be used by Russian persons in accordance with subsequent federal laws.[133]

The second approach reflects the "classical," "old school" position – the stand taken by the Russian Empire, the Soviet Union and the Russian Federation up until 1997. Under this approach, the Arctic is an object of traditional regulation by first and foremost the Arctic countries. Arctic has not

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[130] *Ibid.,* pages 8-9.

[131] Professor Vylegzhanin has later additionally commented that the refusal of the US Senate to ratify the Convention grants the country with additional competitive advantages. Thus, when using the resources of Arctic continental shelf, the United States shall not be bound by the limits and financial obligations that arise from the Convention. Ratification of the Convention, according to A. N. Vylegzhanin, is ineffective for the US as it requires "altruistic innovations" such as consideration of the seabed beneath the area as common heritage of mankind. А. Вылегжанин. Отказ от участия в Конвенции по морскому праву дает США преимущества. – Информационный портал Московского Государственного Института Международных Отношений МИД России, 19 July 2012. Available online: http://www.mgimo.ru/news/experts/document226099.phtml (20.09.2012).

[132] А. Вылегжанин (Note 8), page 9.

[133] *Ibid.,* page 12.

been a special object of regulation during the III Conference on the Law of the Sea, its legal regime has emerged long before the Convention was signed, and the essence of this regime is not the 1982 Convention, but the applicable customary law norms, historical legal grounds, where the domestic law of the Arctic countries plays a large role.[134] Thus, the Arctic seabed is an object of both domestic and international legal regulation, with the latter not being limited to Article 76 of UNCLOS. Moreover, the regulation of Article 76 (on limits between continental shelf and "common heritage of mankind") does not constitute a norm of international customary law. Therefore, the rights of the Russian Federation over the continental shelf in the Arctic do not depend on Russian participation in the Convention.[135] Though the opinion was expressed to the representatives of the Ministry of Foreign Affairs already in 2009, the latter has not agreed to this approach.

The third legal approach is the "new Arctic position" settled in 1997–2001, stating the application of Article 76 of UNCLOS in the Arctic. This position was favored by Professor A. L. Kolodkin[136] and is currently accepted and applied by the Russian Ministry of Foreign Affairs. According to Professor Vylegzhanin and others, the main shortcoming of this position is the fact that Russia loses a substantial area of its continental shelf. At the same time no consideration is given to the juridical fact that most countries of the world have silently accepted that Russia, Canada and other Arctic countries enjoy historical legal grounds in the Arctic region that had been formed long before 1982 Convention and take into account geographical, climate and other peculiarities of the region.[137] In addition to losses in space, the Submission filed by Russia to the CLCS in 2001 has entailed negative feedback from Canada, Denmark, Norway and especially the United States.[138] Also, the filed Submission and the following years up to now have led Russia to a legal dead-end, where the Submission was not approved by the CLCS, the new scientific data was requested and there is no certainty that the Submission will ever be approved.[139]

On the theoretical level, Professor Vylegzhanin and others put forward the argument that Article 76 is not a part of international law applicable to the Arctic region, and therefore cannot change it. Even if Russia was to apply Article 76 of UNCLOS, they say, it should apply also Article 76 (10), stating that "the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Thus, relying on Article 76 (10), Russia, in specific natural and legal conditions of the Arctic, is entitled to apply Article 83 of UNCLOS,[140] and

[134] *Ibid.,* page 12.
[135] *Ibid.,* page 12.
[136] *Ibid.,* page 14.
[137] *Ibid.,* page 15.
[138] *Ibid.,* page 17.
[139] *Ibid.,* page 19.
[140] According to Article 83 (1) of UNCLOS, the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis

delimit the continental shelf with Canada and other Arctic countries instead of bearing substantial losses in space due to unilateral delimitation of the continental shelf in favor of creation of "common heritage of mankind".[141] Also, legal scholars emphasize the possibility of a partial submission granted by the Convention, and suggest that Russia could file a partial submission in respect of the Pacific Ocean areas, and for the rest of the Arctic rely on Article 83 of UNCLOS that constitutes a customary international norm on consensual delimitation of continental shelf between countries with opposite or adjacent coasts.[142]

Finally, in the described Memorandum, prominent Russian legal scholars lead by Professor Vylegzhanin stand to protect the "old school" approach that Arctic, and consequently, its continental shelf are the object of regulation of customary international law. The length of the coastline of the Russian Federation in the Arctic Ocean exceeds the total length of the coastlines of all Arctic countries. As has been noted by the International Court of Justice in its judgment in the Tunisia-Libya continental shelf case,

> "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."[143]

Relying on the abovementioned, as well as on the fact that most of Arctic geographical discoveries were carried out by Russian polar expeditors, Vylegzhanin and others claim that historically the grounds of the Arctic legal regime lay within the legal framework, including that of the continental shelf, of the Russian Empire and the Soviet Union.[144]

The Memorandum quotes a Soviet legal scholar V. N. Kulebyakin, according to whom

> "the Arctic ocean and its border seas are absolutely different from other oceans and seas, and constitute a specific case with unique legal regulation applicable. The complex of historical, economical, political, geographical, ecological and other factors allows to conclude that the Arctic marine spaces cannot be viewed under the same standpoint as marine spaces in general." [145]

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of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

[141] А. Вылегжанин (Note 8), page 20.

[142] *Ibid.,* page 21.

[143] Case Concerning the Continental Shelf. Tunisia/Lybian Arab Jamahiriya. International Court of Justice Judgement of 24 February 1982, page 61. Available online: http://www.icj-cij.org/docket/files/63/6267.pdf (22.10.2012).

[144] А. Вылегжанин (Note 8), page 21.

[145] В. Кулебякин. Правовой режим Арктики. – Международное морское право. Москва, 1988, page 139.

Therefore, "the Arctic states must and may adopt subsequent legal acts concerning the regime of their Arctic sector without sanctions from another states, relying upon their sovereignty and other important principles of international law." [146] Vylegzhanin and others conclude that historically established sectoral borders may be considered as "preliminary" delimitation lines for the purpose of delimitation of the Arctic continental shelf between five countries surrounding the Arctic Ocean.[147]

Furthermore, the Memorandum finds supporting arguments for Arctic customary international legal status in both international legal literature and official documents. The authors quote D. R. Rothwell and C. C. Joyner, according to whom

> "the law of the sea for the polar north has been applied through national approaches. The government of each Arctic State considers, adopts and implements through national legislative means those legal rules and norms that it feels best serve its national interests within the context of its own polar seas." [148]

Professor Vylegzhanin and others rely also on the text of the Ilulissat Declaration[149] signed by representatives of five Arctic countries on 28 May 2008 in Ilulissat, Greenland, stating *i.a.* that "an extensive international legal framework applies to the Arctic Ocean", with no specific reference to 1982 Convention. Also, the Foundation of Russian Arctic Policy[150] does not foresee creation of common heritage of mankind in the Arctic, especially on account of Russian continental shelf. The Foundation provides for application of international law in the area, which does not mount to UNCLOS exclusively.[151]

According to Vylegzhanin and others, the fundamental principle of continental shelf delimitation – the principle of natural prolongation – as well as other principles of maritime delimitation are reflected in general international law, which needs to be referred primarily to customary international law.[152] The

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[146] О. Эфендиев. Арктические воды. – Современное международное морское право. Режим вод и дна Мирового океана. Отв. ред. Лазарев, Москва, 1974, page 190 (Reference by А. Вылегжанин (Note 8), page 28).

[147] А. Вылегжанин (Note 8), page 28.

[148] D. R. Rothwell, C. C. Joyner. The Polar Oceans and the Law of the Sea. – A.G. Oude Elferink, D. R. Rothwell (ed.). The Law of The Sea and Polar Maritime Delimitation and Jurisdiction. Marinus Nijhoff Publishers, 2001, page 1.

[149] The Ilulissat Declaration. Arctic Ocean Conference. Ilulissat, Greenland, 27-29 May 2008. Available online: http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf (07.10.2012).

[150] Основы государственной политики Российской Федерации в Арктике на период до 2020 года и дальнейшую перспективу (Note 70).

[151] А. Вылегжанин (Note 8), page 33.

[152] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area. Canada/United States of America. International Court of Justice Judgement of 12 October 1984, page 290. Available online: http://www.icj-cij.org/docket/files/67/ 6369.pdf (22.10. 2012).

authors refer to initial standpoint of the International Court of Justice, which ascertained that

> "the fundamental rule of general international law governing maritime delimitation (…) requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result."[153]

An equitable solution cannot be obviously reached if one state (Russia) unilaterally limits its continental shelf while the other state (USA) does not.[154]

The International Court of Justice has also stressed the importance of international agreements. For example, in the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area between Canada and the United States, the International Court of Justice has established that:

> "there is nothing to prevent the parties to a convention – whether bilateral or multilateral – from extending the rules contained in that convention to aspects which is less likely that customary international law might govern. In that event, however, the text of the convention must be read with caution."[155]

Therefore, any Arctic country member to the 1982 Convention has a right to apply the Convention to the relations not governed by customary international law, but only if reading the Convention *with caution*. In the specific circumstances of the Arctic reading UNCLOS *with caution* means taking into account the historically formed legal practice of the Arctic countries, both national and international, applicable *i.a.* to submerged areas adjacent to Arctic coast. Merely formal application of Article 76 of UNCLOS is unjustified ignorance of customary international law applicable to the Arctic.[156]

The legal scholars conclude that the rights of the Russian Federation or any other Arctic state over the Arctic continental shelf as natural prolongation of its land territory exist notwithstanding the participation of this state in UNCLOS and notwithstanding the applicability of Article 76 thereof. Russia is not bound to primarily and formally fulfill and imply Article 76 of the Convention in the Arctic. Until the Arctic states with adjacent coasts reach an equitable solution on delimitation of the continental shelf on the grounds of general international law (proceeding from preliminary boundaries set in the nineteenth century), Russia is entitled to practice its national jurisdiction in the Arctic within the limits set by customary international law,[157] thus including the disputable area of outer continental shelf.

Amongst recommendations on legal-political measures given by the expert Memorandum is the recommendation to hold consultations with Canada and

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[153] *Ibid.,* page 339.
[154] А. Вылегжанин (Note 8), page 34.
[155] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area. Canada/United States of America (Note 155), page 290.
[156] А. Вылегжанин (Note 8), page 36.
[157] *Ibid.,* page 37.

Denmark on harmonization of suspension of unilateral delimitation of continental shelf under Article 76 of UNCLOS, until the moment the United States start to unilaterally delimit the continental shelf. Meanwhile, the delimitation line of Russian outer continental shelf as provided in the Russian 2001 Submission should be drawn back from the CLCS. Instead, a new, partial Submission to CLCS on the Russian continental shelf in the Pacific Ocean should be developed and filed.[158]

It should be noted that similar radical opinions that Russia must withdraw its 2001 submission to the CLCS and file a new one following its national interests have been expressed before the abovementioned Memorandum. For instance, Professor G. M. Melkov opines that Russia is entitled to withdraw its submission

> "due to its state sovereignty, newly discovered circumstances in the field of Arctic seabed studies and due to the necessity to protect its national interests notwithstanding the positions of the United States and other countries. Especially as the submission is not an international agreement and does not bear any legal authority." [159]

In his proclamations, Professor Melkov relies on the Ilulissat Declaration[160] concluding that the idea of sharing the Arctic continental shelf between five Arctic countries may become reality, and that the Ilulissat Declaration has totally depreciated hasty proposal of the Russian Federation to create international seabed in the Arctic as common heritage of mankind. Professor Melkov concludes that the Russian Federation must file a new submission, coherent with national interests of Russia, not the United States.[161]

In addition on the abovementioned recommendations on submission to the CLCS, the expert Memorandum suggests that the Russian Federation should notify Canada of its willingness to apply Article 83 of UNCLOS in the upper part of its Arctic continental shelf. Until the continental shelf is delimited by an agreement between the two countries, for the purposes of nature protection Russia should proceed from meridian (sectoral) lines as established by 1867 Russian-American treaty, Soviet Decree from 1926, Russian-English treaty from 1825 and Canadian legal regulation on its sector borders. At the same time it is expected that the Canadian government shall follow the same practice in applying its nature protection policy.[162] A similar note should be sent to the government of Denmark.

After the notes have been sent to Canada and Denmark, relying on Article 6 of the 1958 Convention on the Continental Shelf that both Russia and the United States are a party to, Russia should start negotiations with the United

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[158] *Ibid.,* page 39.
[159] Г. Мелков (Note 119).
[160] The Ilulissat Declaration (Note 149).
[161] Г. Мелков (Note 119).
[162] А. Вылегжанин (Note 8), page 39.

States stating that Russia shall use its Arctic sector as established by 1867 and 1825 treaties for nature protection purposes. It is expected that the government of the United States shall follow the same practice in applying its nature protection policy. Finally, argumentation of Russian international-legal position concerning its continental shelf in the Arctic should be reinforced, emphasizing that the disputable are of the outer continental shelf belongs to Russia. According to the authors of the Memorandum, these measures shall lead to stability of Russian continental shelf limits and continuity of historically formed legal regime of the seabed of the Arctic Ocean.[163]

However, despite elaborated legal arguments introduced in the expert Memorandum and wide support of many prominent Russian legal scholars to the ideas expressed in it, the official Russian position regarding continental shelf relies exclusively on UNCLOS provisions, emphasising the need of collecting and filing additional data to the CLCS to support the 2001 Submission. Representatives of the Russian Ministry of Foreign Affairs (hereinafter "MID") argue with Professor Vylegzhanin[164] that having ratified the 1982 Convention in 1997 with no specific limitations or specific provisions on the Arctic areas, Russia has agreed to act within the framework of the Convention. Furthermore, MID believes that Article 83 of UNCLOS cannot be applicable in case of the Arctic as it regulates only specific cases of continental shelf delimitation. Russian continental shelf needs to be delimited proceeding from Article 76 of the Convention defining the very essence of the continental shelf. Thus, without proving that a certain area constitutes the continental shelf, it cannot be delimited. The disputed area of Russian outer continental shelf around the Gakkel ridge cannot be considered the Russian outer continental shelf as the Convention explicitly excludes oceanic ridges or the subsoil thereof from continental margin. Only if geological, geo-physical and other criteria prove that the Gakkel ridge may be considered a part of the continental shelf according to Article 76, it may be included into the Russian Submission to the CLCS (though, according to the representative of Russian MID, this is scientifically impossible).[165]

1.11. Russian Maritime Boundaries in the Arctic

Despite its claims and on-going debates on the limits of outer continental shelf or on the realm and meaning of the NSR, Russia has taken certain steps to establish maritime boundaries in disputed areas of the Arctic. Since 1974 there has been an unresolved problem of the delimitation of marine expanses in the Barents Sea

[163] *Ibid.,* page 40.

[164] The following opinion was expressed by representative of Russian MID, deputy director of legal department of Russian MID V. Y. Titushkin at the Round Table on International-Legal Aspects of Russian Position in the Arctic (Международно-правовые аспекты позиции России в Арктике) held at the Faculty of International Law of Diplomatic Academy on 16 February 2012. Available online: http://www.youtube.com/watch?v=Yzi3NI8dIiA&feature=plcp (28.10.2012).

[165] *Ibid.*

between the USSR (Russia) and Norway. Both the Soviet Union and Norway had fundamentally different standpoints and neither were willing to compromise. Between the two states' preferred borderls lay a disputed area of 176 000 square kilometers; the rights to exploit the resoures within the zone remained unsettled. The disputed area made up 12% of the whole Barents Sea, which is the equivalent of 45% of Norway's total land area.[166] During Russian President Dmitry Medvedev's official visit to Norway in April 2010, Russian President and Norwegian Prime Minister Jens Stoltenberg surprisingly announced an agreement on the delimitation of the maritime dispute in the Barents Sea.

The delimitation treaty was signed in Murmansk on 15 September 2010, bringing 40 years of negotiations between the two counties to an end.[167] The treaty was ratified by exchange of ratification documents on 7 June 2011 and became effective on 7 July 2011.[168] As the leader of Russian delegation in Norway R. A. Kolodkin (and the son of the late A. L. Kolodkin) has commented,

> "this treaty is beyond the framework of bilateral relations. Having concluded it, Russia and Norway pose an example of how, in the spirit of compromise, cooperation and mutual benefit just international-legal solutions to the disputes concerning appurtenance of spacious Arctic areas, and consequently, resources of these areas, that are often viewed as the source of potential conflicts."[169]

According to the joint statement issued in April 2010, the delimitation line is based on "international law in order to achieve an equitable solution". The achievement of the compromise was possible due to mutual waivers, with the main intention of the parties to make the treaty balanced and just otherwise not to be followed.[170] Under the treaty, Russia and Norway have established a single delimitation line for their EEZs and continental shelf in areas within 200 miles of their coasts and a delimitation line between the Norwegian and Russian continental shelf where it extends beyond 200 miles[171] (see Appendix 2). The treaty includes provisions on how to deal with the shared resources in the

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[166] Delimitation Agreement: A New Era in the Barents Sea in Arctic? EU Arctic Forum. Cross-Platform Arctic Issues. Available online: http://eu-arctic-forum.org/allgemein/delimitation-agreement-a-new-era-in-the-barents-sea-and-the-arctic/ (05.01.2013).

[167] L. Harding. Russia and Norway resolve Arctic border dispute. – The Guardian, 15 September 2010. Available online: http://www.guardian.co.uk/world/2010/sep/15/russia-norway-arctic-border-dispute (05.01.2013).

[168] Norway and Russia ratify treaty on maritime delimitation. Norwegian Ministry of Foreign Affairs. Available online: http://www.regjeringen.no/en/dep/ud/press/news/2011/maritie_delimitation.html?id=646614 (05.01.2013).

[169] Р. Колодкин. Договор с Норвегией: разграничение для сотрудничества. – «Международная жизнь», 2011, No 1, Also available in «Морское право», 2011, No 1, page 23. Available online: http://sea-law.ru/magazines/slm_1_2011/index.html (30.10. 2012).

[170] *Ibid.,* page 17.

[171] T. Henriksen, G. Ulfstein. Maritime Delimitation in the Arctic: The Barents Sea Treaty. – Ocean Development & International Law, 2011, 42, pages 6–7.

Barents Sea and the wider Arctic Ocean. The treaty also establishes a delimitation line between the Svalbard Fisheries Protection Zone and the Russian EEZ, and delimits the continental shelf in the mid- and northern Barents Sea.

Some people in Russia consider the Russian-Norway treaty an unacceptable concession to the Scandinavians.[172] Thus, the opposition to the treaty feared that the agreement might harm the Russian fisheries industry. "Russia loses more than 80 000 square kilometers of territories with huge bio-resources and crude reserves. In the opinion of specialists, fisheries losses alone may exceed 300 000 tonnes per year or over 15 billion rubles," was the position of Russian Communist party.[173] Therefore, the State Duma supplemented the ratification bill with a special statement, which noted that the ratification "must not damage the fishing potential of each side."[174] It also said that the ratification "did not mean Russia's recognition of the 200-mile fishing zone around Spitsbergen unilaterally declared by Norway."[175] "It is important that the principles of joint development and distribution of natural resources and efficient procedures in the settlement of possible disputes are based on practical and conscientious decisions," was the State Duma's position.[176]

The Norway-Russia delimitation treaty will probably have few concrete implications for other existing and future maritime delimitation disputes. As such, the Norway-Russia delimitation includes shelf areas beyond 200 nautical miles, thus adding to the small number of bilateral agreements dealing with the shelf beyond 200 miles. Neither the joint statement nor the treaty provide any information on whether the delimitation in this area was based on the predominant geographical circumstances or geological (*e.g.*, prolongation) circumstances, which could be relevant for other continental shelf delimitation processes in the Arctic and elsewhere.[177]

Another maritime boundary treaty that needs to be mentioned is the 1990 United States – USSR (Russia) boundary agreement negotiated by the U.S. and the former Soviet Union on their maritime boundary in the Bering and Chukchi seas[178]. The agreed boundary runs along the 168°49'30 west longitude meridian, following the line established by the 1867 Treaty. The purpose of the treaty was to determine the limits of national sovereignty of the parties as well as their right to development of natural resources of corresponding maritime zones. Article 1(1) of the Agreement refers instead to the ability to extend the

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[172] Russia and Norway share Arctic waters. – Pravda.Ru, 28 March 2011. Available online: http://english.pravda.ru/russia/economics/28-03-2011/117352-russia_norway_arctic-0/ (05.01.2013).

[173] Amberbridge. The International Public Fund, 27 March 2011. Available online: http://www.amberbridge.org/newstext?id=5345&lang=eng (05.01.2013).

[174] *Ibid.*

[175] *Ibid.*

[176] *Ibid.*

[177] T. Henriksen, G. Ulfstein (Note 171), page 9.

[178] Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary. Available online: http://www.state.gov/documents/organization/125431.pdf (30.10.2012).

boundary as far as permitted by international law. Article 1 (2) states that "each party shall respect the maritime boundary as limiting the extent of its coastal state jurisdiction otherwise permitted by international law". Thus, coastal state jurisdiction beyond 200 nautical miles is provided for within the boundary agreement.[179]

The 1990 U.S.-USSR (Russia) maritime boundary agreement is a treaty that requires ratification by both parties before it formally enters into force. The treaty was made public at the time of its signing. In a separate exchange of diplomatic notes, the parties to the treaty agreed to apply the agreement provisionally. The United States Senate gave its advice and consent to ratification of the U.S.-USSR (Russia) Maritime Boundary Agreement on 16 September 1991.[180] The Russian Federation informed the United States Government by diplomatic note dated January 13, 1992, that it "continues to perform the rights and fulfill the obligations flowing from the international agreements" signed by the Soviet Union.

The United States and the Russian Federation, which is considered to be the sole successor state to the treaty rights and obligations of the former Soviet Union for the purposes of the U.S.-USSR Maritime Boundary Agreement, are applying the treaty on a provisional basis, pending its ratification by the Russian Federation.[181] Thus, due to various reasons, amongst which is also quite sharp critique of the boundary treaty as one of the latest international treaties of Gorbachev era,[182] the State Duma of the Russian Federation it its decision from

[179] M. Weber (Note 87), page 670.

[180] After ratification of the treaty by the U.S., an article in the "Washington Post" wrote that "in protection of the treaty the U.S. Department of State stated that 70 percent of the territory of the Bering Sea shall be under jurisdiction of the United States which shall provide the state with 13 200 nautical miles more than if the delimitation line would be equidistant to the coasts of both countries."

[181] J. A. Roach, R. W. Smith. Excessive Maritime Claims. Third Edition. Martinus Nijhoff Publishers, 2012, page 469.

[182] For instance, it is believed that the delimitation line established by the treaty deprives Russia of at least 50 nautical miles of its economic zone, which results in huge losses of fish catch. Also, according to the treaty, United States receives substantial advantage in the continental shelf areas in the central Bering Sea beyond the limits of 200 miles zone of Russia and the U.S. The text of the treaty is considered to be incoherent with terminology of international law and controversies are found between English and Russian versions. В. Зиланов. Беринговоморское противостояние России и США: продолжение напряженности или сотрудничество? 19 April 2001. Available online: http://www.fishkamchatka.ru/?key=,problem&con=plink&linkid=16&id=16&id_cont=51&t_name=persons_link&id_thema=14&n=51&title=%C1%E5%F0%E8%ED%E3%EE%E2%EE%EC%EE%F0%F1%EA%EE%E5++%EF%F0%EE%F2%E8%E2%EE%F1%F2%EE%FF%ED%E8%E5++%D0%EE%F1%F1%E8%E8++%E8++%D1%D8%C0%3A+%EF%F0%EE%E4%EE%EB%E6%E5%ED%E8%E5+%ED%E0%EF%F0%FF%E6%E5%ED%ED%EE%F1%F2%E8+%E8%EB%E8+%F1%EE%F2%F0%F3%E4%ED%E8%F7%E5%F1%F2%E2%EE%3F&PHPSESSID=097125d6e405f#n1 (30.10.2012).

7 February 1997 denied ratification of the treaty. Despite this, neither party has claimed denunciation of the treaty, and the latter has been applied ever since.[183] According to the U.S. Department of State, the United States regularly holds discussions with Russia on Bering Sea issues, particularly on the questions related to fisheries management. Hence, these discussions do not affect the placement of the U.S.-Russia boundary or the jurisdiction over any territory or the sovereignty of any territory. The United States has no intention of reopening discussion of the 1990 Maritime Boundary Agreement.[184] On the contrary, there are no ardent proponents of ratification of the treaty in Russian State Duma, as the detriment shortcomings to the Russian present and future national and economic interests are too evident. Russian specialists believe that an independent authoritative parliamentary commission of specialists-experts needs to be formed that has to thoroughly analyze the regulations of the 1990 treaty and establish whether the provisions of the treaty are coherent with the long-term national economic and political interests of Russian State. Co-operation between Russia and the U.S. needs to be initiated to give additional consideration to the issues of EEZ, continental shelf and fishing zones of the Bering Seas. Russians see the future of 1990 boundary treaty only in coordinated efforts of both state-parties.[185]

1.12. Russian Arctic Approach *summa summarum*

It should be concluded that Russian interest in the Arctic Ocean relies on historical grounds and has been long-lasting and extensive. The Arctic is equally important for Russian economy, politics and strategic interests; access to the largest portion of the Arctic resource-rich continental shelf and control over the North-East Passage upholds Russian position of one of the dominant powers in the world. Having once declared its territorial sovereignty over *terra nullius* of the ice-covered polar areas and having enjoyed the "ownership" of the Arctic with no restrains, Russia is having a hard time getting used to the idea of common usage, exploration and exploitation of the Arctic. The country is torn between its desire will to master and own the North Pole (as illustrated by the controversial planting of the Russian flag to the Arctic seabed in 2007) and the requirements of international law of the sea granting the rights over the Arctic to all its littoral States and the world community. Meeting today's realities, Russia is striving to justify its rights over the Arctic by means and methods that international law has to offer.

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[183] Г. Агафонов. Правовые аспекты проблем морепользования в АТР и их влияние на морскую деятельность России. Российская Академия Наук, Институт Дальнего Востока, 2004, page 2.

[184] Status of Wrangel and Other Islands. Fact sheet. Bureau of European and Eurasian Affairs. 8 September 2009. Official web-site of U.S. Department of State. Available online: http://www.state.gov/p/eur/rls/fs/128740.htm (30.10.2012).

[185] В. Зиланов (Note 182).

One could observe, additionally, the internal legal controversies related to the Arctic Ocean that Russia is suffering from. As has been indicated above, the official position announced by the Russian Federation (as expressed by MID) differs from the stand taken by the majority of the Russian legal scholarly elite. The position of the latter, as expressed by Professor A. N. Vylegzhanin and others, is to treat the Arctic with respect to its history and the dominant position of the Russian Federation (preceded by the Russian Empire and the Soviet Union), and apply the sectoral division that shall entitle Russia with the largest sector of the Arctic area and seabed. Russian MID, in turn, led by the need to play and win on the international arena, is solely relying on UNCLOS in order to secure Russia a smaller, but perfectly legal and justified, portion of the Arctic continental shelf. Proceeding from UNCLOS, Russian MID is in search for scientific data to justify the claim that Lomonosov Ridge is natural prolongation of the Russian landmass, and therefore should be considered part of the Russian outer continental shelf. Although the approach of the MID is still to be verified by scientists, it is definitely legal and binding on other players under international law.

Furthermore, Russian practice in delimitation of Arctic boundaries can lead one to the following ideas. The conclusion lying on the surface and widely spoken of is that delimitation of the Barents Sea boundary with Noway indicates Russian intention and willingness to reach compromises. Norway and Russia's resolution of their longstanding maritime boundary dispute has been considered compelling evidence that the Arctic States – including Russia – are capable of resolving their differences in a peaceful and cooperative manner.[186] The Barents Agreement can be seen as an inspiration for other countries, for instance, as a potential trigger for a suspended deal on the Bering Strait with the US, reintroducing the issue to the agenda of Russian policy-makers. In addition, certainty over the maritime boundary and the clause on cooperation in the border agreement allow Russia to hope for fast and efficient exploration of Russian Barents Sea area with the help of Norwegian technology and resources. Finally, the legal situation in the Bering Sea, namely, Russian reluctance to ratify the 1990 boundary agreement with the US, seems to indicate that Russia proceeds from the pragmatic principle of *clausula rebus sic stantibus*. Thus, proceeding from the change of circumstances (the collapse of USSR, formation of the Russian Federation, existing disputes over the Arctic), Russia is unwilling to "crystallize" and consider itself bound to the agreements signed by the weakened and disintegrated Soviet Union. A treaty is seen 'in a new light' when

[186] Furthermore, upon signing the agreement, then-President D. Medvedev termed the agreement a way for the two States to "turn a new page" in relations and "a key step forward" whilst Norwegian Prime Minister Jens Stoltenberg referred to the treaty as a "historic milestone" and "new era of cooperation." In a joint statement both leaders hailed the agreement as a symbol of the Arctic as peaceful region where disputes resolved in accordance with international law. Stoltenberg: – A Historic Day! – The Norway Post, 27 April 2010. Available online: http://www.norwaypost.no/index.php/news/latest-news/23523-stoltenberg-a-historic-day (05.01.2013).

power relationships change and shift. Legitimacy of such practice should be under question, proceeding from the underlying assumption of Russia being the *sole* successor state to the treaty rights and obligations of the former Soviet Union for the purposes of the U.S.-USSR Maritime Boundary Agreement. It should be concluded that such Russian practice cannot change its existing obligations under international law.

Whether or not Russian legal practice in the Arctic Ocean is unique and exclusive or forms a part of overwhelming Russian "sea-power" strategy can be observed only in comparison to the other seas. Having assessed the framework of the facts, claims, controversies and illegitimacies of underlying the Russian's position with respect to the Arctic Ocean, the author will next analyze Russia's legal position in the Caspian Sea followed by the Black Sea and the Sea of Azov, and finally the Baltic Sea.

Chapter 2. The Position of the Russian Federation in the Caspian Sea

2.1. Caspian Sea

The Caspian Sea (or Mazandaran Sea) is the largest enclosed body of water on Earth, having an area larger than even the American Great Lakes or that of Lake Victoria in East Africa. If considered a lake, the Caspian Sea with its 78 200 square kilometers would be the largest inland body of water in the world by volume. The Caspian Sea is situated where South-Eastern Europe meets the Asian continent. It is approximately 1 030 kilometers long and its width ranges from 435 kilometers to a minimum of 196 kilometers. It is also thought to be one of only a handful of ancient lakes on earth, approximately 2 million to 20 million years old. Its depths range from an average depth of 187.0 meters to a maximum of 1 025.0 meters. Approximately 130 rivers flow into the Caspian, the largest of those being Volga, Kura, Tereck, Ural and Sulak, which supply over ninety per cent of the incoming fresh water. The Caspian's average salinity rate is just over one third that of seawater. The Caspian has no natural connection to the world's oceans.[187]

Due to its large size, its geographic isolation, and its brackish waters, the sea supports an unusual collection of organisms. Among them are at least 331 endemic species, from zooplankton to mollusks and vertebrates. Most notably, the Caspian boasts five species of sturgeon, including the beluga, prized for their caviar. That population comprises 90 per cent of the world's sturgeon stock. Such valuable aquatic resources, as well as lands suitable for agriculture (watermelon is a prime group) have attracted dense human settlement in the coastal areas.[188] Currently, the Caspian Sea is surrounded by five independent countries: Iran, Kazakhstan, the Russian Federation, Azerbaijan and Turkmenistan (see Appendix 3).

2.2. A Sea or a Lake?

There is no general agreement on the legal status of the Caspian. The Caspian Sea is completely landlocked, causing a controversy over whether it is an inland sea, a major lake[189] or a relict marine basin. W. E. Butler, an American legal scholar who has extensively written on the issues related to the USSR and the

[187] B. H. Dubner. The Caspian: Is It a Lake, a Sea or an Ocean and Does It Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues. – Dickinson Journal of International Law, 2000, Vol 18, page 265.

[188] S. Huseynov. Fate of the Caspian Sea. – Natural History Magazine, December 2011-January 2012. Available online: http://www.naturalhistorymag.com/features/112161/fate-of-the-caspian-sea (31.10.2012).

[189] Interestingly enough, the latest edition of Economist Pocket World in Figures unanimously introduces the Caspian Sea as the largest lake in the world. The Economist. Pocket World in Figures. 2013 Edition. Profile Books Ltd, 2012, page 13.

law of the sea has referred to the legal regime of the Caspian Sea by saying that "the legal regime of the Caspian sea is unique. Geographically speaking, the Caspian is a landlocked, salt-water lake, which historically has been called a sea."[190] If Caspian is to be considered a "sea", it is because (a) historically, that is how it has been referred to;[191] (b) oceanographically, the composition of its water, and the type of flora and fauna, seem to indicate it is a sea.[192]

In Russia the majority of scholars consider the Caspian to be a closed sea. According to Article 122 of UNCLOS, "enclosed or semi-enclosed sea"[193] means a gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states. Already F. F. Martens, a diplomat and jurist in service of the Russian empire has characterized the Caspian Sea as an enclosed sea. Thus, he wrote:

> "In a completely different position in comparison with the high seas are those seas which are not only encircled by the territorial possessions of a single State but also have no connections to the ocean. These are closed seas: they are under the authority of that State within which they lie. On this basis (…) the Caspian Sea is also closed, although it washes the coasts belonging to Russia and Persia, but should be considered to be Russian."[194]

In the first monumental monography on the legal status of the Caspian, Russian legal scholar Y. G. Barsegov has written in 1998:

> "Attempts to treat the Caspian as an expanse without a prevailing international legal status have no legal grounds. It is impossible to imagine that at the end of the twentieth century an entire sea has not fallen under the operation of international law. Besides elementary logic, the existence of the international legal status of the Caspian is confirmed by the aforementioned normative material [having in view the Soviet-Iranian treaties of 1921 and 1940]".

He went on to say: "The Caspian has the status of a closed (in the legal sense) landlocked sea established by the coastal States and recognized by the international community."[195]

On the other hand it has been asserted that "(...) [a]s a land-locked body of water, laying some 27 meters below the ocean level, without any direct outlet to the ocean, the Caspian Sea is not *stricto sensu* a sea, *i.e.* a part of the world

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[190] W. E. Butler. The Soviet Union and The Law of The Sea. The John Hopkins Press, 1971, page 101.

[191] Caspian was referred to as a "sea" already in treaties of Gulistan of 1813 and of Turkamanchai of 1828 between Russian empire and Persia, as well as in 1921 and 1940 treaties with Iran.

[192] B. H. Dubner (Note 187), page 279.

[193] *Infra.,* section 7.1.

[194] Ф. Мартенс (Note 4), page 385.

[195] Ю. Барсегов. Каспий в международном праве и мировой политике. Москва, 1998, page 45.

ocean."[196] Already Herodotus, who knew of the riches of the Caspian Sea when he wrote of its treasures including its delicious fish and the fur-bearing Caspian seals, was aware that the Caspian Sea was surrounded by land on all sides.[197] W. E. Butler was amongst the majority of western international lawyers holding that "general norms of international law relating to the high seas, to the vessels and their crews on the high seas, and to research and exploitation of the natural resources of the high seas do not apply to the Caspian."[198]

Commencing in the 1980s the views emerged in the Soviet legal science concerning the possibility of considering the Caspian Sea to be a frontier international lake. V. F. Meshera, for example, noted that although the designation "sea" had historically been applied to the Caspian, nonetheless from the geographical point of view it was an ordinary frontier lake.[199] According to Professor A. A. Kovalev, the most complete definition of a frontier lake is offered by R. Mamedov:

> "Frontier lakes are water expanses washing the shores of two or more States having no natural link to the World Ocean and possessing an autonomous international legal status and regime determined in a specific international treaty concluded by the lake States."[200]

Professor A. L. Kolodkin, in turn, believed in this connection that:

> "in the event of any changes in the regime of the Caspian, which must be effected with the common consent of five countries, it is necessary to take into account that this is not a part of the World Ocean, and therefore the norms of the law of the sea are inapplicable here: there is no territorial sea, economic zones, and continental shelf in the Caspian (that is, the 1982 Convention cannot be applied to the Caspian)."[201]

If all its littoral states were to declare the Caspian a lake, one might reasonably infer that its resources could then be jointly developed without concern over the application of UNCLOS guidelines.[202]

Scholarly discussions on classifying the legal status of the Caspian Sea continue. While it may seem clear that the resources in this water area are

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[196] S. Vinogradov, P. Wouters, The Caspian Sea: Quest for a New Legal Regime. – Leiden Journal of International Law, 1996, Vol 87, page 90.

[197] Herodotus. The Landmark Herodotus: Histories. Pantheon, 2007, 1.203.

[198] W. E. Butler (Note 190), page 101.

[199] V. Meshera. Soviet Maritime Law. Moskow, 1980, page 66 (Reference by A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 163).

[200] Р. Мамедов. Международно-правовой статус Каспийского моря: Вчера, Сегодня, Завтра (вопросы теории и практики). – Средняя Азия и Кавказ, 2000, No 2 (8).

[201] A. Kolodkin. On the Legal Regime of the Caspian Sea. – Yearbook of Maritime Law 1999–2001. Moscow, 2002, page 115.

[202] C. C. Joyner, K. Z. Walters. The Caspian Conundrum: Reflections on the Interplay Between Law, the Environment and Geopolitics. – The International Journal of Marine and Coastal Law. June 2006, Volume 21, No 2, page 184.

shared and should be allocated among the five littoral states, the use of disparate terms to characterize the Caspian can alter the legal rules employed to demarcate its boundaries and apportion of its resources. While the legal status concerns the sovereignty over a particular body of water, the legal regime is about using the rights and obligations. The legal regime of the Caspian can be determined once all parties agree on its status.

The real problem of the Caspian resides with the very definition of this body of water. If the Caspian is to be considered a "sea", UNCLOS would be applicable. UNCLOS would provide for division of water and seabed into national zones roughly proportional to the length of each maritime state's coastline. According to one calculation for such division, Kazakhstan would control 29,9% of the Caspian; Azerbaijan 20,7%; Turkmenistan 19,2%; and Russia and Iran – only 15,6% and 14,6%, respectively.[203] This approach is strongly rejected by the Russian Federation as it would deprive it of a huge portion of the continental shelf and its resources and woukld enable third countries to exercise freedom of navigation in the Caspian basin. Ironically, Russia and Iran are the only Caspian states that have signed and ratified UNCLOS, in 1997 and 1982 respectively. If the Caspian was treated as a lake, the ownership of its mineral resources would not differ substantially from an arrangement under UNCLOS. Rather, the key difference would lie in the use of its surface waters. The surface waters of international lakes, unlike those of seas, can be used exclusively by the states bordering them.

> In this connection the official position of the Russian Federation is the most pertinent: "the Caspian Sea, having no natural link with the World Ocean, is a unique landlocked body of water which from the international legal point of view can not be regarded either as a sea or as a lake. The operation of the 1982 United Nations Convention on the Law of the Sea can not extend to it."[204]

It follows from the foregoing that the Caspian states, for whom the Caspian Sea and its resources have vitally important significance, are interested in the rapid determination of the legal status and agreement of the legal regime of this enclosed body of water.[205] Some commentators even believe that the question whether the Caspian is a sea or a lake is irrelevant, as the most beneficial method for development of the Caspian region is to have a legal regime based upon a condominium approach in order to guarantee safe passage for oil.[206]

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[203] B. M. Clagett. Ownership of Seabed and Subsoil Resources in the Caspian Sea Under the Rules of International Law. CASPIAN CROSSROADS MAG., Summer/Fall 1995, at 3, 10 (Reference by B. Dunlap. Divide and Conquer. The Russian Plan for Ownership of the Caspian Sea. – Boston College International and Comparative Law Review. Winter 2004, Vol XXVII, No 1, page 121).

[204] Дипломатический вестник [Diplomatic Herald], 2000, No 3 (Reference by A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 163).

[205] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 166.

[206] B. Dunlap. Divide and Conquer. The Russian Plan for Ownership of the Caspian Sea. – Boston College International and Comparative Law Review. Winter 2004, Vol XXVII, No 1, page 287.

2.3. Legal Regime of the Caspian Sea

2.3.1. Historical Approach

The legal regime of the Caspian Sea in the period before the collapse of the Soviet Union was determined by existing treaties between Iran and the USSR. According to the 1921 Treaty of Friendship between Iran and the USSR, both sides equally shared the privileges of navigation in all parts of the Caspian Sea.[207] The 1940 Treaty of Trade and Shipping involved distinct provisions on the questions of fishing rights in the Caspian Sea. It stated that except for a 10 mile exclusive fishing zone in the coastal territories of both countries, fishing remained free all over the Caspian Sea for both parties.[208] Flight over the Caspian, and also issues regarding the seabed were not dealt with in the existing treaties. It seems that according to the treaties existing between Iran and the USSR, the Caspian belonged to the Iranians and Soviets, and they could exploit it equally. The whole Caspian was under joint sovereignty of Iran and the USSR, and there were no borders between the two concerned countries. However, as Dr. Aghai writes in his book,

> "it must be noted that the USSR as a superpower had made it clear to the Iranian regime that it did not want much activity on the Iranian side of the Caspian Sea. In Iran for a long time, the Caspian Sea was treated as a mainly Russian sphere of influence."[209]

The Soviet legislation applicable to the continental shelf of Caspian Sea was homogenous. Thus, according to Article 3 of the Soviet Law on Continental Shelf of the USSR from 1968,[210] all resources found within the limits of the continental shelf and all the installations on the continental shelf belonged to the exclusive ownership of the Soviet Union, not its republics. The Act on Protection of the Continental Shelf from 1974[211] provided that in order to exploit and explore the continental shelf of the USSR, a correspondent registration with the Ministry of Geology and Gosgorteknadzor [Г о с г о р т е х н а д з о р] is necessary, leaving the organs of executive power of Soviet Republics outside of the competence. The Description of USSR Maritime Boundaries and Adjacent Continental Shelf Areas under Fishing Authorities

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[207] B. Aghai Diba. The Law & Politics of the Caspian Sea in the Twenty-First Century. The Positions and Views of Russia, Kazakhstan, Azerbaijan, Turkmenistan, with Special Reference to Iran. IBEX Publishers, 2003, page 19.

[208] *Ibid.,* page 22.

[209] *Ibid.,* page 25.

[210] Указ Президиума Верховного Совета СССР О континентальном шельфе Союза ССР от 6 февраля 1968 года. Available online: http://russia.bestpravo.ru/ussr/data03/tex15345.htm (03.01.2013).

[211] Постановление Совета Министров СССР Об Утверждении Положения об Охране Континентального Шельфа СССР Нр 24 от 11 января 1974 года. Available online: faolex.fao.org/docs/texts/rus52875.doc (03.01.2013).

Protection from 1970[212] classify the areas of Caspian Sea and the continental shelf within its jurisdiction as belonging to USSR, making no differences between competence of the Union and its republics.[213]

Following the collapse of the USSR, the Caspian Sea, which was previously shared by the USSR and Iran under bilateral treaties of 1921 and 1940, became shared by five littoral states: Iran, Kazakhstan, the Russian Federation, Azerbaijan and Turkmenistan. The collapse of the Soviet Union opened a new era in the Caspian Sea region. Among other factors, the Caspian oil and gas resources have since elevated the region's international status, while pitting its littoral states against one another over their division.

Having the world's fifth largest oil reserves and its second largest natural gas deposits,[214] the Caspian resources are of great importance to all littoral states. Azerbaijan, Kazakhstan and Turkmenistan have considered them as their main source of revenue and means to preserve their sovereignty since their independence in 1991, when the Soviet Union disintegrated. In short, all the five littoral states have strong reasons to insist on a formula for the division of the Caspian Sea, which will leave them with the largest possible share. After the dissolution of the USSR the major question was: does the legal regime of the Caspian Sea based on Iran-USSR treaties continue to be valid, and, if not, what is the new legal regime for division of powers and sovereignty in the Caspian?

2.3.2. Russian Position

The Russian Federation, which has claimed to be the state successor – or rather, in these matters at least, continuator – of the USSR and who has assumed the seat of the USSR in the UN (including the Security Council and the right of veto) and accepted the debts of the former Soviet regime, declared its full commitment to the 1921 and 1940 treaties, holding others responsible for observation and application of these treaties, at least until such time that a new regime emerges.[215] As Professor A. A. Kovalev explains in his treatise, the position of Russian Federation was expressed at the international conference on managing the exploitation of the Caspian oil in 2000, where the special repre-

[212] Описание Границ Морских Участков и Прилегающих Участков Континентального Шельфа СССР, Подконтрольных Бассейновым Управлениям Рыбоохраны. Утверждено Главрыбводом 2 апреля 1970 года. Available online: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=10271 (03.01.2013).

[213] Е. Анянова. Территориальные споры в районе Каспийского моря. – Интернет-журнал «Морское право», 2010, нр 2. Available online: http://www.sea-law.ru/ index.php?option=com_content&task=view&id=304&Itemid=76 (03.01.2013).

[214] In terms of percentages, the five Caspian littoral states possess about 21,6% of the world's total proven oil reserves and 45,6% of the world's total proven natural gas reserves. Amongst them, Iran and Russia are the two main powers in terms of the oil and gas reserves in the Caspian region and have the greatest energy reserves in the world.

[215] B. Aghai Diba (Note 207), page 32.

sentative of the President of the Russian Federation, V. I. Kaliuzhnyj, declared as follows:

> "The Caspian Sea has a legal status. It was established by the Soviet-Iranian treaties of 1921 and 1940, and until a new status is adopted, it continues to operate. I recall that all the former republics, now sovereign states, recognized the treaties concluded by the USSR."[216]

Later, however, without denying the validity of 1921 and 1940 treaties, Russia has taken steps to establish the legal regime of the Caspian by bilateral treaties. In 1998, Russia and Kazakhstan executed an agreement on delimitation of the seabed of the northern part of the Caspian Sea for the purpose of exercise of sovereign rights to subsoil use, and in May 2002 a Protocol to the Agreement. Russia-Kazakhstan 1998 agreement was at the time it was signed considered a step out of the Caspian legal quagmire. It was the first bilateral treaty executed between two of the former Soviet Republics on the key issue of boundary delimitation and exploitation of mineral resources. The main import of Russian-Kazakhstan Agreement was seen as a suggestion that Russia is ready to give up the thesis that the Caspian is an area of joint ownership and is ready to move ahead with partition, trough conclusion of series of similar bilateral agreements between each and all of other Caspian states.[217] As Y. G. Barsegov writes, "having sanctioned the delimitation of Caspian Sea bottom, Russia has struck a death blow to status of Caspian established with its participation."[218]

There are current opinions that Russia has practically lost its rights over the existing status of Caspian. Professor A. N. Vylegzhanin notes that by having concluded the 1998 sea bottom delimitation treaty, Russia "has acknowledged the right of three new Caspian states to the exploration of Caspian resources."[219] This reality creates the situation of estoppel which, as defined in Webster's New International Dictionary of English Language, means a bar to one's alleging or denying a fact because of his own previous action, allegation or denial, by which the contrary has been admitted, implied or determined. "Thus, Russia, due to absence of counteraction to factual manifestation by the new Caspian states of their rights to the subsoil of Caspian, has lost its ability to protect its contractual rights to the Caspian areas, as foreseen by Russian-Persian agreements from XVIII–XX centuries,"[220] writes A. N. Vylegzhanin.

The current Russian position concerning the legal regime of the Caspian Sea has not changed since 1998 and its essence lies with the principle "divided bottom, common waters". As such, Russia proposes to delimit the seabed of the Caspian Sea amongst neighboring and opposite Caspian states along the

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[216] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 167.
[217] W. Ascher, N. Mirovitskaya. The Caspian Sea: A Quest For Environmental Security. Kluwer Academic Publishers, 2000, page 149.
[218] Ю. Барсегов (Note 195), page 48.
[219] А. Вылегжанин (Note 27), page 174.
[220] А. Вылегжанин (Note 27), page 176.

modified median line for the purpose of the exercise of sovereign rights over subsoil use (that is, resource jurisdiction) while retaining the water expanse in common use, freedom of navigation, agreed norms in the domain of fishing, and protection of the environment.[221]

Modified median method divides the sea on the basis of a median line, which has the same distance from the opposite shores, and it is modified by consideration of some special circumstances such as, *e.g.*, natural or artificial structures. The modified median line is not a state border and means resource, not territorial delimitation. If this method is to be applied, Iran shall be entitled to 14%, Russia – close to 19%, Azerbaijan – to more than 19%, Kazakhstan – to more than 29% and Turkmenistan to more than 19% of the Caspian seabed[222]. In supporting an equitable delimitation of the seabed of the Caspian, Russia also allowed the possibility of the establishment for the Caspian states of two coastal zones of agreed breadth: one for exercise of frontier, customs, sanitary, and other control; and the other, for fishing.[223]

Final Russian position on the delimitation of the Caspian can be best of all characterised by the opinion expressed by the special representative of the President of the Russian Federation V. I. Kaliuzhnyj on the questions of political regulation of the Caspian sea status, according to whom

> "Russian approach to the formation of a new status of the Caspian Sea is flexible and pragmatical. Russia is ready to talk to all other countries. However, if there is no option to agree simultaneously with everyone, we shall orientate on bilateral agreements. This is our position. This is the position of majority of Caspian states."[224]

2.3.3. Azerbaijan's position

The position of the Russian Federation is supported by Azerbaijan that has initially drawn a line for the division of the Caspian into national sectors, which would have included the seabed, water column, and surface and be under the sovereignty of the respective coastal state. Initially, the Azerbaijan authorities claimed that according to the principle of *clausula rebus sic stantibus* or the fundamental change of circumstances, and also the principle of "Clean state" which gives newly independent states a free hand in choosing their destiny, the

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[221] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 173.

[222] В. Калюжный. Медлить с определением статуса Каспия опасно. – Независимая Газета, 10 February 2001. Available online: http://www.ng.ru/economics/2001-10-02/3_kaluzhny.html (31.10.2012).

[223] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 173.

[224] Статья Специального представителя Президента РФ по вопросам политического урегулирования статуса Каспийского моря, Заместителя Министра иностранных дел России В.И. Калюжного, опубликованная под заголовком «Политики на Каспии меньше не стало. Теперь она более конструктивна» в журнале «Нефтегазовая вертикаль» (Итоги Саммита "Каспий' XXI: от политики к бизнесу"). 2002, №13. Available online: http://www.mid.ru/bdomp/ns-dos.nsf/45682f63b9f5b253432569e7004278c8/432569d800223f3443256c4f004ca717!OpenDocument (31.10.2012).

1921 and 1940 treaties between Iran and USSR were not valid anymore, requesting the Caspian Sea to be divided among the littoral states according to the rules of international law of the sea regarding borders[225]. On 23 September 2002 a Russian-Azerbaijan agreement was signed on delimitation of the neighboring seabed parcels of the Caspian Sea. This agreement establishes, in particular, specific geographic coordinates for the Russian-Azerbaijan line of seabed delimitation. On both sides the Russian Federation and Azerbaijan Republic will also exercise their sovereign rights with respect to developing mineral resources and conducting other lawful economic activities connected with the use of the seabed resources of the Caspian Sea. Russia and Azerbaijan have thus bilaterally settled all issues in the dispute connected with activities related to the use of resources of the seabed of the Caspian Sea in common waters.[226]

2.3.4. Kazakhstan's Position

Quite a similar position is shared by Kazakhstan. This state's starting point was to support the USSR position. In fact, it did not wish to upset its powerful neighbor and former boss. But later Kazakhstan became more interested in the division of the Caspian Sea into national territories. The government of Kazakhstan has proposed to consider the Caspian Sea a "sea" and apply rules of UNCLOS to all its issues, including delimitation of maritime boundaries.[227] Hence, by the mid 1990s, it has taken an intermediate position proposing for a sectoral division of the seabed and subsoil, and a common use of the water column for navigation, fishing and environmental protection. As a result of numerous contacts of the heads of state of Kazakhstan and Russia, a compromise position was elaborated with respect to determining the new legal status of the Caspian Sea, and the 1998 agreement and 2002 Protocol to it on delimitation of the seabed of the northern Caspian by application of the modified median line method was signed.

Taking into account the analogous agreement with Azerbaijan, in May 2003 the three countries entered into a trilateral agreement on the Caspian Sea based on the "modified median line" method that entitles Kazakhstan with the largest sector, Russia with the second largest and Azerbaijan with the smallest sector of the northern Caspian seabed. In this agreement, the median line applies only to the seabed, with the water column being divided into territorial seas along a 12-nautical mile territorial band. Beyond the territorial sea jurisdiction, the waters of the Caspian will be managed by all three states as a common space.[228]

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[225] B. Aghai Diba (Note 207), page 39. According to 1995 Azerbaijan Constitution, the "Azerbaijan sector" of the Caspian Sea is a part of territory of the Republic.
[226] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 169.
[227] B. Aghai Diba (Note 207), page 48.
[228] C. C. Joyner, K. Z. Walters (Note 202), page 191.

2.3.5. Turkmenistan's Position

Originally, Turkmenistan was inclined to support the positions of Iran and the USSR on all Caspian Sea issues. Hence, as the prevalent conception of condominium has been losing its importance, Turkmenistan has taken the standpoint of sectoral division of the Caspian. Thus, Turkmenistan has unilaterally established its own territorial sector in the Caspian. Turkmenistan sees the borderline laying in the middle of the southern section of the Caspian Sea, in a way that it divides the distance between Turkmenistan and Azerbaijan into equal sectors. Such division would grant Turkmenistan a better share of the Caspian oil and gas.[229] In this connection Russia has cautioned Turkmenistan that the realization of the powers would be contrary to the prevailing regime of the Caspian. Hence, as Professor A. A. Kovalev writes, "recently Turkmenistan has also leaned towards the position taken by Azerbaijan, that is, delimitation of the seabed of the Caspian as a common aquatory."[230]

2.3.6. Iran's Position

The position of Iran is more or less based on the validity of the 1921 and 1940 treaties. Namely, both Russia and Iran hold the same position on validity and applicability of 1921 and 1940 treaties. On 12 March 2001 the presidents of two countries signed the Joint Statement of the Russian Federation and Islamic Republic of Iran with regard to the legal status of the Caspian Sea, which identified the coincidence or proximity of their positions on many issues of principle.[231] Hence, some legal analysts in Iran have tried to convince the State and the public that as the Caspian Sea was a condominium between Iran and the USSR, after having divided the USSR into several countries, Iran should pertain its rights to its original share of 50% of the Caspian, while the others could divide their other half as they wished. But this kind of argument needed more powers of persuasion than Iran had[232] and has not gained much support so far.

Officially Tehran holds the position of entitling the Caspian Sea with an international-legal status of "condominium" which shall result in common possession and joint use of the Caspian resources by all littoral states. Generally, there are quite few examples of shared ownership of seabed resources in international case law and state practice. The only case in which a court has held in favor of the principle of condominium concerns the Gulf of Fonseca. Situated in the Pacific Ocean, the gulf is surrounded by El Salvador, Honduras, and Nicaragua. Prior to 1821, all three countries were part of the Spanish Empire. Similarly to the dispute over the Caspian, the Gulf of Fonseca case involved state succession and rival claims to a body of water that arose only after the breakup of the empire. A chamber of the International Court of Justice

[229] B. Aghai Diba (Note 207), page 80.
[230] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 171.
[231] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 176.
[232] B. Aghai Diba (Note 207), page 34.

found that the three riparian states were each entitled to a three-mile strip off their coast, but that beyond this limit the waters of the gulf appertained to them all. Important factors, however, distinguish the question of the Gulf of Fonseca from that of the Caspian. For one thing, unlike the Caspian, the gulf belonged to a single state before its dissolution. In addition, the successor states in the Gulf of Fonseca case, unlike those in the case of the Caspian, had treated the body of water as common property for an extended period of time. Finally, as Brice Clagett points out, the ICJ, which was mainly concerned with the issue of navigation, realized that division of the Gulf of Fonseca would have created insurmountable difficulties by leaving at least one of the states with no deepwater outlet to the sea. No such difficulty, insofar as division of the seabed is concerned, characterizes the Caspian case.[233]

Notwithstanding the absence of previous examples, Iran proposes that within the principle of "condominium" each littoral state would have its national zone determined under mutual agreement, and the rest part of the Caspian Sea would be possessed and used jointly. Until the new status of the Caspian Sea is established, Iran considers that any unilateral and groundless exploration of the resources of this unique sea shall not be acknowledged by Iran because the Caspian resources belong to all coastal states. As a result, Iran suggests that Azerbaijan, Kazakhstan and Turkmenistan should suspend their oil and gas producing activities in the Caspian until a new multilateral agreement has been reached.[234]

Iran still believes that the old treaties between the USSR and Iran are the best criteria for dividing the Caspian Sea, and in the case of disregarding those treaties, which are the only legal documents that have ever discussed the legal regime of the Caspian Sea, it would only agree to an equitable division of the concerned waters into five sectors, giving each of them a 20% of share of the sea and its resources.[235] It seems that Iran is left alone with its idea of sharing the Caspian Sea. Hence, one may argue that the history of the littoral states' practice in the Caspian Sea weakens the argument that it is the common property of those states. Beginning in 1949, the Soviet Union engaged in

[233] K. Mehdiyoun. Ownership of Oil and Gas Resources in the Caspian Sea. – The American Journal of International Law. January 2000, Volume 94, No 1, page 188.

[234] While Iran has insisted on nondevelopment policy of offshore fossil energy resources in the absence of a legal regime, the other Caspian states have taken steps to develop those oil fields, which they consider to fall within their territorial waters. Unsurprisingly, this policy has created conflict between and among the littoral states as there are many double and triple claims to different parts of the Caspian Sea, which are rich in fossil energy. One incident is specifically remarkable. In July 2001 an Iranian gunboat chased two BP survey ships from a disputed oil field Alov-Araz Sharq, which Iranians claimed to belong to them. BP, who has signed a production sharing agreement with Azerbaijan, immediately suspended all activity under its contract with Azerbaijan in the disputed oil field. Both the United States and Russia protested to the Iranian action. The July 2001 incident underscored Iran's isolation, and events since then have demonstrated the extent to which the other Caspian states have aligned themselves with Russia. B. Dunlap (Note 206), page 124.

[235] B. Aghai Diba (Note 207), page 81.

intensive oil operations in the Caspian without acquiring the consent of its southern neighbor Iran. Fear of the political complications of raising objections to these operations prevented Iran from publicly and privately airing its concerns about the oil pollution in the Caspian caused by Soviet offshore drilling. An argument may therefore be made that Iran's forty-year-long silence regarding Soviet oil operations now prevents it from raising objections to similar operations by the successor states.

2.3.7. Cooperation of Caspian States

Despite seemingly insurmountable differences in their legal positions, the Caspian states underscore the necessity to co-operate in determination of the legal regime of the Caspian. The purpose of having a regional plan for arrangement (creation of a new legal regime) amongst the states is threefold: first, to set forth the procedure the Caspian states will utilize in order to obtain the resources available in the area; second, to set forth a procedure that they will utilize in order to protect the non-resource rights such as navigation; and, third, because a regional plan is needed to proceed with development/distribution and at the same time protect the environment[236]. Peace and stability in the Caspian region require a legal regime acceptable to all parties in order to remove a major source of tension and conflict and to create mechanisms for the peaceful settlement of future disputes. Unless such arrangement is reached, the Caspian Sea's rich resources will likely help to deteriorate ties between and among its littoral countries, all of which have other reasons for unhappiness with their neighbors.

As the on-going negotiations demonstrate, all states in the region in one way or another support the division of the Caspian Sea. The dispute has therefore shifted from the question "whether the seabed should be divided" to "how that division might be accomplished". On the second meeting of the heads of the Caspian littoral states in Tehran in 2007, the agenda for developing a new legal regime for the Caspian Sea – the Caspian Convention – was laid down. Caspian states have agreed that the Caspian Convention should settle the delimitation of territorial waters, fisheries and common waters of the Caspian; determine maritime boundaries of the littoral states; grant all Caspian states freedom of shipping, fishing and transit passage in the common waters; provide legal framework for cooperation in the spheres of use, protection and recovery of biological resources.[237] The Convention has been elaborated for years and according to optimistic prognoses of participating states, the Convention should have been adopted already in 2011.[238] Evidently, this prognosis has not been

[236] B. Dunlap (Note 206), page 280.

[237] О. Цыганов, Ш. Меджидов, А. Караваев. Море новых возможностей. – Известия, 26 November 2009, нр 219 (27990), page 4.

[238] Конвенция по статусу Каспия может быть принята уже в этом году. – Вестник Кавказа, 26 April 2011. Available online: http://www.vestikavkaza.ru/news/obshestvo/diaspora/36274.html (31.10.2012).

realised. As Caspian states have already ratified the Framework Convention for the Protection of the Marine Environment of the Caspian Sea in 2003,[239] the upcoming Caspian Convention shall encompass just a few environmental issues.

Additionally, in November 2010 the Caspian countries signed an agreement regarding security cooperation in the Caspian. This is a framework agreement which demonstrates the collective responsibility of the Caspian states in the questions of fighting terrorism, illegal drug sale and other problems in the Caspian. As experts note, if the five littoral states managed to agree on such comprehensive issue, it is soon possible to reach a general agreement on the Caspian.[240] However, one cannot discount the fact that discussions between Azerbaijan, Turkmenistan and Iran over the territory of South Caspian continue until present.

There seems to be a general understanding amongst the Caspian states that the fate of the Caspian Sea shall be decided by the Caspian states only.[241] According to the special representative of the Russian Federation in the Caspian, Mr A. Golovin, all five Caspian states have agreed and have reached a decision that only Caspian states enjoy sovereign rights over the Caspian, and that only these states decide question concerning the sea. "We can not prohibit other states from being interested in the region, from trying to influence any states of the region. But we have agreed that the decisions on core questions – legal regime, navigation, fishing – shall be taken by the Caspian states only."[242] This approach is consistent with provisions of UNCLOS, as Articles 122–123 on closed and semi-enclosed seas do not touch questions of the legal status or the legal regime of the closed and semi-enclosed seas and leave the establishment of legal regime in those water areas to the coastal states by means of conclusion of the respective treaties, taking into account the interests thereof, and also the freedom of navigation, fishing and other types of activity, on the basis on generally recognized norms of international law.[243]

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[239] Framework Convention for the Protection of the Marine Environment of the Caspian Sea has been criticised for not attracting the public into environmental protection issues as does, for instance, Convention on the Protection of the Marine Environment of the Baltic Sea Area from 1992.

[240] С. Калмыкова. Каспийская пятерка обойдется без третьих стран. – Сайт Радио «Голос России», 20 July 2011. Available online: http://rus.ruvr.ru/2011/07/20/ 53493811.html (31.10.2012).

[241] *Ibid.*

[242] *Ibid.*

[243] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 156.

2.4. Russian Caspian Approach: Brief Summary

"What's in a name?" asked Shakespeare. In the case of the Caspian Sea, the answer is – *ambiguity*! That is to say the body of water that is in dispute among five states can be considered both a sea and a lake, with each term representing a different regime and specific strategic impacts. With no internationally recognized legal regime governing this water body, the Caspian Sea can be characterized by a *status quo* regime composed of bilateral treaties in the North Caspian Sea and disputes over boundaries in the South Caspian Sea. There is now general agreement between Russia, Azerbaijan, and Kazakhstan on both "the principle and the method" of dividing rights to the seabed and the mineral wealth beneath it, but Turkmenistan only agrees on the principle of dividing the Sea, and Iran disagrees with both the principle and method of dividing the Sea and its resources.

Russian position in the Caspian Sea has also suffered from ambiguity. Likewise to the situation around Arctic Ocean, the stand of majority of legal scholars differs from the official position of the Russian Federation concerning the legal status of the Caspian Sea. When the former see the Caspian as a sea and subject to UNCLOS regulation, the latter view the area to be completely landlocked lake open to condominium regime of five littoral states. One of the explanations why Russian MID's position favors "international lake" regime is that the "sea" regime rewards the states that either owns or can establish the longest coastline. Therefore, it is the state with the longest coastline that gets the largest portion of the sea and seabed (more coast = more seabed). Russian Caspian coastline is not the longest, and could grant Russia control over only 15,6% of the Caspian Sea and subsoil. Division of the Caspian as an "international lake" under the modified meridian method rewards Russia with a larger sector of 19% of the Caspian seabed. Additionally, the status of Caspian as a landlocked body of water allows Russia to conclude bilateral or tripartial agreements with its neighbors on the use of both Caspian waters and the seabed in the light that shall favor Russian position in the area.

Such Russian position in the Caspian Sea might be called an "integration approach":[244] Russia has refused to accept the monopolization of the Caspian Sea delivery on the world market and has actually admitted the principle of sector division of the Caspian. Russia seems to be open for compromise – but only in the case it satisfies its interests. The fact that such compromises are possible is well proven by the following example of the Russian practice in the Black Sea and the Sea of Azov.

[244] R. Mamedov. About the International Legal Status of the Caspian Sea. Geology Institute. Azerbaijan National Academy of Sciences. Available online: http://www.gia.az/view.php?lang=en&menu=47&id=835 (08.01.2013).

Chapter 3. Russian Position in the Region of Black Sea and the Sea of Azov

3.1. Legal Regime of the Black Sea

The Black Sea is the world's most isolated semi-enclosed sea connected to the World Ocean via the Mediterranean and Aegean Seas and various straits. The Bosphorus strait connects it to the Sea of Marmara, and the strait of Dardanelles connects the Black Sea to the Aegean Sea region of the Mediterranean. These waters separate eastern Europe from western Asia. The Black Sea also connects to the Sea of Azov by the Strait of Kerch. The Black Sea is surrounded by the Russian Federation, Ukraine, Georgia, Bulgaria, Romania and Turkey.

The status of the Black Sea has a history of its own. For centuries the Ottoman Empire held the lands surrounding the Bosporus and the Black Sea. Until 1774, when Russia gained a foothold of the Black Sea coast, the body of water was considered to be an Ottoman lake. At the time of the Russian empire, Russian textbooks of international law were content to describe the Black Sea as an open sea whose straits were subject to a special regime. There was no effort to manipulate geographic criteria in order to reach a different result.[245]

In Soviet times, the Black Sea was referred to as a closed sea, where only the littoral states were said to enjoy freedom of navigation and the right to engage in fishing and other maritime trades. Commercial navigation by vessels of non-littoral states "may be permitted" in the interests of international trade.[246] Currently, Russia views the Black Sea as a lake which should not be navigated by warships other that those of the littoral states.[247] The legal situation is that the Black Sea is a sea not a lake but the access to it via Turkey's territorial waters is still dictated by Montreux Convention of 1936[248] which restricts the passage through the Bosporus and Dardanelles of both warships and ships over a certain weight. The convention gives control over the passage to Turkey.[249]

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[245] W. E. Butler (Note 190), page 119.

[246] Е. Коровин. Международное право. Госюриздат, 1951, page 309.

[247] C. Weaver. Black Sea or Black Lake? How U.S.-Russian Tensions are Affecting EU Policy. – K. Henderson, C. Weaver (ed.). The Black Sea Region and EU Policy. The Chanlenge of Divergent Agendas. Ashgate Publishing Limited, 2010, page 65.

[248] 1936 Convention Regarding The Regime of The Straits Adopted in Montreux, Switzerland on 20 July 1936. Available online: http://cil.nus.edu.sg/rp/il/pdf/1936%20Convention%20Regarding%20the%20Regime%20of%20the%20Straits-pdf.pdf (08.01.2013).

[249] The Turkish Straits, comprising of Dardanelles, the Sea of Marmara and the Bosporus, are in the Turkey's territorial waters. As the sovereign over the Straits, Turkey is entrusted by the international community with regulation of the traffic of merchant and naval ships trough them. The Montreux Convention provides the legal basis in international law for passage of warships of non-Black Sea states through the Turkish Straits. In peacetime, only light and support naval ships with a tonnage under 15,000 tons during their transit through the Straits are allowed, and their number must not be more than nine with a 15-day notification of the Turkish government. A. Murison. Russia Accuses Turkey of violating Montreux Convention. Central Asia-Caucasus Institute. Analyst. 15 October 2008. Available online: http://www.cacianalyst.org/ ?q=node/4960 (08.01.2013).

Currently, there are numerous delimitation issues in the Black Sea. In addition to Romanian-Ukrainian continental shelf and EEZ delimitation dispute settled by ICJ in 2009,[250] both Turkey and Bulgaria have continental shelf and exclusive economic zone entitlements in the western basin of the Black Sea. Considering the geographical configuration of the area, there are five delimitation situations between the riparian states in this western basin. A number of these delimitations have already been settled by agreement. There are single maritime boundaries for both the continental shelf and the exclusive economic zones between Turkey and Ukraine and between Turkey and Bulgaria. The boundaries between Romania and Bulgaria, Romania and Turkey, the Russian Federation and Ukraine in the Kerch strait have yet to be agreed. The latter is of specific importance to the hereby thesis and is closely connected to the legal regime of the Sea of Azov described below.

3.2. Legal Regime of the Sea of Azov

The Sea of Azov is an inland sea on the southwest of Ukraine and south of Russia. It is linked by the narrow strait of Kerch to the Black Sea in the south and it is bounded by Ukraine mainland in the north, by Russia in the east, and by the Ukraine's Crimean Peninsula in the west (see Appendix 4). The Don and Kuban are the major rivers that flow into it. The Sea of Azov is the shallowest sea in the world, to the extent that the locals joke that at Azov Sea, such people go for the vacation who cannot swim. There is a constant outflow of water from the Sea of Azov to the Black Sea.

Until the end of the seventeenth century the Sea of Azov likewise to the Black Sea belonged to the Ottoman Empire. Hence, since the beginning of eighteenth century it has become a Russian internal sea. As emphasized by Professor A. F. Vysockiy, since that time the sovereignty of Russia, and later of the Soviet Union over the maritime areas of the Sea of Azov has never been questioned by any state.[251] The water area of the Sea of Azov has been treated as an integral part of the Russian territory, whereas with the emergence of the USSR the legal status of the Sea of Azov as part of the state territory had not changed.[252] Not only the waters, but also the seabed and the subsoil of the Sea of Azov were under sovereignty of the USSR with its sole right to establish the regime for navigation and fishing. At the same time, many western international lawyers held a different opinion. For example, J. Colombos wrote that:

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[250] Maritime Delimitation in the Black Sea (Romania vs Ukraine). International Court of Justice Judgement of 3 February 2009. Available online: http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2009 (20.02.2013).

[251] А. Высоцкий, В. Цемко. Черноморско-Азовский бассейн (правовые вопросы использования пространства и ресурсов). Киев: Наукова думка, 1991, page 13.

[252] О. Усачева. К вопросу о правовом статусе и режиме использования Азовского моря. – Российский ежегодник международного права. Российская Ассоциация Международного Права, 2007, page 164.

> "when the inland sea finds its outlet through a strait or river leading to the high sea, it still remains under the sovereignty of the state which possesses all the banks and the strait leading into it, as for instance in the case of the Sea of Azov which is wholly bounded by Russian territory, but communicates with the ocean through the narrow strait of Kerch. In such a case, the better principle appears to be that Russia would not be entitled to close it entirely to the international navigation in time of peace."[253]

This, in turn, proves that the status of the Sea of Azov has always been under question and a subject to wide polemic. Neither does UNCLOS give a certain answer to the status of the Sea of Azov. According to Article 10 (1) of the Convention, the provisions on bays apply only to bays the coasts of which belong to a single State and do not apply to historical bays (Article 10(6)). Thus, if the Sea of Azov is to be considered a historic bay, it can be treated as internal waters of the littoral states, and the territorial sea, the EEZ and the coastal shelf of Russia and Ukraine should be established. However, the international practice shows that the states use international bays on their discretion bearing no interference from other states.

After the collapse of the Soviet Union, with the emergence on the shores of the sea and the strait of new independent states, the Russian Federation and Ukraine, the question over a treaty consolidation of the legal status of the maritime expanses of the Sea of Azov has arisen. As the successor states to the USSR (Russia also being the state-continuator) Russia and Ukraine can exercise sovereignty over the sea, although the limits for sovereignty are not established yet. Negotiations between Russia and Ukraine on the delimitation of the sea expanses concern two main problems: the bilateral establishment of the regime of internal waters of Russia and Ukraine for the entire aquatory of the Sea of Azov and the Kerch Strait; and delimitation of the territorial sea in the sector from straight baselines in the area of the Kerch Strait up to the delimitation line under the intergovernmental agreement between the USSR and Turkey on the delimitation of the continental shelf between the USSR and Republic of Turkey in the Black Sea of 23 June 1978.[254]

3.3. Russian-Ukrainian Delimitation Dispute in the Sea of Azov and the Kerch Strait

In 2003, the Russian President Vladimir Putin and his Ukrainian counterpart at the time Leonid Kuchma signed an agreement on the joint use of the Azov Sea and Kerch Strait (see Appendix 4). Under the agreement, the sea and the strait remained territorial waters of both Russia and Ukraine. However, this agreement did not establish the maritime boundary line between the two states, and the dispute continued. Also, according to Professor A. A. Kovalev, the idea of

[253] J. Colombos. The International Law of The Sea. 6th revised edition. Longmans, 1967, page 192.
[254] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 156.

preserving for aquatories [of the Sea of Azov and Kerch Strait] the status of internal waters of Russia and Ukraine can hardly be deemed to be legitimate. The Sea of Azov, in particular, in accordance with the norms of the prevailing international law of the sea falls under the concept of the closed seas.[255]

The position of Ukraine regarding the delimitation line in the Sea of Azov and the Kerch Strait has been to accept the administrative border established in the Soviet times between the Crimean oblast of the Ukranian SSR and Krasnodar krai of the RSFSR. That would mean that approximately 60% of the aquatorium and the seabed of the Sea of Azov and the navigated Kerch-Yenikalskiy Channel[256] would remain with Ukraine. According to Ukrainian scientists, the perspective amount of oil and gas resources in this area and continental shelf are 1.5 billion of tons of oil and 1.5 trillion of cubic meters of gas respectively.[257] The arguments put forward by Kiev are supported by the old maps of Soviet Union.[258] Ukraine has unilaterally established a maritime border with Russia in the 1990s, claiming it was based on the Soviet-era administrative border between the two republics. In doing so, Ukraine has also drawn Russia's attention to the fact that for instance, the post-Soviet Estonian-Russian border in Narva and Finnish Bay has been drawn exactly according to the Soviet administrative borderline.[259]

Russians, however, refused to rely on arguments provided by Ukraine, claiming that no administrative borders were established in the Soviet Union between the Russian and Ukrainian republics along the internal sea area.[260] Russia has repeatedly denied the existence of Soviet administrative borders and has insisted on drawing a modified median line that would be equidistant from both state coasts and would entitle both states with equal rights to the Kerch-Yenikalskiy Channel. The real argument behind the Russian position is believed to be solely the economic factor. Thus, if exercising its sovereignty over the

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[255] *Ibid.,* page 156.

[256] The Kerch-Yenikalskiy Channel, located in Kerch Strait, connects the Black Sea and Sea of Azov. It consists of 4 bends, and is 18,9 miles long, 120 meters wide, and the least depth is 8 meters. The Kerch-Yenikalskiy Channel is accessible for ships of up to 215 m in length, and up to 8 m in draft. The Harbour Master may permit bigger vessels to enter the channel on a case by case basis. Ships over 160 m in length and over 6 m draft should only navigate the channel during daytime. It is prohibited to enter Kerch Yenikalskiy Channel during periods of fog, snowfall, mist, heavy rain, and if wind speed is over 14 mps.

[257] Г. Кухалейшвили. Азовско-Керченский дележ: компромисс или уступка. – Агентство Стратегічних Досліджень, 16 July 2012. Available online: http://sd.net.ua/2012/07/16/print:page,1,azovsko-kerchenskij-delyozh-kompromiss-ili-ustupka.html (31.10.2012).

[258] Ивженко, Т. Киев рубит морской узел в отношениях с Москвой. – Независимая Газета, 15 February 2011. Available online: http://www.ng.ru/cis/2011-02-15/1_kiev.html (30.10.2012).

[259] Керченский пролив поделят на украинских условиях. – Издание Lenta.Ru. 11 July 2012. Available online: http://lenta.ru/news/2012/07/11/kerch/ (30.10.2012).

[260] Russia set to resolve Azov-Kerch sea border dispute with Ukraine. – Ria Novosti, 25 January 2007. Available online: http://en.rian.ru/russia/20070125/59672622.html (30.10. 2012).

Kertch Strait, Ukraine would be entitled to collect charges from the passing vessels. Up to 9 000 ships pass through the Kerch Strait each year. Ukraine charges Russian ships passing through the Kerch-Yenikal Channel for navigation and pilotage services; the sum of charges mounts to 150–180 million USD each year. These conditions were not acceptable for Russia, who wanted a free passage between the Black Sea and the Sea of Azov.[261]

Thus, while Ukraine has proposed delimitation of the Kerch Strait according to Soviet borders, and alteration of the status of the Azov Sea from territorial to international waters, Russia remaines committed to the Kerch Agreement signed in 2003 by President Vladimir Putin and his Ukrainian counterpart at the time Leonid Kuchma.[262] In 2003 Russia has started construction of a dam that would connect the territory of Krasnodar krai with Ukrainian island Tuzla and would allow drawing the borderline. The construction that had almost escalated into an armed conflict, ended in 100 meters from the island, and the presidents Kuchma and Putin had temporarily settled the dispute having agreed on joint use of the channel. Since then the situation was factually frozen.[263]

Hence, without final regulation of the maritime delimitation problem, the Russians refused to settle the delimitation of land boundaries between the two states. Lack of established state boundaries is one of the factors that hinders the Ukrainian further association with the EU. Moreover, this problem blocks one of the most ambitious Ukrainian-Russian economic projects on joint exploration of the continental shelf of the Black Sea: without knowing whose subsoil is under exploration, it is impossible to sign contracts or to start actual exploration of oil and gas.[264]

As the problem has exceeded the bounds of delimitation dispute, the states activated the negotiations. In the beginning of 2011, a new round of negotiations held behind closed doors started. It has been reported by a Ukrainian newspaper "Zerkalo nedeli" that Ukraine is ready to give up certain positions and to be more loyal to the division of the Kerch Strait, the Sea of Azov and the Black Sea as well as to grant Russian vessels guarantees of the freedom of navigation in [Kerch-Yenikalskiy] Channel.[265] It is believed that the joint use of this navigational channel may be a reasonable compromise. Unofficially, the negotiators note that the final decision is still absent; the situation on the negotiations is constantly changing. As one Ukrainian official has noted, the compromise should include a package of related documents establishing the delimitation line according to Ukrainian claims and foreseeing not only equal use of the navigation channel but also the Russian right to forbid passage of vessels of third states. Thus, it is important for the Russian Federation to grant

[261] Г. Кухалейшвили (Note 257).
[262] Керченский пролив поделят на украинских условиях (Note 259).
[263] Т. Ивженко. Москва и Киев разошлись в проливе. – Независимая Газета, 21 May 2011. Available online: http://www.ng.ru/cis/2010-05-21/1_kiev.html (31.10.2012).
[264] *Ibid.*
[265] *Ibid.*

that no NATO ships shall appear within the sphere of Russian strategic interests.[266]

The optimistic forecast was to settle the Russian-Ukrainian border dispute by April 2011. However, only on 12 July 2012 have Russian President Vladimir Putin and his Ukrainian counterpart Viktor Yanukovych signed a preliminary agreement on the delimitation of the maritime border between the two countries in the Kerch Strait.[267] According to the preliminary agreement, "the parties believe it is important to carry out the delimitation of maritime spaces in the Azov and Black Seas, as well as in the Kerch Strait in the spirit of friendship, good neighborliness and strategic partnership, taking into account the legitimate interests of both countries."[268] The preliminary agreement settles that the island Tuzla and the Kerch-Yenikalskiy Channel would be considered Ukraine's territory, while Russia maintains its "right of the key" to the Kerch Strait meaning that Russian vessels shall enjoy the right of free and unimpeded passage. "We are not dividing the Black Sea and the Sea of Azov. We talk about determining the final border. Our ministries of foreign affairs have reached principal solutions on how it should be done in the interests of both states", said V. Putin[269]. Russian political scientists conclude that such an agreement between two presidents just confirms the existing situation and favors the interests of Russia and historical justice.[270]

3.4. Summary of the Russian Federation's Position in the Region of Black and Azov Seas

The development of the legal situation around the Kerch-Yenikalskiy Channel and the boundary in the Sea of Azov can once again be seen as Russian willingness to find compromises. However, as in the case of the Arctic Ocean and the Caspian Sea, the compromise is possible for Russia only if it advocates for Russian economic and political interests. Unless such a compromise is to be reached, Russia tends to act in its own way (like building a dam so close to the Ukrainian island Tuzla that it almost resulted in an armed international conflict). An interesting observation can be drawn on Russia's adherence to the border treaties signed by the Soviet Union. Notwithstanding its official state continuator status nor the principle that the change of sovereignty does not affect boundaries[271], Russia seems to accept the boundary agreements signed by the

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[266] *Ibid.*

[267] Russia, Ukraine Agree on Maritime Border Delimitation. – Ria Novosti, 13 July 2012. Available online: http://en.rian.ru/russia/20120713/174576071.html (31.10.2012).

[268] Ukraine's FM: Yanukovych and Putin did not discuss Tuza island question. – ForUm, 13 July 2012. Available online: http://en.for-ua.com/news/2012/07/13/ 113211.html (31.10. 2012).

[269] К. Солянская. Тузла ушла навсегда. – Интернет-версия Газета.Ru, 13 July 2012. Available online: http://www.gazeta.ru/politics/2012/07/13_a_4680153.shtml (31.10.2012).

[270] Russia, Ukraine Agree on Maritime Border Delimitation (Note 254).

[271] I. Brownlie (Note 5), page 663.

USSR as final and binding upon itself only in the cases when such agreements rewards Russia with a favorable position. In the example of the Sea of Azov, Russia continues to reject the administrative border established in the Soviet times between the Crimean oblast of the Ukranian SSR and Krasnodar krai of the RSFSR, as the admittance of such borderline would deprive Russia of certain economic benefits. A parallel could be drawn with Tartu Peace Treaty from 1920 between independent Republic of Estonia and Russian RSFSR, which established the borderline between two countries. The treaty is currently not recognised by the Russian Federation, which maintains that the "Tartu Peace Treaty ceased to be a legally relevant treaty between two independent states in 1940 when the Republic of Estonia 'entered' the USSR and was transformed into a Soviet republic."[272] Should Russia recognize the legal validity of the Tartu Peace Treaty, it will not only bear territorial losses (as several territories currently belonging to Russia shall become the territory of Estonia as provided by the Tartu Peace Treaty), but would need to acknowledge the illegality of Soviet occupation and annexation of Estonia and other Baltic republics in 1940. As shall be indicated below, Russian reluctance to recognise Tartu Peace Treaty bears imprints on the country's position in the Baltic Sea.

[272] L. Mälksoo. Which Continuity: The Tartu Peace Treaty of 2 February 1920, the Estonian-Russian Border Treaties of 18 May 2005, and the Legal Debate about Estonia's Status in International Law. -Juridica International, 2005, Volume X, page 146.

Chapter 4. The Position of the Russian Federation in the Baltic Sea

4.1. The Baltic Sea

One of the world's largest bodies of brackish water, the Baltic Sea is a semi-enclosed sea measuring some 420 000 square kilometers, which is almost completely surrounded by land territory. It is connected to the North Sea and the Atlantic Ocean by the Kattegat, a narrow passage between Denmark and Sweden. The most important subsidiary bodies of the Baltic Sea are the Gulf of Bothnia, the Gulf of Riga and the Gulf of Finland. Because of its size, all of the Baltic Sea lies within 200 miles from the coast. At an average depth of 56 meters, it is shallow with a slow rate of water exchange, taking over 20 years for a complete renewal of seawater. Its drainage area includes a population of 85 million, and it is one of the most polluted and stressed seas in the world, affected by eutrophication, agricultural wastes, contaminants from industrial activities and municipal waste discharges, increased shipping, overexploitation of living marine resources and invasive species.[273]

The coastal states of the Baltic Sea are Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Sweden and the Russian Federation. Often referred to as "the Mediterranean of the North", the importance of the Baltic Sea for the littoral states, as well as its potential for trade and commerce are hard to underestimate. For Finland, Poland and the three Baltic States, the Baltic Sea is the only sea-route connection to other seas and the world ocean. For the northern European part of Russia, the Baltic Sea is equally important in this respect. The Russian port of St Petersburg located on the Baltic Sea is not only the Russian outlet to the Baltic Sea, but also the gateway to internal waterways such as to the river Dnepr, which empties into the Black Sea, and to the river Volga, which flows into the Caspian Sea.[274]

The following description shall emphasize the historical development of Russian position in the Baltic Sea, the Soviet domination in the area and the maritime border disputes that arose in the area after the dissolution of the USSR. Amongst current Russian interests in the Baltic Sea, the hereby thesis focuses on Nord Stream gas pipeline constructed and operating on the continental shelf of the Baltic Sea.

[273] E. Karm. Environment and Energy: The Baltic Sea Gas Pipeline. – Journal of Baltic Studies, 2008, Volume 39, No. 2, page 101.
[274] R. Platzöder, P. Verlaan. Introduction. – The Baltic Sea: New Developments in National Policies and International Cooperation. Martinus Nijhoff Publishers, 1996, page 12.

4.2. Historical Development of the Baltic Sea: *dominium maris Baltici;* Russian-Soviet Sea

The history of the Baltic Sea region is characterized by struggles, conflicts and wars over access, access fees, harbour and sea control. The amount of blood shed for the control over the Baltic Sea might be almost equal to the total volume of water in the sea. In the early Middle Ages, navigation, economy, and politics of the Baltic Sea area were largely controlled by the North Germanic Normans or Vikings. During the thirteenth, fourteenth and fifteenth centuries the most important political, economic and cultural force in the region was the Hanseatic League.[275] For the following centuries, the coastal states of the Baltic Sea fought for dominance at sea. It was a struggle for what became to be known as *dominium maris Baltici,* mostly between Sweden and Denmark, and sometimes the *dominium* was executed in common.[276] In international legal literature the *dominium maris* is the right of a state for exclusive use of the sea for navigation and fisheries[277]. The basic assumption for *dominium maris Baltici* of Sweden and Denmark was that no foreign warships were allowed to be present in the Baltic Sea. The peace of Westphalia (1648) confirmed the Swedish position of *dominium maris Baltici*, and another peace treaty, concluded in Nystad in 1721, ended it.[278]

In the early eightteenth century, under the reign of Peter the Great who opened the Russian "window on Europe" by establishing the port of St Petersburg on the coast of the Baltic Sea, Russia became the leading power in the region.[279] A number of treaties were concluded between the littoral states to recognize and protect the Baltic Sea as *mare clausum.*[280] In 1807 and 1808, Denmark and Sweden stopped claiming that the Baltic Sea was *mare clausum*

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[275] *Ibid.,* page 12.

[276] M. Jacobsson. Sweden and the Law of the Sea. – T. Treves (ed.). The Law of The Sea: The European Union and Its Member States. Martinus Nijhoff Publishers, 1997, page 513.

[277] A. Taska. Dominium Maris Baltici und die Sowjetunion. – J. G. Poska (ed.). Pro Baltica. Mélanges dédiés à Kaarel R. Pusta, Stockholm: Comité des Amis de K.R. Pusta, 1965, page 203.

[278] M. Jacobsson (Note 276), page 513.

[279] The fact that Russia has achieved access and control over the Baltic Sea at the time was perceived on both political and national levels, and reflected itself in the self-consciousness of Russian people. For instance, the famous Russian poet of the nineteenth century Alexander Pushkin, writing in his poem "The Bronze Horseman" devoted to Peter the Great, speaks in the words of Peter about the establishment of the Peter-town, St Petersburg:

> From here by Nature we're destined
> To cut a door to Europe wide,
> To step with a strong foot by waters.
> Here, by the new for them sea-paths,
> Ships of all flags will come to us –
> And on all seas our great feast opens.

[280] A. Taska (Note 277), page 204.

of littoral states[281] and with the Napoleonic wars the status of *mare clausum* of the Baltic ended.[282] Particularly important is the treaty of Copenhagen in 1857, which included Russia and declared the Baltic Sea open to all ships, including warships, during peacetime.[283]

However, in 1906–1908 Russia considered again applying the doctrine of *mare clausum* for the Baltic Sea, together with Germany.[284] In April 1908, Germany, Russia, Denmark and Sweden concluded the so-called "Baltic Agreement", by which four states mutually guaranteed the existing status of this sea and its coasts. The attitude of the two smaller states was purely defensive.[285] Hence, due to the following defeat and dissolution of the Russian Empire and the emergence of new, *i.a.* the Baltic States, the idea of *mare clausum* of the Baltics was abandoned.

Russian influence in the Baltic Sea area peaked again after the Second World War. The Soviet concept of the "Baltic Sea – Sea of Peace" translated to absolute Soviet control of the sea.[286] For some 45 years the Soviet Union had controlled almost the entire southern coast of the Baltic Sea. It was at that time that the Soviet Union introduced 12 miles territorial sea[287] to the Baltic Sea. Until the adoption of the 1960 Statute on the Protection of the State Boundary the Soviet Union had not defined either the regime or breadth of its territorial waters in an unequivocal way in its national legislation. Nevertheless, the Soviet doctrine after 1945 did assert that the Soviet Union's practice evidenced the existence of territorial sea of 12 miles. The 1927 Statute on the Protection of the State Boundary of the USSR established a frontier belt by defining its outer limit, with the general practice being that the belt was 12 miles in breadth.[288] Before 1960, two agreements on territorial sea boundaries with neighboring states were concluded explicitly delimiting the Soviet territorial sea of 12 miles[289], one of them being the 1958 delimitation agreement with Poland.[290]

In a number of incidents, Soviet military arrested foreign fishing vessels who had ended up in its territorial sea[291] of the Baltic waters. The Soviet decree of 1935 "About the regulation of fisheries and the protection of fishstock"

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[281] *Ibid.*
[282] M. Jacobsson (Note 276), page 514.
[283] A. Taska (Note 277), page 205.
[284] *Ibid.*
[285] O. Hoetzsch. The Baltic States, Germany and Russia. – Foreign Affairs, 1931, Volume 10, Number 1, page 120.
[286] A. Juntunen. The Baltic Sea in Russian Strategy. – The Royal Swedish Academy of War Sciences. Discussions and Debates, 2010, Nr 4, page 120.
[287] A. Taska (Note 277), page 207.
[288] A. G. O. Elferink. Law of Maritime Boundary Delimitation: A Case Stydy of the Russian Federation. Martinus Nijhoff Publishers, 1994, page 143.
[289] *Ibid.*
[290] E. Franckx. Maritime Delimitation in the Baltic Sea: What Has Already Been Accomplished? – International Journal of Marine Navigation and Safety of Sea Transportation, 2012, Volume 6, Number 3, page 439.
[291] A. Taska (Note 277), page 207.

prohibited foreigners catching fish in the 12 sea miles zone adjacent to the Soviet coast. In 1950, Denmark and Sweden protested against the Soviet 12 miles zone and against the arrest of some ships of their citizens, in particular fishermen. Both governments argued that in the Baltic Sea the width of territorial sea had for centuries been 3 sea miles and in a few cases 4 sea miles[292] – not 12 sea miles as the USSR claimed. Therefore, such an extension to 12 sea miles constitutes occupation of free (and open) sea.[293] The USSR responded that it had extended the territorial sea to 12 sea miles already in 1927 and 1935, and there was no general rule in international law prohibiting that.[294] Aditionally, the USSR argued that the 3 miles zone was never a principle of general customary international law,[295] nor that there was a norm of general international law for the width of territorial sea.[296] Sweden and Denmark suggested to the USSR to go to the ICJ with the conflict but the USSR refused, arguing this was its internal affair only.[297]

The assumption of the Baltic Sea being a "Soviet Sea" found its way into the Soviet legal literature of that time. Thus, in 1950 there was an article by the Soviet legal scholar S. V. Molodtsov on "Navigation in the Baltic Sea", where the author came to the conclusion that the Baltic Sea was a closed sea and only commercial and military ships of the littoral states were allowed to navigate there[298]. S. V. Molodstov claimed the same in his textbook "М е ж д у н а р о д н о е п р а в о" [International Law] published in Moscow in 1951.[299] This concept was severely criticized by Western scholars. For example, the German scholar H.-A. Reinkemeyer came to the conclusion that such an attempt to close the Baltic Sea for ships of other nations was not compatible with international law of sea.[300] H.-A. Reinkemeyer devoted a whole chapter of his treatise on Soviet 12 miles zone in the Baltic Sea to the arguments of Molodtsov on the Baltic Sea (and partly, Black Sea), as closed seas. Proceeding from the history of the Baltic Sea, H.-A. Reinkemeyer introduced his vision of the history of international legal status of the Baltic Sea, stating that it was always a free sea, even at the times when Sweden and Denmark claimed *dominium maris baltici*. H.-A. Reinkemeyer concluded that the claim of the USSR to a 12 sea miles

[292] This was the case in the Gulf of Finland, where under Peace Treaty of 1920 between the USSR and Finland a 4 mile outer limit of the territorial sea was applied.
[293] H.-A. Reinkemeyer. *Die sowjetische Zwölfmeilenzone in der Ostsee und die Freiheit des Meeres* [The Soviet 12 miles zone in the Baltic Sea and freedom of the sea]. Köln-Berlin: Carl Heymanns Verlag, 1955, page 8.
[294] *Ibid.,* page 9.
[295] *Ibid.,* page 52.
[296] *Ibid.,* page 56.
[297] *Ibid.,* page 10.
[298] A. Taska (Note 277), page 208.
[299] Е. Коровин (Note 246), page 309.
[300] A. Taska (Note 277), page 208. See also, H.-A. Reinkemeyer (Note 293), page 110.

territorial sea in the Baltic Sea was not justified under international law,[301] and such a claim was in contradiction with the principle of freedom of seas.[302] Notwithstanding the opposition and critique of Western legal specialists, the concept of the Baltics as closed "Soviet Sea" was cherished by the Soviet Union till the disintegration of the latter in 1991. Due to major political events, the situation in the Baltics changed drastically, and Baltic States restored their independence and the question of maritime delimitation of the Baltic Sea emerged.

4.3. Maritime Boundaries in the Post-Soviet Baltic Sea

The Baltic Sea area has been characterized by a rather unusual development when considered from a maritime boundary point of view. At the eve of the dissolution of the former Soviet Union, the delimitation of maritime zones in the Baltic Sea had reached a very advanced stage, not easily encountered in other regions around the world.[303] Thus, the Soviet Union shared maritime boundaries with Finland, Poland and Sweden, and had executed a number of bilateral agreements with those states leaving only some 20 miles of a total of over 500 miles of maritime boundary undelimited. Only the delimitation between Denmark and Poland, south of Bornholm island, remained outstanding, as well as a few tripoints which still had to be filled in.[304]

This situation, however, changed in 1991. After Gorbachev's televised speech on Christmas Eve 1991, in which he resigned as the President of the USSR, the Supreme Soviet abolished itself the next day and officially declared that the Soviet Union no longer existed. Estonia, Latvia and Lithuania resorted to the statehood they had *de facto* lost in World War II, while the former German Democratic Republic disappeared altogether. As a result, a whole set of newly to be delimitated maritime boundaries surfaced overnight in areas where no such boundaries had ever existed in the past[305] (see Appendix 5). Given the fact that the Baltic Sea is nowhere more than 400 miles wide, coastal states were obliged to conclude delimitation agreements not only with adjacent, but each time also with opposite states[306]. Starting from the South, the maritime boundaries between Russia and Lithuania, Lithuania and Latvia, Latvia and Estonia, and finally Estonia and Russia needed to be agreed upon, for these water expanses had never really required any delimitation under the unified Soviet state.[307] Only the first three have so far been signed by the respective

[301] H.-A. Reinkemeyer (Note 293), page 159.
[302] A. Taska (Note 277), page 208.
[303] A. Taska (Note 277), page 440.
[304] E. Franckx. Current Legal Developments. Baltic Sea. New Maritime Boundaries Concluded in the Eastern Baltic Sea Since 1998. – The International Journal of Marine and Coastal Law, 2001, Volume 16, No 4, page 645.
[305] *Ibid.*
[306] E. Franckx 2012 (Note 290), page 438.
[307] *Ibid.,* page 440.

parties, in 1997, 1999 and 1996 respectively. All of these three agreements, except for the one between Latvia and Lithuania, have moreover entered into force by now.[308]

The delimitation of the abovementioned maritime boundaries was never easy, because in some instances the very land frontier was under discussion. For example, in early 1991 Estonia and Latvia decided to open negotiations in order to adjust their common boundary to the situation that existed in the pre-1945 period. In 1992 both states signed an agreement on their common land frontier, however, the delimitation line inside the Gulf of Riga, considered by the former USSR as its historical bay, was a hotly debated issue[309] for few more years before the boundary agreement was finally signed in 1996.

Similarly problematic have been the negotiations between Estonia and the Russian Federation on the delimitation of their maritime boundary in the eastern part of the Gulf of Finland. The delimitation of the maritime boundary is complicated by the on-going dispute over the location of the land frontier between Estonia and the Russian Federation. Estonia has claimed that the land frontier between Estonia and the Russian Federation has been established by the Estonian-Russian Pease Treaty of 1920, and has maintained that the changes in the frontier after its loss of independence in 1940 were not lawful because of the illegality of the incorporation of Estonia in the Soviet Union.[310] The Russian Federation has rejected the Estonian position and holds that the Peace Treaty of 1920 does not determine the Estonian-Russian Federation land frontier.[311] Recently, however, the Estonian government seems to have given up on the claim that both countries need to resort to the border envisaged in the Tartu Peace Treaty. The countries seemed to have reached an agreement on both land- and maritime boundary in 2005, but referring to the introductory declaration attached to the text of the agreement by the Estonian Parliament during the ratification process, the Russian side withdrew its signature to the treaties.[312] Russia stated that it did not consider itself bound by the circumstances concerning the object and the purposes of the agreement.[313] Currently, both states are again negotiating the terms of the new possible border agreement.[314]

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[308] *Ibid.*

[309] E. Franckx. Maritime Boundaries in the Baltic Sea: Past, Present and Future. – Maritime Briefing, 1996, Volume 2, Number 2, page 12.

[310] A. G. O. Elferink (Note 288), page 177.

[311] *Ibid.*

[312] E. Franckx 2012 (Note 290), page 441.

[313] Estonian Ministry of Foreign Affairs on Estonian-Russian Border Treaty. Available online: http://www.vm.ee/?q=en/node/93 (18.12.2012).

[314] On 7 October 2012 the foreign affairs committee of Estonian Parliament together with representatives of all parlamentary fractions made a proposal to the government to begin consultations with Russia in order to conclude a border treaty that satisfies both sides. During a discussion in Luxembourg on 14 October 2012 between Foreign Minister of Estonia Urmas Paet and Russian Foreign Minister Sergei Lavrov, both sides agreed to carry out consultations with the goal of finding an opportunity to bring the border treaty into force. The first round of consultations took place on 31 October 2012 in Moscow. Estonian

Not only had the dissolution of the Soviet Union entailed the necessity to delimit new maritime boundaries, at the same time, the more subtle question arose as to the exact juridical nature of maritime boundary agreements concluded by the former Soviet Union in maritime areas over which the Russian Federation today no longer exercises sovereignty or sovereign rights.[315] Such was the maritime dispute between Estonia and Finland, where the main aim of the negotiations was not to try to establish a maritime boundary in areas where no such boundary existed before, but what the Estonian-Finland Agreement did was rather to provide an answer about the exact legal value to be attributed under international law to the previously concluded maritime boundary agreements, *in casu* by the former Soviet Union.[316] The final outcome of the dispute was that out of the 17 points listed in Estonian-Finnish Boundary Agreement,[317] 16 correspond to turning points already established by the former Soviet Union in its relations with Finland. In other words, in as far as a maritime boundary line existed at the time of the dissolution of the Soviet Union, that line has now been taken over, point by point, by Estonia and Finland to form the basis of the new agreement.[318]

Another interesting set of problems arose when Estonia started to consider the formal adoption of a 12 nautical miles territorial sea. This could have turned the Gulf of Finland into a Gulf of Aqaba-type situation.[319] Namely, the Gulf of Finland is a 285 nautical miles long inlet which in many sections is less than 24 nautical miles wide with bordering countries Russia to the East, Finland to the North, Estonia to the South. Indeed, if in the past the 12-mile zone claimed by the Soviet Union did not create any problem for Soviet ship to reach Leningrad as it was then called, such a 12-mile zone claimed by Estonia might well restrict Russian navigation to St Petersburg, especially if Finland were to consider a similar extension in the area. But even if Finland were not to extend its territorial sea to 12 nautical miles, such an Estonian move would push all Russian ships to the Finnish side of the Gulf of Finland, a possibility totally unacceptable to Finland.[320] Reportedly, Finland had criticized Estonian draft legislation which provided for a general extension of 12 miles or to the

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Ministry of Foreign Affairs on Estonian-Russian Border Treaty. Available online: http://www.vm.ee/?q=en/node/93 (18.12.2012).

[315] E. Franckx 2001 (Note 304), page 646.

[316] E. Franckx. Current Legal Developments. Baltic. Two New Maritime Boundary Agreements in the Eastern Baltic Sea. – The International Journal of Marine and Coastal Law, 1997, Volume 12, No 3, page 369.

[317] Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and on the Northern Baltic Sea, 18 October 1996. Available online: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EST-FIN1996MZ.PDF (26.12.2012).

[318] E. Franckx 1997 (Note 316), page 371.

[319] E. Franckx 1996 (Note 309), page 13.

[320] *Ibid.*

boundaries with other states, because it would move the channels for Russian ships close to Finnish coasts.[321]

Therefore, when Estonia finally decided to extend its territorial sea, this was preceded by several rounds of negotiations with Finland. The final result was achieved by exchange of diplomatic notes where both parties, "in order to maintain the free passage through the Gulf of Finland", agreed that they would not expand their territorial sea in the Gulf of Finland so as to infringe a 3 nautical miles zone from the centre line, unless prior notice is given to the other party.[322] Consequently, a 6-mile channel extending to both sides of the middle of the Gulf of Finland was created, in which all ships and aircraft would enjoy the rights of the high seas with respect to navigation and overflight. Such channel arrangement was based on the internal legislation of both States, confirmed by the abovementioned exchange of Notes "constituting an agreement" between Finland and Estonia in 1994. Estonia fully complied with this requirement when it enacted its law on the maritime boundaries already in 1993.[323] The extent of the territorial sea of Finland was 4 miles until summer 1995, which corresponded to an old Nordic custom[324]. However, in 1995 Finnish Parliament has adopted several amendments to Territorial Waters Act, the most important one being the enlargement, with certain exceptions, of the extent of the territorial sea to 12 nautical miles.[325] In this enactment, Finland clearly stated that the outer limit of the territorial sea in the Gulf of Finland will always stop at least 3 nautical miles from the centre line.[326]

Thus, due to voluntary limitation of Estonian and Finnish sovereignty over their territorial seas, in the midst of the narrow Gulf of Finland a corridor of 6 nautical miles comprised of Estonian and Finnish exclusive economic zone waters with the status of open sea was established. As shall become evident, many countries including Russia have made wide use of this channel for various purposes.

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[321] A. G. O. Elferink (Note 288), page 176.

[322] Exchange of notes between Estonia and Finland constituting an agreement on the procedure to be followed in the modification of the limits of the territorial waters in the Gulf of Finland. 6 April and 4 May 1994. Available online: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EST-FIN1994GF.pdf (18.12.2012).

[323] Merealapiiride seadus. RT 1993, 14, 217. Available online: https://www.riigiteataja.ee/akt/MPS (18.12.2012).

[324] M. Koskenniemi, M. Lehto. Finland and the Law of the Sea. – T. Treves (ed.). The Law of The Sea: The European Union and Its Member States. Martinus Nijhoff Publishers, 1997, page 128.

[325] *Ibid.*

[326] E. Franckx 1996 (Note 309), page 14.

4.4. Russia's Current Interests in the Baltic. Nord Stream Gas Pipeline

After the disintegration of the USSR, the situation in the Baltic area changed and Russia was forced to retreat to the easternmost end of the Gulf of Finland. However, from the Russian point of view, the present situation is not as dire as before the Second World War. Russsia still controls the Kaliningrad area and a longer strip of the northern shores of the Gulf of Finland than prior to the Moscow Peace Treaty of 1940.[327] Despite its territorial losses, Russia has not abandoned its "sea power" strategy. The Baltic Sea is important for Russian trade due to its strategic sea lines of communications, its access to oceans and because it is the most peaceful area with a reduced risk of military conflict[328]. In the Maritime Doctrine of the Russian Federation,[329] the Baltic Sea is first and foremost defined as a transport route, and special emphasis is placed on the development of port infrastructures. Over the past decade, Russia has constructed numerous new ports at the easternmost end of the Gulf of Finland, renovated old ones and constructed infrastructure to support maritime traffic.[330] Being shallow, the Baltic Sea provides ample opportunities for the utilization of the continental shelf of Russia and for building artificial islands, installations and structures. These are means for improving coastal infrastructure and defense. The Nord Stream gas pipeline is the flagship of these projects.[331]

The Nord Stream project is a 1 224-kilometer twin pipeline system lying on the floor of the Baltic Sea running from Vyborg, Russia to Lubmin near Greifswald, Germany. The project is launched by five private entities: Gazprom, a Russian state-owned gas company, as the majority shareholder with 51% of shares, and the minority shareholders such as BASF/Wintershall, a German chemical company, and E.ON Ruhrgas, a German power-and-gas company, each owning 15.5% of shares, and Netherlands-based natural gas infrastructure company Gasunie along with the leading French energy provider GDF SUEZ S.A. each owning 9% of shares[332]. The Nord Stream route crosses the Exclusive Economic Zones of Russia, Finland, Sweden, Denmark and Germany, as well as the territorial waters of Russia, Denmark, and Germany.[333] Combined, the twin pipelines have the capacity to transport a combined total of 55 billion cubic meters of gas a year to businesses and households in the EU for at least 50 years.[334] The project's aim is to reduce transit risks, the importance of which has been amptly demonstrated by recent energy disputes involving Russian and its

[327] A. Juntunen (Note 286), page 120.
[328] *Ibid.,* page 121.
[329] Морская Доктрина Российской Федерации на Период до 2020 года (Note 69).
[330] A. Juntunen (Note 286), page 122.
[331] *Ibid.*
[332] Who We Are. Nord Stream. The New Gas Supply Route for Europe. – Official website. Available online: http://www.nord-stream.com/about-us/ (27.12.2012).
[333] The Pipeline. Nord Stream. The New Gas Supply Route for Europe. – Official website. Available online: http://www.nord-stream.com/pipeline/ (27.12.2012).
[334] *Ibid.*

neigbors such as Ukraine[335] and Belarus. Currently, both strings of the pipeline have been placed and are fully operational, and the gas is flowing through both of the lines.[336]

Nord Stream is promoted as a pan-European endeavor, characterized by the former President of the Russian Federation Dmitry Medvedev as a project "equally serving the interests of reliable energy supplies and energy security for all the countries on the European continent."[337] In the TEN-E guidelines, it is upgraded to a "project of European interest."[338] However, one cannot escape the fact that Nord Stream runs ashore in Germany, and that the project serves this state more than any other within the union (the bulk of the gas is earmarked for the German market).[339] Research conducted by Cambridge University on "The Economics of The Nord Stream Pipeline System" concluded that the project has a positive economic value in all (low, moderate and high demand) scenarios, even in the worst case of demand and maximum expenditure the present value of the project will still be positive.[340] Therefore the project, while bypassing the Baltic countries and Poland[341] and substantially diminishing Russian gas transit

[335] As previous agreements between Russia and Ukraine on the price of Russian gas supply to Ukraine and a tariff for Russian gas transit to Europe expired on 31 December 2008, both countries failed to agree on new prices for 2009. As the result, Russian exports to Ukraine were cut off on 1 January 2009. Furthermore, exports to 16 EU member states and Moldova were drastically reduced on 6 January 2009 and cut completely from 7 January 2009. Deliveries to both Ukraine and other European countries restarted on 20 January 2009 following the signing of two new ten year contracts. The most seriously affected countries in the Balkans experienced a humanitarian emergency, with parts of the populations unable to heat their homes. Significant economic problems, but not of a humanitarian kind, were also caused in Hungary and Slovakia. S. Pirani, J. Stern, K. Yafimava. The Russo-Ukrainian Gas Dispute of January 2009: a Comprehensive Assessment. – Oxford Institute for Energy Studies, 2009, NG 27. Available also online: http://www.globalcitizen.net/data/topic/knowledge/uploads/20110630223130533.pdf (03.01.2013).

[336] Twin Pipeline System Fully Operational. – Nord Stream's Online Magazine, 8 October 2012, Available Online: http://www.nord-stream.com/press-info/emagazine/twin-pipeline-system-fully-operational-112/ (27.12.2012).

[337] B. S. Whist. Nord Stream: Not Just a Pipeline. An Analysis of the political debates in the Baltic Sea region regarding the planned gas pipeline from Russia to Germany. – Fridjof Nansens Institute Report 15/2008, page 12.

[338] EC Decision 1364/2006/ of 6 September 2006, OJ 2006 L 262, 8. Projects of "European interest" have preference when it comes to European Union funding under the TEN-E budget with special attention given to their funding under other Union budgets. See S. Vinogradov. Challenges of Nord Stream: Streamlining International Legal Framework and Regimes for Submarine Pipelines. – German Yearbook of International Law, 2009, Volume 52, page 257.

[339] S. Vinogradov. Challenges of Nord Stream: Streamlining International Legal Framework and Regimes for Submarine Pipelines. – German Yearbook of International Law, 2009, Volume 52, page 257.

[340] C. K. Chyong, P. Noel, D. M. Reiner. The Economics of The Nord Stream Pipeline System. CWPE 1051 & EPRG 1026, September 2010, page 18. Available also online: http://www.dspace.cam.ac.uk/bitstream/1810/242076/1/cwpe1051.pdf (27.12.2012).

[341] Poland has been one of the strongest opponents to Nord Stream construction. Thus, Radek Sikorski, the Polish foreign minister, has in 2006 compared the pipeline deal between

through Ukraine and Belarus, is first and foremost economically beneficial to Russia and Germany as establishing reliable gas export market for the former and granting relatively cheap gas supplies to the latter. Nord Stream project is often referred to as "Russian-German" pipeline.

As of the date the Nord Stream Agreement was signed in 2005 by the President of Russian Federation Vladimir Putin and then-Chancellor of Germany Gerhard Schroder,[342] the project has been severely criticized by various nations, politicians, energy experts, security analysts, ecologists, etc. Nord Stream project has been viewed to use the "divide and conquer" strategy in favor of Russian and German foreign policies. Increased economical dependence of Europe on Russia has been feared. Nord Stream gas pipeline has often been identified as a Russian "gas weapon"[343], "energy weapon"[344] or as "a tool of geopolitical influence"[345]. In addition, there have been concerns about environmental issues and risks concerning the construction and operation of the pipeline, potential increase of military presence of Russian Navy in the Baltic Sea,[346] the lack of transparency of Russia's possible political influence, the

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Russia and Germany to the 1939 Molotov-Ribbentrop Pact that divided Central Europe into spheres of German and Soviet influence. Today, the government and press reactions in Warsaw are calm. Nord Stream: A View From Poland. – Natural Gas Europe, 9 November 2011. Available online: http://www.naturalgaseurope.com/nord-stream-a-view-from-poland-3421 (30.12.2012).

[342] I. Kornfeld. The Marriage of Russian Gas and Germany's Energy Needs: Do the Environment and Baltic Sea Fisheries Have a Place in the Wedding Party? – Journal of Energy and Environmental Law, Winter 2012, page 66.

[343] M. Paletar. Nord Stream and the Reality of Russia's "Gas Weapon". – The Global Policy Institute, January 11, 2012. Available online: http://www.gpilondon.com/student-think-tank/nord-stream-and-the-reality-of-russias-gas-weapon-2/ (30.12.2012).

[344] R. Beste, C. Meyer. German-US Tensions grow over the Baltic Pipeline. – Spiegel Online International, 22 September 2008. Available online: http://www.spiegel.de/international/world/russia-s-energy-weapon-german-us-tensions-grow-over-baltic-pipeline-a-579677.html (31.12.2012).

[345] D. Finlay. The Wiley Bear – Russian Motives for the Nord Stream Pipeline. – The State of the Century, 12 November 2012. Available online: http://thestateofthecentury.wordpress.com/2012/11/12/russian-motives-for-the-nord-stream-pipeline/ (30.12.2012).

[346] Regarding the potential increase of Russian military presence in the Baltic Sea, the words of Russian President Vladimir Putin are often cited: "*And here, you know, one of our major priority projects is constructing the North European Gas Pipeline that will run under the Baltic Sea and ensure that our energy resources go directly to our west European consumers. This is a major project, very important for the country's economy, and indeed for all Western Europe. And of course we are going to involve and use the opportunities offered by the navy to resolve environmental, economic, and technical problems because since the Second World War no one knows better than seamen how to operate on the bottom of the Baltic Sea".* While naval activities in economic zones of the littoral states of the Baltic Sea are permitted according to international law, Nord Stream will give Russia reason for increased presence should it ever feel a need for it. From Moscow's perspective, patrolling the pipeline stretch should be welcomed as it aims to secure supplies to Europe, but an increased militarization of the sea can thus be expected. An increased naval presence does not necessarily mean increased activity, but increased presence may lead to increased

choice of Switzerland for Nord Stream headquarters (that is falling outside the European jurisdiction) and the fact that Nord Stream is not a true European project because only a few European states will profit from it leaving the rest – especially the Eastern European countries like the Baltic States and Poland – behind. Nevertheless, as of today, the Nord Stream has become operational, and the company is looking for potential extension of the pipeline by one or two lines.[347]

4.5. Legal Aspects of Nord Stream in the Framework of UNCLOS

Unlike the case of most North Sea pipelines, the states behind the Nord Stream project refrained from determining the legal or technical aspect of the pipeline construction and operation, including such issues as jurisdiction, licenses and authorizations, applicable law, standards regarding design, safety and environmental protection and so forth. In absence of a special pipeline treaty involving "sponsor" and "transit countries", the Nord Stream consortium has to apply and comply with relevant international regulations.[348] As a transboundary long-distance gas transmission submarine pipeline[349] that is running along the territorial waters of Russia, Germany and Denmark and the exclusive economic zones of Sweden and Finland, Nord Stream is subject to UNCLOS regulation.

Additionally, it is impossible to imagine a construction project of this magnitude in the closed sea without causing some environmental interference. In the case of Nord Stream, environmental issues have become the center of attention, with heated debates in some of the Baltic States. Nord Stream is subject to the Convention on Environmental Impact Assessment in a Trans-

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tension. R. L. Larsson. Nord Stream, Sweden and Baltic Sea Security. Swedish Defence Research Agency (FOI). Defence Analysis. March 2007. Available also online: http://people.arcada.fi/~luvsana/Nord%20Stream/Nord%20Stream,%20Sweden%20and%20Baltic%20Sea%20Security.PDF (03.01.2013).

[347] Next Step in the Potential Extension of Nord Stream. – Official website. Available online: http://www.nord-stream.com/press-info/press-releases/next-step-in-the-potential-extension-of-nord-stream-426/ (30.12.2012).

[348] S. Vinogradov (Note 339), page 258.

[349] Distinction is usually made between pipelines that constitute an integral part of offshore installations and operations (intra-field and, as a rule, most of the inter-field pipelines), and long-distance oil or gas transmission pipelines (cross-border, offshore-to-coast and coast-to-coast). Such a differentiation follows from UNCLOS (Article 79(4)), but is also supported by state practice, reflected in numerous bilateral pipeline agreements and regional environmental instruments. The first are typically dealt with in the context of regulation of offshore petroleum exploration and production. Second category pipelines cover long distances and, as the Nord Stream case demonstrates, usually pass across maritime areas that have different legal status and regime. S. Vinogradov (Note 339), pages 275-276. Nord Stream as a cross-border transit pipeline specifically falls under international legal regime of UNCLOS.

boundary Context (Espoo Convention),[350] and had to undergo a rigorous environmental impact assessment (EIA) in accordance with the Convention and relevant national legislations of the Baltic States. In addition to complying with national EIA requirements, given the cross-border nature of the Nord Stream project, an international consultation process had to be conducted with the purpose of providing all countries, which may be affected by it, the opportunity to overview the projects' potential impact.[351] Furthermore, Nord Stream is bound by general obligation "to take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance" as provided by Article 3 (1) of the Helsinki Convention,[352] complemented by the requirement to apply precautionary and polluter pays principles, to promote the use of Best Available Technology and Best Environmental Practice, to conserve natural habitats and biodiversity, and to control pollution from a variety of sources.

The author finds it necessary to emphasize, however, that the legal aspects of Nord Stream gas pipeline related to the environmental issues, without prejudice to their importance, fall outside the scope of hereby research. The following analysis is focused on legal aspects of Nord Stream and correspondent practice of coastal States under UNCLOS regulation of submarine pipelines in the territorial sea and EEZ.

4.5.1. Nord Stream in the Territorial Sea

Article 2 of UNCLOS states that the sovereignty of the coastal State extends to its territorial and archipelagic waters. Therefore, as a matter of principle, coastal states have the right to regulate all activities in their territorial sea, and their laws and regulations apply to activities in their territorial sea.[353] Thus, the consent of the coastal state is necessary to lay a submarine cable or a pipeline in

[350] Convention on Environmental Impact Assessment in a Transboundary Context done at Espoo (Finland) on 25 February 1991. Available online: http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf (03.01.2013). According to Article 1(2) of the Convention, each Party shall take the necessary legal, administrative or other measures to implement the provisions of the Convention, including, with respect to proposed activities that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in the Convention.

[351] S. Vinogradov (Note 339), page 266.

[352] Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992. Available online: http://www.helcom.fi/stc/files/Convention/Conv1108.pdf (03.01.2013).

[353] R. Beckman. Submarine Cables – A Critically Important but Neglected Area of the Law of the Sea. 7th International Conference on Legal Regimes of Sea, Air, Space and Antarctica (ISIL Conference), January 2010, page 3. Available also online: http://cil.nus.edu.sg/wp/wp-content/uploads/2010/01/Beckman-PDF-ISIL-Submarine-Cables-rev-8-Jan-10.pdf (30.12.2012).

that area. The coastal state has full rights to impose transit charges.[354] Coastal state control over the laying of pipelines within the territorial sea is a clear-cut contaminant of sovereignty.[355]

Also, if a ship engages in the laying, maintenance or repair of submarine cables in the territorial sea, it would not be exercising the right of innocent passage. Therefore, a coastal state has the right to regulate the laying, maintenance and repair of submarine cables within its territorial sea,[356] and there is a possibility for the coastal state to set conditions regarding the track of the cable and its dimensions.[357] Coastal states also have the right to place restrictions on the right of innocent passage of ships in order to protect submarine cables. Article 21 (1) (c) of UNCLOS expressly provides that coastal states have the right to adopt laws and regulations restricting the right of innocent passage by ships in order to protect submarine cables. Article 79 (4) reaffirms the coastal state's powers by stipulating that "nothing in this part [on the Continental Shelf] affects the right of the coastal state to establish conditions for cables or pipelines entering its territory or territorial sea."

Therefore, the laying and protection of the submarine cables and the pipelines in the territorial waters is completely regulated by the national law of the coastal state. The parts of Nord Stream pipeline bypassing the territorial waters of Russia, Germany and Denmark are subordinated to the national jurisdictions of the correspondent states. According to Article 22 of the Russian Federal Law on the Continental Shelf of the Russian Federation,[358] both Russian and foreign applicants may lay submarine cables and pipelines on the continental shelf of the Russian Federation, in accordance with the rules of international law, provided that such action does impede regional geological study of the continental shelf, the prospecting, exploration and exploitation of mineral resources, or the use and repair of cables and pipelines laid earlier, and provided that measures are taken to protect and conserve mineral and living resources. The incoming applications to lay submarine cables and pipelines shall be considered and the decisions on the proposed course for the laying of the submarine cables and pipelines shall be rendered by specifically authorized federal agency for geology and use.

It has been considered an advantage for the Nord Stream project that due to the narrowness of the Gulf of Finland, the outer limit of the territorial sea of Finland and Estonia had been established with the aim to never reach closer than 3 nautical miles to the maritime boundary between the two states. Thereby the territorial sovereignty of either of the states in that area was excluded and

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[354] M. Mudric. Rights of States Regarding Underwater Cables and Pipelines. – Australian Resource and Energy Law Journal, 2010, Volume 29, No 2, page 236.

[355] J. Crowley. International Law and Coastal State Control over the Laying of Submarine Pipelines on the Continental Shelf: The Ekofisk-Emden Gas Pipeline. – Nordic Journal of International Law, 1987, 39, page 40.

[356] R. Beckman (Note 353).

[357] M. Mudric (Note 354), page 236.

[358] Федеральный закон о континетнальном шельфе Российской Федерации (Note 95).

instead a six-mile wide EEZ was created to maintain free passage[359] as has been described above. This has a particular importance to the Nord Stream Project as otherwise its construction would have been subject to the explicit consent of either of the coastal states and the respective domestic regulation.[360]

Prior to the construction of the pipeline it has been discussed whether Estonia and Finland should use their right to territorial sea of 12 nautical miles as provided by the international law of the sea.[361] As the countries have voluntarily limited sovereignty over their territorial watres, both Estonia and Finland are entitled to return to the maximum possible limit of the territorial waters. However, such delimitation of Estonian and Finnish territorial seas could take effect only if Estonia and Finland after prior 12 months notice would mutually decide to broaden their territorial sea to 12 nautical miles. Notwithstanding the existing legal possibility under international law, such an enlargement of Estonian and Finnish territorial sea is unlikely to happen as it would consequently in accordance with Article 2 of UNCLOS, *inter alia,* cause the closure of the strategically important overflight route for Russian military aircraft *en route* to the Russian exclave Kaliningrad Oblast between Poland and Lithuania.[362]

4.5.2. Nord Stream in the EEZ

Under Article 58 (1) of UNCLOS, in the exclusive economic zone, all States, whether coastal or land-locked, enjoy the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of submarine cables and pipelines. Additionally, the freedom to lay submarine cables on a continental shelf is granted under Article 79 (1) of UNCLOS. As all of the Baltic Sea lies within 200 nautical miles from the coast, Nord Stream is subject to both EEZ and the continental shelf regulation of UNCLOS.[363]

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[359] E. Karm (Note 273), page 107.

[360] S. Vinogradov (Note 339), page 276.

[361] In 2005, Estonian politicians and experts Hardo Aasmäe, Igor Gräzin, Heiki Lindpere ja Juhan Parts have expressed an opinion that Estonia should broaden the limit of its territorial sea to 12 nautical miles as it is provided by the international law and Estonian Law on Territorial Sea. This would eliminate the "free passage" corridor created by Estonia and Finland in 1994, and would place the border of Estonian territorial sea to the "right and justified place". According to the opinion, placing the limit of Estonian territorial sea to 12 nautical miles from the shore would give Estonians the right of control over the objects to be placed to the continental shelf of the Baltic Sea. Eesti peaks nihutama merepiiri! – Delfi, 28 December 2005. Available online: http://www.delfi.ee/news/paevauudised/eesti/eesti-peaks-nihutama-merepiiri.d?id=11879973 (30.12.2012).

[362] A. Lott. Marine Environmental Protection and Transboundary Pipeline Projects: A Case Study of the Nord Stream Pipeline. – Merkourios-Utrecht Journal of International and European and Law, 2011, Volume 27/Issue 73, page 57.

[363] *Ibid.,* page 56.

Under Article 56 (2) of UNCLOS, in exercising its rights and performing its duties in the EEZ, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. Therefore, the freedom to lay submarine cables provided in Article 58 (1) and 79 (1) may not be impeded.[364] However, Article 79 (3) of UNCLOS provides that the delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State. This clearly provides a limitation on the freedom to lay submarine pipelines as it is subjected to the consent of the coastal state. It constitutes a right for the coastal state to influence the delineation process on its continental shelf, both inside and outside the limits of the EEZ but does not provide the coastal state with the right to prohibit *in toto* the laying of the pipeline.[365] The Nord Stream story is quite indicative of the prevailing tendency by the coastal states to apply very rigorous requirements regarding the pipeline route through their EEZ and continental shelf.[366]

However, under UNCLOS the state parties have the right by implementing the necessary domestic legislation on protection and preservation of the marine environment, specifically on reduction and control of pollution from pipelines (Articles 192, 194 (1), 194 (3), 56 (1) (b)), not to grant a permit for the construction of a submarine pipeline in their EEZ or on their continental shelf if the former constitutes the risk to their marine environment. Hence, no international legal instrument is established that would provide standards for prevention, reduction and control of marine pollution from pipelines. Thus, due to the lack of harmonized rules that would provide guidelines for states acting under Article 79 (2) of UNCLOS, it is a matter of interpretation whether the measures taken satisfy the threshold criterion of reasonableness in order to be lawful.[367] In the case of Nord Stream project, neither of the State-parties involved has invoked the right not to grant the permission for the pipeline under the abovementioned UNCLOS regulation.

In addition to the coastal state's right to deny a permit for laying of a submarine pipeline in the EEZ, the coastal state has the right to withhold its consent in connection with projects that concern scientific investigations in the EEZ. In relation with the Nord Stream pipeline these projects are carried out in the context of surveying and assessing the marine environment in the Baltic Sea.[368] No pipeline can be built without first examining the seabed along its planned route in order to indentify available alternatives, ascertain possible environmental impacts, and then decide (together with the coastal state) on the

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[364] North Sea Continental Shelf Cases. Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands. International Court of Justice Judgement of 20 February 1969, para 65, page 40. Available online: http://www.icj-cij.org/docket/files/ 51/5535.pdf (30.12.2012).

[365] A. Lott (Note 362), page 57.

[366] S. Vinogradov (Note 339), page 283.

[367] A. Lott (Note 362), page 58.

[368] *Ibid.*

best option. Without such survey, the freedom to lay submarine pipelines cannot be realized in principle.[369]

According to Article 238 of UNCLOS, all states, irrespective of their geographical location have the right to conduct marine scientific research subject to the rights and duties of other states. This right is further confirmed in Articles 242 (1) and 242 (2). In the territorial sea, coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea (Article 245). However, marine scientific research in the exclusive economic zone and on the continental shelf of a coastal state shall be conducted with the consent of this state (Article 246 (2)). Article 246 (3) provides that the coastal states shall, in normal circumstances, grant their consent for marine scientific research projects by other states in their EEZ or on their continental shelf to be carried out exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. Article 246 (5) provides for grounds when the coastal state may withhold their consent to the marine scientific research.

Initially the plan of Nord Stream project was to lay the line across the continental shelf of Finland, but in spring 2007, the Finnish authorities have requested the Nord Stream consortium to conduct surveys on the Estonian side of the Gulf of Finland for possible re-routing of the pipeline due to geological and environmental considerations.[370] The route through Estonia would have been shorter and less technically challenging than the original pipeline route through Finland's territorial waters. Moreover, Finland's seabed is noticeably rockier than Estonia's, making pipeline construction more arduous.[371] The shorter distance and smoother seabed would have decreased the pipeline construction costs substantially. The Government of Estonia rejected Nord Stream's application for survey in Estonian EEZ. Article 246 (5) (a)[372] provides the legal basis for Estonia's refusal if the Nord Stream Project is of direct significance for the exploration and exploitation of natural resources under Estonia's jurisdiction. According to the official statement of the government of Estonia,[373] "because the results of drilling work on the continental shelf will

[369] S. Vinogradov (Note 339), page 284.

[370] S. Vinogradov (Note 339), page 261.

[371] Estonia: Split Opinions About Nord Stream. – The Lithuania Tribune, 25 October 2012. Available online: http://www.lithuaniatribune.com/17964/estonia-split-opinions-about-nord-stream-201217964/ (31.12.2012).

[372] Under Article 246(5)(a), coastal states may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project is of direct significance for the exploration and exploitation of natural resources, whether living or non-living.

[373] However, the vibrant public debate preceding the Estonian government's rejection indicates that numerous other issues influenced the decision. First of all, the prospect of Russia stepping up its military presence in the Baltic Sea in order to protect the pipeline was a non-welcome one for most Estonians. Second, there was indeed concern about the

give information about Estonia's natural resources and their possible use, the Estonian government has the right to reject the research application."[374] Under Article 297 (2) (b) Russia could have used its right to challenge the Estonian authorities refusal in 2007 to grant the permit to conduct hydrographic surveys in the EEZ.[375] Yet, the fact that Russia failed to refer Estonia to compulsory conciliation may be regarded as an indication of its tacit consent to the Estonian position.[376]

Having decided on expansion of Nord Stream by the third and fourth pipelines, in August 2012 Nord Stream consortium submitted a request to the Estonian Ministry of Foreign Affairs to conduct preliminary surveys in the Estonian EEZ. The surveys would involve an up to 4 km wide corridor located outside Estonia's territorial waters. They are necessary for designing the pipelines and for making preparations for their environmental impact assessments.[377]

After considering the matter, on 6th December 2012 the Estonian government decided to not satisfy the request by the Nord Stream citing the Economic Zone Act.[378] The Economic Zone Act says that assent to marine research may be refused if the research provides information about the volume of natural resources in Estonia and the possibilities for their use, or the research plan provides for drilling on the continental shelf, use of explosive materials, disposal of health damaging agents into the sea, or otherwise endangers the preservation of inorganic or organic natural resources. The Estonian Ministry of Environment has said in its opinion to the Foreign Ministry concerning the Nord Stream application that in the course of the survey the party conducting the survey may obtain information about Estonia's natural resources and possibilities for their use.[379] As such, the reasons to Estonian rejection in 2012 do not differ from the ones relied on in 2007.[380] It its response, representatives

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environmental impact of the pipeline. Third, several disputes, and notably the "Bronze Soldier" incident in April 2007, had played its part in souring the general Russo-Estonian relationship. Finally, the intra-government disagreement, which was indeed driven by domestic politics and probably influenced by the result of the "Bronze Soldier" affair, became an important driving force in the Estonian debate. See B. S. Whist (Note 337), page 53.

[374] S. Vinogradov (Note 339), page 261.

[375] S. Vinogradov (Note 339), pages 283-285.

[376] A. Lott (Note 362), page 55.

[377] R. Kaljurand. Nord Stream: Pipelines That Are Making Waves. – Diplomaatia. September 2012, No 109. Available also online: http://www.diplomaatia.ee/index.php?id=242&L=1&tx_ttnews[tt_news]=1500&tx_ttnews[backPid]=611&cHash=a4186c4d7f (31.12.2012).

[378] Estonian Government Turns Down Nord Stream's Request to Conduct Marine Research. – Baltic News Service, 6 December 2012. Available online: http://www.lexisnexis.com.ezproxy.umuc.edu/hottopics/lnacademic/ (31.12.2012).

[379] *Ibid.*

[380] This time, however, pragmatic statements in the Estonian public and media in favor of Nord Stream were made more frequently. It was emphasized that if gas pipelines is to cross the Estonian EEZ, Estonians shall have the right to ask transit or lease fees. It would also be possible to seek compensation, to require infrastructure to be modernized or to claim funding

of Nord Stream have announced that they "fully respect the decision to refuse a survey permit in Estonia. This means that no survey will be conducted and consequently there will be no opportunity to build any part of the pipelines in the Estonian EEZ".[381]

4.6. Russians in the Baltics

Since the time when Peter the Great had opened the Russian "window on Europe", Russia has paid considerable attention to its presence in the Baltic Sea. It was strategically and economically important for imperial and Soviet Russia to treat and use the Baltics as Russian *mare clausum,* as reflected in the state's official positions in the early 18th and throughout the 20th century.

The situation changed with the dissolution of Soviet Union and the emergence of the Baltic states, for the second time in the twentieth century. Immediately there was a need to agree on maritime boundaries with the independent Baltic republics in areas where no such boundaries ever existed before. Also, it became necessary to re-consider legal validity of the maritime boundaries previously agreed by the Soviet Union – as has been indicated, these boundaries have more or less remained in place.

Most notably, however, after the dissolution of Soviet Union, Russia had lost its immense coastline in the Baltics and had to cope with the new reality of being not the *dominant*, but *one of* the Baltic littoral states. The break-up of the Soviet Empire left Russia with a new position on the Baltic Sea area, with the dominance becoming the chimera of the past; and isolation becoming the worst case for the future.[382] In this context, the project of Nord Stream gas pipeline launched by the Russian Federation (in the face of Gazprom) can also be seen as Russian pursuit to re-gain certain economic, political, strategical and military control over the Baltic. To a certain extent the Russian effort has succeeded – the pipeline has been built and is fully operational as of October 2012. Hence, the practice has indicated that both the marine scientific research preceding the realization of the project as well as laying of the gas pipeline and its functioning are subject to UNCLOS, and through the reference in the latter, to national jurisdiction of other Baltic countries. Thus, the Nord Stream group had to refuse from building the pipeline in Estonian waters, which would have benefitted the project the most, as Estonia rejected the consortium application to conduct

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for related additional projects which could create new jobs. See R. Kaljurand (Note 377). Nevertheless, the Government rejected the application on environmental and security grounds.

[381] Nord Stream To Further Develop Finnish Route Alternative After Estonia Rejects Survey Application. 6 December 2012. – Official website. Available online: http://www.nord-stream.com/press-info/press-releases/nord-stream-to-further-develop-finnish-route-alternative-after-estonia-rejects-survey-application-428/ (31.12.2012).

[382] P. Baev. Russia's Conflicting Interests in the Baltic Area. – R. Platzöder, P. Verlaan (ed.). The Baltic Sea: New Developments in National Policies and International Cooperation. Martinus Nijhoff Publishers, 1996, page 428.

necessary surveys in the area under Estonian jurisdiction. UNCLOS grants Baltic littoral states other opportunities to control the structuring and functioning of the pipeline as has been elaborated above.

Therefore, possible Russia's dominance over the Baltic Sea is now excessively limited by both international and domestic laws, and as indicated by recent developments, the Baltic states are eager to use their legal voices to limit Russian rights and potential control. For the purpose of proceeding with its activities in the Baltic Sea, Russia is forced to search for and abide to compromises.

Chapter 5. General Remarks on the First Part

In conclusion of the first part of this thesis, it is important to make some general remarks on the Russia's legal practice in the realm of the law of the sea in the Arctic Ocean, Caspian Sea, Baltic Sea, Black Sea, and the Sea of Azov. First of all, certain similarities in historical development of the Russia's position in the four water reservoirs may be observed. For centuries has the Russian Empire followed by the Soviet Union been the dominant power in the Arctic Ocean, the Caspian Sea (though *de facto* sharing it with Iran), and the Baltic Sea. Throughout the history, Russia has claimed dominion over both the Baltic and the Black Seas, even referring to them as its closed seas. Until recently, Russia (Soviet Union) has remained the sole littoral state to the Sea of Azov and the predominant power in the region.

However, in the twentieth century the balance of power began to change drastically. At the end of the millennium, Russians had to come to terms with suddenly no longer being a land and sea empire, and having to be a nation,[383] one out of many. More and more countries showed their vivid interest in the Arctic Ocean resulting in the necessity to divide the Arctic. The crumbling of the Soviet Union in 1991 resulted in the emergence of new littoral states to the Caspian Sea, the Black and Azov Seas, the Baltic Sea, all requesting a justified portion of maritime spaces as provided by the law of the sea. In the result of geopolitical changes, Russia has lost its dominant position in the areas, but nevertheless has since then been trying to re-gain its lapsed control by a number of means. One can thus say that the Russian current State practice in the four oceans/seas has been relatively "imperialistic", striving for continuous dominion over the adjacent water areas.

Second, a certain pattern in the Russia's legal behavior may be singled out. Since 1997 Russia is subject to UNCLOS, which is applicable to all of the examined regions except for the Caspian Sea, and thus bound by the legal regulation therein. Quite interestingly, the application of UNCLOS by the Russian Federation lacks universality and homogeneity. Thus, Russia insists on implementation of the Convention in the Arctic Ocean, but is ready to violate the rules of UNCLOS with respect to establishment of baselines or consideration of North-East Passage as international straight, not its "national transportation communication". Russia rejects application of the Convention to the Caspian Sea, though there is no universal accepted stand on the status of the Caspian Sea as an international lake where the Convention would not be applied. Likewise, Russia treats the Black Sea as a Russian-Ukrainian lake, notwithstanding the fact that under international law, the Black Sea is strictly a "sea" that falls within the scope of UNCLOS regulation. Even in the Baltic Sea, where the country seems to duly follow the Convention, Russia has managed to violate its certain provisions: in 2005, a Russian ship *Pjotr Kotsov,* was found by the Estonian Coast Guard conducting research without Estonia's prior

[383] D. Lieven. The Russian Empire and Its Rivals. Yale University Press, 2000, page 253.

authorization in Estonian EEZ, which is an explicit violation of UNCLOS corresponding provisions.[384]

Similar strategy of partial adherence to legal regulation may be traced in the current Russian application of the treaties once signed by the Soviet Union. As has been described above, being the sole successor and continuator of the Soviet Union and generally bound by the principle of *pacta sunt servanda*, Russia refuses to accept and declare itself bound by the 1990 U.S.- USSR Maritime Boundary Agreement in the Bering and Chukchi Seas, border agreement between the Crimean oblast of the Ukranian SSR and Krasnodar krai of the RSFSR regarding the Sea of Azov and the Kerch Strait, not to speak of the 1920 Tartu Peace Treaty on Estonian-Russian land frontier.

The reasons behind the described Russian legal practice depend on the specific circumstances of each separate case. Generally it may be recognized that the degree of Russian adherence to legal framework lies in direct proportion to the gains and economic benefits such legal regulation is to grant to Russia. In example, adherence to UNCLOS in the Arctic secures Russia with a legal opportunity to justify its claims over the resource-rich extended continental shelf. Division of the Caspian Sea as a lake under the modified meridian method awards Russia with a larger portion of Caspian seabed in comparison to the maritime zones Russia would be entitled to under UNCLOS. Renouncement of border treaties previously signed by the Soviet Union relies on potential land or other economic losses that acceptance of such treaties is likely to entail to Russia.

Furthermore, Russia's legal positions seem to be largely influenced by potential political benefits. Thus, regardless of strong support that Russian academic society grants to the sectoral division of the Arctic, the official Russia's position relies on application of the Convention as no other Arctic state is at present advocating for the Arctic sector whereas all seem to agree on general implementation of UNCLOS in the Arctic. Denial of UNCLOS' application to the Caspian Sea and the Sea of Azov eliminates the risk that third states shall gain certain rights in the area that could jeopardize Russia's sphere of influence. One of the fears of the Baltic countries associated with the Nord Stream pipeline is the that Russia might blackmail the Baltic countries totally dependent on Russian gas with the gas prices as it used to do with transit countries Ukraine and Belarus.

Being led by economic and political gains, Russia can be seen acting rationally to maximize its interests. This is best of all explained by the rational choice theory used by many legal scholars to understand international law. According to rational choice theory, international law emerges from states acting rationally to maximize their interests, given their perception of the interests of other states and distribution of state power.[385] State preferences for compliance with international law will depend on what citizens and leaders are willing to pay in terms of the other things they care about; preference for

[384] A. Lott (Note 362), page 59.
[385] J. Goldsmith, E. Posner. Limits of International Law. Oxford University Press, 2005, page 3.

international law compliance tend to depend on whether such compliance will bring security, economic growth, and related goods; and that citizens and leaders are willing to forgo international law compliance when such compliance comes at the cost of these goods.[386] Rational theory further differentiates between forces of reputation, retaliation, and reciprocity that give states an incentive to comply with their legal obligations or, more accurately, with their promises, whether or not these are termed "legal".[387] Not going into the depth of rational theory here, one could reason that the Russian compliance with the U.S., Ukraine or Estonian border treaties would be dependent on the benefits such compliance or non-compliance would entail to Russia. However, Russia is surrounded by other states also trying to act rationally, and in order to achieve its benefits, Russia is interested both in co-operation with others and in avoiding reputation-associated sanctions.[388]

Therefore, the "good news" is that recent Russian practice in all four regions shows Russian initiative, either forced or voluntary, to reach compromises. The 2010 Russian-Norwegian border agreement in the Barents Sea; Russian bilateral and tripartite agreements in the Caspian Sea; Russian active participation in the elaboration of the Caspian Convention; Russian and Ukrainian preliminary agreement on the delimitation of the maritime border between the two countries in the Kerch Strait; finally, the willingness of Nord Stream to comply with the restrictions imposed by international and domestic legislation in the Baltic Sea – these are all signs of a certain Russian openness to international normative dialogue. It reflects a certain degree of understanding by the Russian authorities that negotiations and compromises are the only tools that shall legally and justifiably promote and foster Russian claims and interests. However, whether Russia is willing to compromise on the large scale – as in the case of the Arctic outer continental shelf delimitation – or shall stick to its "superpower" position shall be seen in the future.

Having thus painted a picture of the Russia's legal past and present in the four areas, and indicated major Russia's claims and interests in the Arctic Ocean, Caspian and Baltic Seas, the Black Sea and the Sea of Azov, the author shall proceed with the elaboration of the concept of State sovereignty as the legal doctrine chosen for the purpose of this thesis to further explain and analyze the Russian practice under international law of the sea. It was indicated above that although showing willingness to compromise, Russia's State practice is revealing certain imperial reflexes and extensive pursuit for resources. Empires tend to have an *extensive* concept of (their) sovereignty, which is relevant for understanding the State's positions in the realm of law of the sea.

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[386] *Ibid.*, page 9.
[387] A. Guzman. How International Law Works. Oxford University Press, 2008, page 133.
[388] I. Nossova. Cold Arctic and Hot Caspian Side by Side: New Legal Regimes Emerging? – Juridica International, 2011, Volume XVIII, page 119.

PART II. RUSSIA'S APPROACH TO THE INTERNATIONAL LAW OF THE SEA THROUGH EXTENSION OF SOVEREIGNTY IN THE CASE OF FOUR OCEANS/SEAS

Chapter 6. Concept of State Sovereignty. Russian Approach to the Doctrine of Sovereignty

6.1. Relevance of the Russian Notion of Sovereignty to the State's Approach to the Law of the Sea

An understanding of the modern law and the problems which remain unsolved must depend to a considerable extent on obtaining a historical perspective.[389] The same assumption is valid regarding a state's position on the international arena and actions under international law. The Russian Federation today is the largest country in the world, which has evolved from relatively small Kievan Rus' and the Grand Duchy of Moscow, both located in the heart of mainland. Geography makes it a continental nation, but for centuries Russia has strived to become a "sea power". Russian land is blessed with a dense and viable network of rivers, and inevitably, the power that gained control of these riverheads came to dominate the whole country, each river offering a direction for expansion.[390] The Russians achieved control over the Volga and access to the Caspian Sea in the 1550s, conquest of the Baltic and Black Sea coastlines in the eighteenth century, and have been expanding to the North since the times of Ivan IV. The Russia, which is familiar to everybody today – a major power with huge population controlling a vast area of land – is washed by 12 seas, the Caspian Sea-lake and the Pacific Ocean.

Russia has perceived itself as an empire since the 1550s, since the reign of Tsar Ivan IV,[391] and was officially proclaimed an empire by Tsar Peter the Great following the Treaty of Nystad in 1721. Russian geography, security concerns and the sense of overwhelming power[392] influenced its historical expansion and growth over land onto the sea. Russians have considered the urge to expand as something natural and just: a great nation must have free access to the oceans and exercise control over them! Strong strive for sovereign, territorial and economic dominion over land and sea that one can observe throughout Russian history has resulted in great areas, massive population and treasure trove of resources under control of the Russian Empire and later the Soviet Union. Though the USSR could not officially be called an empire in the sense that Lenin gave to imperialism, it its essence it was one indeed, being the

[389] I. Brownlie (Note 5), page 174.
[390] D. Lieven (Note 383), page 206.
[391] *Ibid.,* page 231.
[392] *Ibid.,* page 217.

largest country on earth and containing huge range of peoples of very varying religion, ethnicity, culture and level of economic development.[393]

Moreover, some contemporary Russian authors refer to modern Russia as an "empire, though truncated and miserable one."[394] "It must be recognized that Russian state has imperial nature", writes Professor of Higer School of Economics in Moscow N. I. Grachev. "This recognition is grounded in the following: the gigantic range of Russian space, which is one of the key dominants in the state's political culture and mentality; preservation of ethnocultural and ethnopolitical heterogeneity of this space; continuity of new Russian statehood in relation to previous, including Soviet, imperial forms,"[395] maintains Grachev. Reference to Russian imperial experience may also be found in section 32 (u) of the Concept of the Foreign Policy of the Russian Federation signed by the President Vladimir Putin on 12 February 2013,[396] stressing Russian longlasted experience of "coexistence of different nations, ethnic and religious groups."[397]

Therefore and as has been indicated in the first part of this thesis, Russia's imperial past has undoubtedly influenced Russian position in the world today. Thus, it is evident that Russia perceives itself as a "Great Power", a big and important player on international arena. In the words of F. F. Martens, the leading international jurist of the tsarist Russian Empire,

> "legal grounds for equality of the members of international communication do not exclude their factual inequality – inequality in power, population, riches etc. Private persons are also equal in the eye of law; (…) but not all private persons have same opportunities to use their legal rights. Likewise, "great" states, powerful, have many more means to utilize their rights than small and weak [States]."[398]

Surrounded by other countries, Russia turns to the tools offered by international law to accommodate and establish its sovereign claims and interests. Specifically, the mindset of a "Great Power" and its impetus to extend sovereign dominion over the sea has led Russia to allocation of its rights over maritime spaces by operation and means of specific regulation of law of the sea. In the

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[393] *Ibid.,* page 288.

[394] К. Плешаков. Сквозь заросли мифов. Издательство Pro et Contra, 1997, Том нр 2, нр 2, page 67.

[395] Н. Грачев. Государственный суверенитет и формы территориальной организации современного государства: основные закономерности и тенденции развития. Монография. ООО «Книгодел», 2009, page 402.

[396] Концепция внешней политики Российской Федерации. Утверждена Президентом Российской Федерации В. В. Путиным 12 февраля 2013 года. Available online: http://www.mid.ru/brp_4.nsf/newsline/6D84DDEDEDBF7DA644257B160051BF7F (20.03.2013) (In Russian).
http://www.mid.ru/brp_4.nsf/0/76389FEC168189ED44257B2E0039B16D (20.03.2013) (In English).

[397] *Ibid.*

[398] Ф. Мартенс (Note 4), page 285.

case of land, simple *de facto* possession of a particular area is a good in and of itself, with the absence of legal title being of diminished importance; the maritime areas are, in contrast, valued primarily for the resource extraction, meaning that the generally recognized legal title [granted by the law of the sea] assumes a more central role.[399] Therefore, in order to expand its sovereignty over the sea, Russia needed to rely on the specific legal regulation, the international law of the sea.

The purpose of the second part of this thesis is to connect the notion of state sovereignty as an underlying force for Russian territorial expansion over the sea to the Russian approach to the law of the sea and current legal position of the Russian Federation in the Arctic Ocean, the Caspian Sea, the region of Black and Azov Seas and the Baltic Sea. The concept of state sovereignty is a powerful principle. Ever since the Frenchman Jean Bodin[400] coined it, it has caught the attention of jurists, theologians and philosophers for centuries; many books and innumerable articles have been written upon the subject. It has interested the ancients and the moderns, has influenced individuals, communities and nations. Amongs the conquests of the concept of sovereignty is the great influence it has paid to the development of the international law of the sea regime. Sovereignty of the coastal state over adjacent belt of territorial waters and the seabed beneath is a customary international law norm that is currently codified in the Convention. UNCLOS contains many other provisions establishing the limits of state sovereignty in the sea with respect to various maritime zones. The connection between the concept of sovereignty and the international regulation of maritime spaces explains the relevance of the notion of sovereignty to the application of law of the sea by the Russian Federation.

Furthermore, the author believes that the doctrine of sovereignty as a legal theoretical tool is one possible method for a deeper understanding of the Russian approach to the law of the sea and the Russian legal practice in the four regions. As will be proven, the notion of sovereignty and its different shades are enacted into Russian legislation governing the State's maritime areas. Moreover, the author dares to argue that the Russian current position and legal practice in the Arctic Ocean, the Caspian Sea, the region of Black and Azov Seas and the Baltic Sea is the product of Russian strive for sovereignty, and should be looked upon through the prism of the latter. Considering the Caspian Sea and the Sea of Azov as the cases for *divide et impera*, fighting for occupation of "nobody's land" in the Arctic and playing sovereign economic games in the Baltic Sea, Russian legal claims in the respective areas seem to be undermined by the desire to acquire and/or retain the State sovereign power over these marine territories and their resources.

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[399] L. Brilmayer, N. Klein. Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator. – New York University journal of international law & politics, 2001, 33/3, page 732.

[400] "Sovereignty", wrote Jean Bodin in 1576, "is the absolute and perpetual power of a commonwealth." – H. Kalmo, Q. Skinner (ed.). Sovereignty in Fragments. Cambridge University Press, 2010, page 241.

For the purpose of the present research and in order to prove the hypothesis stipulated in the very beginning of the hereby thesis, the author devotes this part to the consideration of the extent to which the Russian notion of sovereignty has influenced the State's positions in the four seas. The following methods will be applied. First, it is essential to understand the quintessence of the Russian concept of sovereignty, its major elements and specifics in comparison to the corresponding Western approach. Second, it is important to illustrate how the concept of sovereignty has historically influenced the development of international law of the sea, what role did it have to play in the formation of its sources, the main concepts and principles and how it is embedded in the contemporary regulation of the law of the sea. The establishment of the connection between the notion of state sovereignty and the contemporary law of the sea in general will create the grounds for further State-specific analysis. Third, the immediate analysis of the concept of state sovereignty as reflected in the Russian approach to the law of the sea will be carried out. Fourth, the reasoning of how Russian legal maritime claims and state practice in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov and the Baltic Sea can be explained and justified by the country's notion and thrive for extension of sovereignty will be offered. The described trace of thought is to lead the author to general conclusions on Russian modern, *extensive,* approach to the notion of sovereignty, the leading role of hydrocarbons and Russian status of a "Great Power" as reflected in its application of the international law of the sea.

6.2. Sovereignty. Territory as its Core Element

The idea of sovereignty of states is a big idea. It is one of the constituent ideas of the post-medieval world: it conveys a distinctive configuration of politics and law that sets the modern era apart from previous eras.[401] It is probably one of the most important concepts of international law today. "Sovereignty" is one of the most frequently used terms that are most difficult to define. The concept of national sovereignty is universally accepted, but no universally accepted definition exists. Certain scholars defined sovereignty as a bundle of legal rights (competences), which may or may not be unbundled. For others, sovereignty is an absolute right or absolute power, which remains indivisible, even when certain sovereign rights are exercised separately.[402] As L. Oppenheim has written,

> "here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the

[401] R. Jackson. Sovereignty. Polity Press, 2007, page 1.

[402] G. Tunkin and N. Ushakov defined sovereignty as one of the most important principles of international law and an inherent legal feature of the state. State sovereignty implies the territorial supremacy of the state and its independence in international affairs.

> moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon."[403]

A definition that captures what sovereignty came to mean in the early modern Europe defines sovereign state as an authority that is supreme in relation to all other authorities in the same territorial jurisdiction, and that is independent of all foreign authorities.[404] The holder of sovereignty possesses authority deriving from some mutually acknowledged source of legitimacy – natural law, a divine mandate, hereditary law, a constitution, even international law. In the contemporary era, a body of law is ubiquitously the source of sovereignty. But if sovereignty is a matter of authority, it is not a matter of mere authority, but of supreme authority. The holder of sovereignty is superior to all authorities under its purview. As Professor I. Brownlie defines it, "sovereignty" characterizes powers and privileges resting on customary international law and independent of the particular consent of another state.[405]

It is widely recognized that the nature of sovereign authority is dual. As Robert Jackson, Professor at the Departments of International Relations and Political Science at Boston University, puts it,

> "sovereignty is one holistic idea with two conceptual faces: like two sides of a ship's hull, inside and outside. The ship of state is sovereign internally: its crew and passengers are subject to the captain's supreme authority. The ship of state is also sovereign externally: its independence is recognized or at least tolerated and not extinguished by other independent ships sailing on the ocean of world of politics, each with its own captain, crew and passengers."[406]

Internally, the nation-state has the power or jurisdiction to make decisions according to its own constitution. Jurisdiction may be encountered in various shapes and forms; one could refer to the judicial, legislative, or administrative competence of the state. Externally, it is the nation-state as a whole which is sovereign and equal to all other nation-states, irrespective of its internal structure. The equality of all sovereign states is emphasized by the Charter of the United Nations[407] providing for "equal rights of nations, both large and small."[408]

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[403] L. Oppenheim. International Law. Sir Arnold D. McNair (ed.), 4th edition, 1928, page 450.
[404] R. Jackson (Note 401), page 10.
[405] I. Brownlie (Note 5), page 291.
[406] R. Jackson (Note 401), page 12.
[407] Charter of the United Nations. Available online: http://www.un.org/en/documents/charter/index.shtml (01.11.2012).
[408] According to UN Charter, the principle of sovereign equality of the state means that: a) every state has to respect sovereignty of other states; b) every state is obliged to respect territorial integrity and political independence of other states; c) every state has a free right to choose and develop its political, social, economic and cultural systems; d) all states are legally equal. They have equal rights and obligations as members of the international community notwithstanding the differences in their economic, social and political systems; e) every state is a subject of international law since the moment of its origin; f) every state

An essential ingredient of sovereignty is the territory, as sovereignty of the state extends over a particular territory. As L. Oppenheim has noted, "a state without a territory is not possible."[409] According to W. D. Coplin, the term sovereignty makes the most sense when it is related to territorial control.[410] C. Rousseau used the expression "territorial competence,"[411] which he defined as the competence of a state over men who live on its territory. G. I. Tunkin spoke of territorial supremacy.[412]

Territory of a state is closely connected to the principles of "territoriality" and "territorial sovereignty". Territoriality became the foundation principle of sovereign statehood in the early-modern period and has remained so ever since. Territoriality is a principle by which members of a community are to be defined, as their membership derives from their residence within borders. Territoriality defines membership in a way that may not correspond with people's identity. It is rather by simple virtue of their location within geographic borders that people belong to a state and fall under the authority of its ruler. It is within a geographic territory that modern sovereigns are supremely authoritative. Territoriality is now deeply taken for granted. It is a feature of authority all across the globe. Even supranational and international institutions like the European Union and the United Nations are composed of states whose membership is in turn defined territorially. Territoriality specifies by what quality citizens are subject to authority – their geographic location within a set of boundaries.

The concept of "territorial sovereignty" bears some resemblance to the patrimonial notion of ownership under private law, and in fact the early writers on international law adopted many of the civil principles of property law in their treatment of state territorial sovereignty. To this day, their influence has persisted so that, for example, the rules of acquisition and loss of territorial sovereignty plainly reflect the influences of civil law. The patrimonial concept is also of significance in Anglo-American jurisprudence.[413]

Territorial sovereignty is essential before one can talk of a state. Judge Max Huber in the case of Island of Palmas Case[414] between the Netherlands and the United States briefly defined territorial sovereignty in terms of the existence of

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has a right to participate in decision of international questions, more or less touching upon its interests; g) every state is endowed with one voice on international conferences and in international organizations; h) states create norms of international law on equal-right basis. No group of states may impose its international legal norms on the other state.

[409] L. Oppenheim (Note 403), page 451.

[410] W. Coplin. Introduction to International Politics. Rand McNally, 1974, page 411.

[411] C. Rousseau. Droit International Public: Vol. 3: Les Competences. Sirey, 1977, page 8.

[412] Г. Тункин (ред.). Международное право. «Юридическая литература», 1994, page 365.

[413] M. N. Shaw, Territory in International Law. Netherlands Yearbook of International Law, 12, pages 61–91. – M. N. Shaw (ed.). Title to Territory. Ashgate Publishing Company, 2005, Page 18.

[414] Reports of International Arbitral Awards. Island of Palmas case (Netherlands, USA). 4 April 1928, Volume II, pages 829–871. Available online: http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf (01.11.2012).

rights over territory rather than the independence of the state itself or the relation of persons to persons. In this case it was held that

> "sovereignty in the relation between the States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[415]

Judge Max Huber further went on to say that:

> "the development of national organization of States during the last few centuries and, as corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it a point of departure in settling most questions that concern international relations."[416]

In the Corfu Channel case tried by the International Court of Justice in 1948–1949, territorial sovereignty was defined as "an essential foundation of international relations".[417]

6.3. Russian Approach to the Concept of Sovereignty

As this thesis presumes that the notion of sovereignty influences the State's approach the international law of the sea and its application of international legal norms relevant thereto, the author considers it essential to concentrate on the specifics of a certain state's understanding of the notion of sovereignty. Such examination is specifically important in the case of the Russian Federation, whose historical position as a land- and sea empire and current role of a major Power have to a large extent been lead by the State's strive for extended sovereignty. The following section shall briefly examine Russian state and scholarly doctrines of the concept of sovereignty.

6.3.1. Definitions of Sovereignty offered by Russian Legal Scholars

According to F. F. Martens, sovereignty as an international characteristic of a state are the qualities without which the state is inconceivable in the area of international relations and which form the basis for mutual rights of the states. Sovereignty is the implication of state's independence, both in internal regulations and in international relations. "Absolute in the meaning of domestic law, the beginning of sovereignty in international communication is determined

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[415] *Ibid.,* page 838.
[416] *Ibid.*
[417] The Corfu Channel Case. United Kingdom of Great Britain and Northern Ireland/ Albania. International Court of Justice Judgment of 9 April 1949 (Merits), Page 35. Available online: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4 (01.11.2012).

by mutual relations which exist between the peoples, and is limited by them,"[418] wrote F. F. Martens. Martens has also written on sovereignty in respect to Russian positions in international treaties concluded with Austria, Prussia (Germany), England and France in his magesterial 15-volume "Collection of Treaties and Conventions, Concluded by Russia with Foreign States" [Собрание Трактатов и Конвенций, заключенных Россией с иностранными державами] published in 1874–1909.

Soviet lawyers defined sovereignty as "the inherent leadership of a state over its territory and independence in international relations"[419] (N. A. Ushakov) or "the leadership of a state in its inner matters and its independence in international relations"[420] and "the condition of full power of the state over its territory and its independence from other states"[421] (D. B. Levin). G. I. Tunkin wrote of sovereignty as of an inherent quality of state as a subject of international law that constitutes "leadership of a state over its territory and independence in international relations"[422].

Contemporary Russian researchers of sovereignty speak of sovereignty as of "condition of full power of the state in its territory and its independence from other states"[423] (A. S. Feschenko), or of "dual term that from one side means – supreme power apparent mostly in inner relations, and from the other side – independence directed outside, to the relations with other states"[424] (A. A. Choban). The most comprehensive definition of sovereignty in Russia is probably offered by Professor A. A. Moiseev, according to whom

> "[state] sovereignty is an inalienable juridical quality of an independent state that symbolizes its political-legal selfsufficiency, supreme responsibility and value as a primary subject of international law; necessary for exclusive leadership of the state power and assuming insubordination to the authority of another state; emerging or disappearing due to voluntary change of status of the independent state as a whole social organism; determined by legal equality of independent states and lying in the basis of contemporary international law."[425]

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[418] Ф. Мартенс (Note 4), page 295.
[419] Н. Ушаков. Суверенитет с современном международном праве. Москва, 1963, page 6.
[420] Д. Левин. Суверенитет. Москва, 1948, page 64.
[421] *Ibid.*
[422] Г. Тункин (ред.) (Note 412), page 87.
[423] А. Фещенко. Проблема национальности в деятельности международных организаций и международное право. Диссертация Кандидата юридических наук, Москва, 1988, page 40.
[424] А. Чобан. Государственный суверенитет. Теоретико-правовой аспект. Диссертация Кандидата юридических наук, Москва,1993, pages 60–61.
[425] А. Моисеев. Суверенитет государства в международном праве. Учебное пособие. Восток-Запад, 2011, page 68.

6.3.2. Elements of Sovereignty: State Power, Territory, Jurisdiction

Russian scholars conceive sovereignty as a political-legal notion.[426] The contemporary researcher of sovereignty Professor A. A. Moiseev from Moscow's Diplomatic Academy elaborates on this considering sovereignty as more of a legal quality of a state, which guarantees to the universally recognized primary subject of international law both legal and political selfsufficiency.[427] The notion of sovereignty means denial of restriction or subordination of one state authority to any other state authority, one national legal system to another. Every sovereign state has universal competence and can on its own discretion establish subjects to its authority and execute certain amount of functions. As such, the legal characteristics of state sovereignty include supreme, independent and indivisible state power.

The supremacy of state power is expressed in the establishment of a certain legal order in the state, rights and duties of its nationals, state bodies and organizations; also in absence of any other authority that supersedes the state power.[428] Indivisibility or integrity of state power guarantees existence of a sole state body or a system of state bodies that encompass all competences necessary to constitute the supreme state authority.[429] Independence of the state power is understood as its total independence in solving both state's internal problems and problems of formation and exercise of the state's international policy, and participation in relations with other international legal subjects on equal grounds.[430] As such, state sovereignty may be expressed as recognized by people (legitimized), externally underivative, permanent, juridically unlimited supreme power of the state that has universal competence to administer the state and concentrates in its hands a monopolistic right to take final decisions in all important questions.[431]

It should be noted that such supreme, indivisible and independent state authority that violates its own national laws and its international obligations may by its actions cause harm to other members of the international community, and, as a consequence, may cause hazard to other states. Hence, the presence of sovereignty does not depend on "law obedience" of the state. Illegal actions of the state do not cast doubt on the sovereignty of the state in breach.[432] Also, the sovereignty of the state does not depend on other qualities of the state: the size of its territory, population, economic and cultural development, military power. This is the principle of sovereign equality of states that serves as one of the basic principles in international law.

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[426] Г. Тункин (ред.) (Note 412), page 87.
[427] А. Моисеев (Note 425), page 48.
[428] А. Маслов. Государственный суверенитет в современном международном праве. Диссертация на соискание ученой степени кандидата юридических наук, Москва, 2010, page 21.
[429] *Ibid.,* page 19.
[430] *Ibid.,* page 22.
[431] Н. Грачев (Note 395), page 63.
[432] А. Моисеев (Note 425), page 24.

Likewise to international universal understanding of sovereignty, the study of the phenomenon of sovereignty in Russia was traditionally connected to the territorial aspect. As such, defined territory is regarded as one of the basic elements of sovereign state.[433] Territory as defined by F. F. Martens, is a "space of land and water that is subordinated exclusively to the supreme power of the state."[434] State territory, as elaborated by A. I. Elistratov, "is the area of earth surface that constitutes a historically developed limit for state supremacy."[435] The contemporary definition of territory as defined by Russian scholar S. N. Baburin is the "geographical area of self-determination of people, within limits of which the state exercises its sovereignty and jurisdiction."[436]

In Soviet international law the approach, according to which the state exercises public property law over the territory was often absolutized. The territory was believed to be an "object of the socialistic property and the material base for socialistic economy"[437] (V. N. Durdenevksiy). Sovereignty of the state served as the basis for nationalization of property located on the state's territory, industrial and other objects of foreign states. The same views appeared in the understanding of Soviet international legal scholars like A. M. Ladyzhenskiy, who in 1948 wrote that in international relations the state "shows itself as the owner of the territory, when it concludes with other states treaties of acquisition or concession of territory, of exchange of its certain areas, of granting or getting it into international-legal rent and so on".[438] Later on this approach has been rejected by a number of authors due to the understanding that the land and the territory are not the same. One can speak of state right of property to the land, but not to the territory.[439] According to the current approach, the territory is not and by its essence cannot be in any legal relations with the state; it is its essential element.

Territorial element of the state sovereignty includes territorial supremacy, territorial independence and territorial integrity of the state that is expressed in the fact that the territory of a separate state is governed by one and only state authority that excludes existence or two or more sovereign states on one territory.[440] Secondly, all natural and legal persons located within the territory (including the persons with diplomatic immunity) shall obey to the state power and legislation. Without established territorial borders, the state could not

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[433] Russian legal doctrine follows the understanding according to which the formula of a state consists of three main elements: territory, state power, people.

[434] Ф. Мартенс (Note 4), page 351.

[435] А. Елистратов. Очерк государственного права (конституционное право). 2-ое издание, Москва, 1915, page 8.

[436] С. Бабурин. Мир Империй. Территория государства и мировой порядок. «Юридический центр Пресс», 2005, page 22.

[437] *Ibid.,* page 17.

[438] А. Ладыженский. Юридическая природа территориального верховенства. – Вестник МГУ, 1948, N 10, page 43.

[439] С. Бабурин (Note 436), page 18.

[440] А. Моисеев (Note 425), page 26.

influence its nationals. Thus, if the state was not determined in its borders, it could not be an integral subject of the international law.

In addition, territorial integrity also means the principle of indivisibility of the state's territory due to any reasons excluding subsequent voluntary and free decision of state sovereign authorities. The notion of territorial independence holds that the land and other natural resources within state's sovereign territory cannot be used by the other state without an explicit consent of the state-sovereign. The environment with its components – land and water, atmosphere, forests and entrails (resources) – compose the material content of the state territory and, in the view of international law, belong to the state in which borders they are to be found. Temporary existence within these borders of floating objects like water and atmospheric air, and also of nonrenewable (exhaustible) resources does not alter this general approach.[441]

Finally, jurisdiction of a state is the manifestation of sovereignty within the state.[442] It is the totality of state's rights or powers that let the state carry out legal actions, its state authority. Jurisdiction bears territorial character that is expressed in direct dependence of the object of jurisdiction from its location, territorial regime and the reasonableness of the interest of jurisdiction that is to be exercised. The definition of jurisdiction is narrower than that of territorial supremacy. But jurisdiction can be also exercised in areas where the state does not exercise territorial supremacy. Hence, no state is entitled to apply its jurisdiction, especially means of coercion, on the territory of the foreign state if not provided by international law or subsequent treaties (principle of non-intervention). As such, in exercising their authority, sovereign states are independent from national jurisdiction of any other state.

6.3.3. Internal and External Sovereignty

Russian scholars, like their western counterparts, also differentiate between an internal and external sovereignty. In particular, N. A. Ushakov wrote that these two sides of sovereignty formed and developed historically as indissoluble and mutually supplementing elements that constitute one whole – sovereignty. "Internal and external sides of sovereignty always exist in every state,"[443] he maintained.

The internal side of sovereignty has a decisive meaning as it determines the full power of governing authority within the state and defines its character. The implications of internal sovereignty include existence of bodies of national administration and governance formed without any participation of foreign states; national legislation that is independent from any outward influence;

[441] Ю. Колосов, Э. Кривчикова (ред.). Международное право. Учебник. 2-е издание, переработанное и дополненное. Международные отношения, 2005, page 38.
[442] А. Моисеев (Note 425), page 29.
[443] Н. Ушаков (Note 419), page 78.

existence of economic sources to finance the state expenses (as taxes and other payments required by the state from its nationals); existence of means guaranteeing and securing state sovereignty from any, either internal or external, encroachments.[444]

The external side is prolongation of the internal sovereignty – it expresses the independence of the governing authority from other states, and protects the authority from possible invasions of outside powers into the inner sphere of sovereign state activities. External sovereignty is the most important sign of the state as of a politically organized community; it is the state's distinctive "business card" in the international relations.[445] The implication of external sovereignty is legal independence of a state in international relations, both in its inner and external matters. Inner independence of a state is guaranteed by the fact that international law does not regulate or cannot in principle regulate inner-state relations as positively expressed in the principle of non-intervention.[446] External independence of a state is its independence in external matters, in relations with other states – which is the sphere of international-legal regulations. The state freely, selfsufficiently and independently from other states exercises its external functions and determines its external foreign policy in the framework of international-legal regulations and relations with other states and subjects of international law.[447]

6.3.4. Economic Sovereignty

Though sovereignty is conceived as a legal-political notion, Russian scholars (*e.g.* distinguished Russian scholar, Professor I. P. Blischenko) closely connect it to the problem of economic independence of states. Thus, it follows from the principle of sovereign equality of states that while being legally equal, states are sovereign and independent in their economic systems. Economic sovereignty is a legal-political term, determining selfsufficiency of a state in exercising its sovereign right of economic nature in relations with other states.[448] It is a totality of legal norms that establish mutual obligations of states that guarantee to each state separately and all states together the sovereign right to dispose of their resources, wealth and all economic activity, and their sovereign right to equal participation in international economic relations.[449]

It follows that the economic sovereignty has two dimensions. The internal dimension of state economic sovereignty endows the state with sovereign rights

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[444] А. Маслов (Note 428), pages 28-30.
[445] Н. Грачев (Note 395), page 66.
[446] А. Маслов (Note 428), page 32.
[447] А. Маслов (Note 428), page 33.
[448] И. Блищенко, Ж. Дориа (ред.) Экономический суверенитет государства. Учебное пособие. Российский Университет Дружбы Народов, Институт Международного Права, Москва, 2000, page 40.
[449] *Ibid.,* page 56.

to dispose of its natural resources, wealth and all economic activity. According to the UN Charter of Economic Rights and Duties of States[450] adopted by the UN General Assembly Resolution nr 3281 (XXIX) on 12 December 1974, every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities (Article 2 (1)). Today the norm of State's permanent sovereignty over the resources includes the following: the right of a state to freely dispose of its wealth and natural resources including determination of discovery, exploitation and disposal of the resources under national legislation; the right to regulate exploitation of the resources by foreign investors; the right to nationalize every kind of property in its territory when it is in the interests of state security; the right to regulate economic activity in the territory of the state including both determination of foreign investments regime and the order for exercise of external economic relations with other states, including customs regulations, quotas, licenses, determination of prices for its resources, wealth *etc.*; the right to pay compensation in case of nationalization of foreign property in accordance with relevant circumstances and national legislation.[451]

The external dimension of state economic sovereignty, in turn, means state equality in relation to other states. UN Charter of Economic Rights and Duties of States[452] names sovereign equality of states as one of the fundamental principles that govern economic as well as political and other relations among States (Article 1 (b)). The Charter also stresses that every state has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems. Economic sovereignty of one state is neither connected nor influenced by the level of economic and social development of the state. The internal and external dimensions of economic sovereignty endow the principle with qualitative independence.

Obviously, the condition for realization of economic sovereignty of one state is "due regard" toward legal capabilities of other states. The respect for state economic sovereignty is as an integral part of political-economical concepts of sovereign equality as are principles of territorial inviolability, political independence and non-intervention. The respect for economic sovereignty of state includes acknowledgement of inalienable sovereignty over natural resources and whole economic activity and of principles of economic non-discrimination, mutual profit and favoring interests of less-developed states.[453] The principle of respect for economic sovereignty is enacted in a number of international legal contexts. Thus, in international law of the sea these are norms determining legal regime in the EEZ and continental shelf; in international environmental law

[450] UN Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly Resolution nr 3281 (XXIX) on 12 December 1974. Available online: http://www.un-documents.net/a29r3281.htm (01.11.2012).
[451] И. Блищенко, Ж. Дориа (Note 448), page 62.
[452] UN Charter of Economic Rights and Duties of States (Note 450).
[453] И. Блищенко, Ж. Дориа (Note 448), page 62.

norms concerning biological resources; in international organizations law norms for state participation in international organizations for cooperative solution of economic problems, etc. As such, one can speak of it as of developed international legal principle.[454]

Together with the concept of economic sovereignty Professor I. P. Blischenko spoke of "economic independence of a state". Economic independence is conceived firstly as economic selfsufficiency of the state having achieved a level of such social-economic development, of such economical power, that allows the state to strengthen itself in international economic relations. In this sense economic independence means a material guarantee of state sovereignty and security. Secondly, economic independence is used as a synonym for economic sovereignty, *i.e.,* as a subjective right of the state and as an objective principle of the international law.[455] At the same time, economic dependence of less-developed states expressed in their economic backwardness and dependence on foreign material aid is not an antipode of economic independence[456]. For the latter being the constituent element of state sovereignty, economic backwardness does not play a decisive role, otherwise one would need to deny sovereignty of most of poorly developed world states, and even sovereignty of those European states who in Western terms of measurement are considered weak (Portugal, Ireland, Greece or Turkey[457]).[458]

6.3.5. National Sovereignty

An interesting aspect of sovereignty that is distinguished by Russian legal scholars is "national sovereignty". National sovereignty as a constitutional principle is manifested in the right of ethnic, territorial, citizens, religious or linguistic groups (peoples, nations) to self-determination in different ethno-cultural or political forms, that is realised on the basis of constitutional and international law for the purpose of free development of people (nations), and protection of rights and freedoms of persons belonging to subsequent groups.[459] Whereas external self-determination of a nation means determination of its political status within the framework of international relations, the internal self-determination is exercised in creation of a national-cultural autonomy. As such, the principle of national sovereignty is different from the principle of the people's sovereignty, where the latter treats people as the source of sovereignty

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[454] *Ibid.,* page 55.
[455] И. Блищенко, Ж. Дориа (Note 448), page 47.
[456] *Ibid.,* page 53.
[457] One could speculate, however, that if professor Blischenko was to consider Turkey nowadays, he would have not labeled the state as "weak". The status of Turkey, a potential candidate to join Europan Union, has changed in recent years – the country is now considered economically dynamic and strong.
[458] И. Блищенко, Ж. Дориа (Note 448), page 53.
[459] А. Порфирьев. Национальный суверенитет в правовой природе Российского федерализма. Монография. ООО «Книгодел», 2009, page 68.

and the former provides the nation with the right of self-determination. Today the principle of national sovereignty as the right of peoples to self-determination can be found both in the Constitution of the Russian Federation and the Charter of United Nations (Articles 1, 50).

6.3.6. Sovereignty in the Constitution of the Russian Federation

Article 4 (1) of the contemporary Constitution of the Russian Federation[460] establishes that the sovereignty of the Russian Federation as a democratic federal law-bound state shall cover the whole of its territory. Under Article 4 (2), the Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation. According to Article 4 (3) of the Constitution, the Russian Federation shall ensure the integrity and inviolability of its territory.

As such, territorial integrity and independence constitute one of the main values of the Russian state order. Territorial integrity and territorial inviolability are guaranteed by the Armed Forces of the Russian Federation, whose main competence is defense of the country from any possible external aggression and protection of the state's sovereignty. The obligation to protect territorial integrity of the state has also been confirmed by the Constitutional Court of the Russian Federation in the decision from 31 July 1995,[461] where the Court has acknowledged allowance of the use of the armed forces of the Russian Federation to protect not only the state from external threats, but also to protect population, territory and sovereignty and territorial integrity. The need to protect Russian state sovereignty and territorial integrity is stressed as one of the main goals of the renewed Concepts of Russian Foreign Policy.[462]

The exclusive competences granted to the Russian Federation by Article 71 of the Constitution express the features of the State as the formal bearer of sovereignty on the international arena, as the supreme power and as the factual bearer of the sovereign rights. Only the Russian Federation is considered to be the subject of international law that is allowed to take decisions on participation

[460] Конституция Российской Федерации (Note 58).

[461] Decision of the Constitutional Court of the Russian Federation from 31 July 1995 „On the constitutionality of Presidential Decree No. 2137 of 30 November 1994 on measures for the restoration of the Constitution and the rule of law on the territory of the Chechen Republic, of Presidential Decree No. 2166 of 9 December 1994 on repression of the activities of illegal armed units within the territory of the Chechen Republic and in the zone of the Ossetino-Ingushetian conflict, of Resolution No. 1360 of 9 December 1994 on ensuring the security and territorial integrity of the Russian Federation, the principle of legality, the rights and freedoms of citizens, and disarmament of illegal armed units within the territory of the Chechen Republic and contiguous regions of the northern Caucasus, and of Presidential Decree No. 1833 of 2 November 1993 on the basic provisions of the military doctrine of the Russian Federation". Available online: http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/ac8db8b32b8a2a5d432564dc0048bda4!OpenDocument (20.02.2013) (In English).

[462] Концепция внешней политики Российской Федерации (Note 396).

in foreign policy and international relations. Decisions on international treaties and agreements, issues of war and peace also belong to the State's exclusive competence.

The Constitution of the Russian Federation also lays emphasis on the concept of economic sovereignty. Thus, Article 9 (1) establishes that land and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories. Article 9 (2) ascertains that land and other natural resources may be in private, state, municipal and other forms of ownership. As such, the state is entitled to property rights over natural resources due to its sovereign status. Famous Russian political scientist M. A. Khrustalev confirms in his interpretation of Russian economic sovereignty that "the state is entitled to a traditional right of ownership over certain territory. (…) Lately, the right of ownership over territory has been spread over significant water- and air spaces."[463] Ownership of land is recognized in the 2001 Land Code for citizens, juridical persons and the State. The 2006 Water Code of the Russian Federation provides that water objects are in the ownership of the Russian Federation except for a pond or flooded quarry located within the boundaries of a land plot belonging by the right of ownership to the subject of the Russian Federation, municipal formation, natural person or juridical person (Article 8). Article 1.2 of the 1992 Law of the Russian Federation on the Subsoil,[464] as amended, provides that the subsoil within the boundaries of the territory of the Russian Federation, including underground space and minerals contained in the subsoil, is in state ownership. The possession, use, and disposition of subsoil is relegated to the joint jurisdiction of the Russian Federation and subjects of the Federation.[465]

6.4. Russian *vs* Western Concept of Sovereignty

Proceeding from the above, one can conclude that Russian understanding of the notion of sovereignty has been elaborated in great detail and is deeply imbedded into the foundations of Russian state and legal order and the Constitution of the Russian Federation. One should also conclude that the concept of state sovereignty in the mindset of the majority of Russian legal scholars bears rather *absolute* character, meaning that a sovereign state is politically, legally and economically selfsufficient and independent, both internally and externally, from any other states (see, for instance, definition of state sovereignty as offered by Professor A. A. Moiseev). The concept of absolute sovereignty in relation to the Russian Federation means that Russian state sovereignty is independent,

[463] М. Хрусталев. Политология и политический анализ. – А. Богатуров, Н. Косолапов, М. Хрусталев. Очерки теории и политического анализа международных отношений. НОФМО, 2002, page 26.
[464] Закон Российской Федерации О недрах от 21 февраля 1992 года. N 2395-I. Available online: http://base.garant.ru/10104313/ (31.10.2012).
[465] W. E. Butler (Note 190), pages 612-614.

unitary, unalienable and indivisible. Sovereignty is the quality of "absolute and perpetual" Russian state power that is supreme in relation to all other types of power.

Absolute character of Russian state sovereignty is supported by the subsequent Russian legislation, namely, the Constitution, providing for the notions of territorial integrity and independence; the principle of non-intervention; exclusivity of Russian jurisdiction and economic independence of Russian State. According to Professor A. A. Moiseev, under the Constitution of the Russian Federation, specifically, its Articles 3, 4, 5, 15, 69 and 79, sovereignty of the Russian state constitutes a

> "necessary qualitative indication of state that characterizes the constitutional-legal status of the state and presupposes supremacy of the Constitution and federal laws, that have direct effect and are applicable on the whole territory; independence and selfsufficiency of the state authority; completeness of legislative, enforcement and judicial powers of the state on its territory; and independence in international communication."[466]

Professor N. Grachev goes on to say that the "ideal framework of absolute political-legal opportunities of central power," [467] an unalienable feature of a sole absolute authority, "as consolidated in 1993 Constitution, (…) became a reality, a fact of life."[468] N. Grachev attributes amplification of absolute state sovereignty to the regime of the current Russian President, saying that the "classical theory of sovereignty in its rigid interpretation was in demand by President Putin administration in the circumstances of disruption of the state, and has proved its efficiency once again."[469] Russian political scientist P. A. Tsygankov supports the idea of absolute state sovereignty of the Russian Federation maintaining that obly "preservation of [absolute state] sovereignty enables a state to pursue its goals, notwithstanding the pressure from interdependence or making use of it."[470]

Under the concept of (absolute) Russian state sovereignty, participation of the Russian Federation in international relations and entering into international legal agreements is not regarded as a limitation of Russian state sovereignty. The prevailing opinion regarding this issue was expresses by Professor Y. M. Kolossov, according to whom "taking certain obligations upon itself, that is, consenting to certain limitations of the freedom of actions is one of the manifestations of State sovereignty."[471] The obligation to act within the limts of international law restricts the possibility of arbitrary actions and thus constitutes a guarantee of the state sovereign rights, but not their limitation. Claiming that

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[466] А. Моисеев (Note 425), page 54.
[467] Н. Грачев (Note 395), page 389.
[468] *Ibid.*
[469] *Ibid.*
[470] П. Цыганков. Теория международных отношений. Гардарика, 2004, page 313.
[471] Ю. Колосов. Ответственность в международном праве. Москва, 1975, page 13.

any [international legal] agreement restricts state sovereignty is as logical as claiming that transportation by plane limits one's freedom of movement, wheras walking by foot does not. Limitations [enacted by international legal agreements] of state's freedom to act entitles the state with new opportunities to realize its sovereignty.[472]

Likewise, majority of Russian legal scholars believe that in the circumstances of modern global politics and other features of globalization,[473] absolute state sovereignty remains steady and unshaken. As Professor R. H. Makuev puts it, "sovereignty of a state is too fundamental to be an object of minor political combinations."[474] He proceeds to explain that the process of globalization

> "does not mean that the very concept [of state sovereignty] is altered. The essence of sovereignty does not change (…), what changes is the depth of understanding of the concept; its qualitative characteristics and internal and external factors indirectly affecting the concept of sovereignty through the notion of state. No doubt that as a society and an individ develop, the understanding of sovereignty becomes broader and deeper. But, let us emphasize it once again, the essence of sovereignty does not change. If it qualities undergo substantial changes, it is not sovereignty any more."[475]

For Professor Makuev, "sovereignty is the nerve of the state, by eliminating which the whole governmental structure falls apart."[476] Therefore the legal scholar concludes that the essence of (absolute) state sovereignty does not change with the actuals of globalization phenomenon.[477]

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[472] И. Лукашук. Международное право. Общая часть: учебник для студентов юридических факультетов и вузов. 3-е издание, дополненное и переработанное. Волтерс Клувер, 2008, page 54.

[473] According to UN Report on Globalization and Nation States from 2001, globalization refers, *i.a.,* to a largely commercial process involving rapid increases in the exchange of goods, capital, and services across national frontiers. J. Dhanapala. Globalization and Nation States. Under Secretary General for Disarmament Affairs. United Nations. 7 April 2001. Available online: http://www.un.org/disarmament/HomePage/HR/docs/2001/2001Apr07_Colorado.pdf (20.03.2013). The President of Council on Foreign Relations Richard N. Haass proceeds to explain that "at its core, globalisation entails the increasing volume, velocity and importance of flows within and across borders of people, ideas, greenhouse gases, goods, dollars, drugs, viruses, emails, weapons, and a good deal else." R. N. Haass. Sovereignty and Globalization. Council on Foreign Relations. 17 February 2006. Available online: http://www.cfr.org/ sovereignty/sovereignty-globalisation/p9903 (20.03.2013).

[474] Р. Макуев. Несостоятельность идеи «ограниченного» суверенитета. Журнал «Государство и право», 2008, нр 9. Available online: http://r-makuev.narod.ru/suverenitet.html (20.03.2013).

[475] *Ibid.*

[476] *Ibid.*

[477] It should be added, however, that a certain layer of Russian legal scholars shares the Western views on effects of globalization on national state sovereignty. Thus, L. Grinin writes that globalization does limit state's national sovereignty, and as a result "internal matters of a state that no one interfers with and that are regulated by national law and customs only diminish, whereas international law or the law of collective participation

The absolute character that Russian legal scholars allot to the concept of state sovereignty distinguishes Russian doctrinal approach from the general contemporary discussion held on the topic of state sovereignty by Western legal scholars. According to the latter, the "quality of state sovereignty in the contemporary world, both in internal and external relations, has fundamentally changed. Indeed, state sovereignty is not absolute any more."[478] The Western theoreticians speak of *relative* State sovereignty that is changing according to the realities of the today's world. For many contemporary Western jurists "sovereignty" is a higly adaptive concept that varies by time periods, locales and debates, and "can be used for good and for ill."[479] It is a concept that has been and shall continue to be an integral part of the evolution of legal and political systems. In the words of Professor M. Koskenniemi, "the time of sovereignty is hardly over, and whatever changes our political and juridical languages may undergo in the forseeable future, 'sovereignty' will remain part of them."[480]

In the understanding of Western legal scholars, sovereignty nowadays is seldom monopolized by the state, but is regularly divided and shared among state and non-state actors at all levels of governance, depending on the issue or problem at hand.[481] In their researches on contemporary meaning on sovereignty, Thomas L. Ilgen and Neil Walker both describe the transition from a world of sovereign states to a world in which sovereignty has been relocated to different levels above as well as below that of a state.[482] Jüri Lipping, lecturer at the University of Tartu, follows them to explain that

> "sovereignty has been the key concept for modern state since the inception in the sixteenth and seventeenth centuries. (…) Given this intimate relation, it is unsurprising that the ills of one also necessarily affect the other. Indeed, for some time now we have been able to observe that the classical paradigm of the (modern) state is undergoing more or less extensive transformations. The state is still at the center of the political landscape, but beside it there are other and different entities at play."[483]

"The idea of states as autonomous, independent entities is collapsing under the combined onslaught of monetary unions, CNN, the Internet, and nongovern-

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enlarges." Л. Гринин. Национальный суверенитет в век глобализации. – М. Ильин, И. Кудряшова (ред.). Суверенитет. Трансформация понятий и практик. Издательство «МГИМО-Университет», 2008, page 119.

[478] I. Simonovic. Relative Sovereignty of the Twenty First Century. – Hastings International and Comparative Law Review, 2001-2002, Volume 25, page 37.

[479] M. Koskenniemi. Conclusion: Vocabularies of Sovereignty – Powers of a Paradox. – H. Kalmo, Q. Skinner (ed.) (Note 400), page 241.

[480] *Ibid.,* page 222.

[481] J. Bartelson. The Concept of Sovereignty Revisited. The European Journal of International Law, 2006, Vol 16, No 2, page 466.

[482] *Ibid.,* page 473.

[483] J. Lipping. Sovereignty Beyond the State. – H. Kalmo, Q. Skinner (ed.) (Note 400), page 187.

mental organizations", [484] continues the thought Professor of International Relations at Stanford University, California, Stephen D. Krasner. "The principle of [State] autonomy has been violated in the name of other norms including human rights, minority rights, democracy, communism, fiscal responsibility, and international security",[485] maintains Krasner. He distinguishes between four core elements of sovereignty (international legal sovereignty, interdependence sovereignty, Westphalian and domestic sovereignty) and believes that these elements are not "logically related, nor have they always been conjoined in practice."[486] A state can have one kind of sovereignty, but not the other. According to Krasner, though plurality of states enjoy traditional or conventional sovereignty with all four core elements present, there are multiple states that lack one or more kinds of sovereignty and that in one or another way influence the existence of states of traditional sovereignty. For Krasner, the system of sovereignt states is thus an "organized hypocrisy", where almost certainly "no set of rules will be consistently followed."[487]

Contrary to the Russian approach, the majority of Western legal minds hold the stand that all sorts of international agreements, conventions and contracts impose restrictions on the state's sovereignty.[488] Neil MacCormick, Professor of Public Law and the Law of Nature and Nations at Edinburgh University, illustrates that states exercising their sovereignty by entering into treaty obligations[489] are entitled to alienate their sovereignty in a permanent way.[490] Such is the case with the European Union, to which member states confer power. European Union is often taken to be a paradigmatic case of diminished sovereignty.[491] It is a

> "continuing voluntary association of members, who can withdraw from it if they choose, thereby revoking any powers of law-making they have delegated to the Union and its institutions. Implicitly, at least, there is here a reservation of sovereignty on behalf of each state, however unlikely any one of them may be to exercise the right of withdrawal,"[492]

[484] S. D. Krasner. Think Again: Sovereignty. – Foreign Policy. 01 January 2001, page 48.
[485] S. D. Krasner. Rethinking the Sovereign State Model. – Review of International Studies, 2001, Volume 27, page 17.
[486] S. D. Krasner. The durability of Organized Hypocrisy. – H. Kalmo, Q. Skinner (ed.) (Note 400), page 97.
[487] *Ibid.,* page 112.
[488] S. D. Krasner (Note 485)*,* page 23.
[489] N. MacCormick. Sovereignty and After. – H. Kalmo, Q. Skinner (ed.) (Note 400), page 166.
[490] M. Koskenniemi (Note 479), page 227.
[491] H. Kalmo, Q. Skinner. A Concept in Fragments. – H. Kalmo, Q. Skinner (ed.) (Note 400), page 19.
[492] N. MacCormick (Note 489), page 167.

writes N. MacCormick. According to him, "it is clear that absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community."

Moreover, according to the Western legal minds, the effects and significance of globalization are constantly weakening and transforming the concept of state sovereignty. [493] In the words of J. Lipping, "there is a little doubt that globalization (and similar developments) have considerably diminished the importance and independence of individual states, thereby overstretching the old paradigm of national sovereignty."[494] Likewise, the President of Council on Foreign Relations Richard N. Haass holds that globalization "challenges one of sovereignty's fundamental principles: the ability to control what crosses borders in either direction,"[495] and believes that state "sovereignty is no longer a sanctuary, (…) it must be conditional, even contractual, rather than absolute."[496] R. Haass recommends the states to weaken their sovereignty "in order to protect themselves."[497]

Refraining from any further consideration of the contemporary Western approach to the notion of sovereignty, one should conclude from the abovesaid that the the majority of Western legal scholars perceive the concept of "absolute" state sovereignty as an anachronism of the past,[498] whereas it seems to be the leading understanding of the concept of state sovereignty by the mainstream academics in Russia. The conclusion on rather absolute character of Russian state sovereignty as distinguished by Russian legal experts and imbedded into certain legislative provisions, and the difference between Russian and Western contemporary approaches to the concept of sovereignty is an interesting inductive observation that may play a certain role in the further analysis of Russian approach to the law of the sea and the country's current positions in the maritime areas under scrutiny. However, before returning to the Russian specific context, the author finds it necessary to provide for general understanding of the influence that the concept of sovereignty has paid to the development of international law of the sea. Furthermore, the author shall elaborate on the notion of State sovereignty as enacted in current legal framework of UNCLOS, creating the general basis for State-, in our case Russia's, specific analysis.

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[493] M. Goodhart. Review Essay: Sovereignty: Reckoning What is Real. – Polity. Winter 2001, Volume XXXIV, Number 2, page 241.

[494] J. Lipping (Note 483), page 187.

[495] R. N. Haass. Sovereignty and Globalization. Council on Foreign Relations. 17 February 2006. Available online: http://www.cfr.org/sovereignty/sovereignty-globalisation/p9903 (20.03.2013).

[496] *Ibid.*

[497] *Ibid.*

[498] For instance, both S. D. Krasner and N. MacCormick speak of "post-sovereignty" in relation to Europe. H. Kalmo, Q. Skinner (ed.) (Note 400), pages 151–152, 226.

Chapter 7. Extension of State Sovereignty into the Sea

7.1. Historical Development of International Law of the Sea. The battle of *Mare Clausum* and *Mare Liberum*

Dr Maria Gavouneli, lecturer of International Law at the Faculty of Law in the University of Athens, Greece, calls the development of the international law of the sea (as culminated by UNCLOS) a

> "tug-of-war between the sovereignty of the coastal State, which atavistically purports to expand its powers further and further away from land; and the freedom of the high seas, a principle partly created as a reflexion of the impossibility to subdue the vast expanse of water for long centuries in human history."[499]

Though the freedom of the high seas came to be the winner of this tough battle, the notion of State sovereignty has left a remarkable trace in the development of international law of the sea.

Ever since humankind managed to venture out into the seas, the freedom of this seemingly limitless space was challenged by sovereign domination from the land. Over the years and centuries, countries large and small, possessing vast ocean-going fleets or small fishing flotillas, husbanding rich fishing grounds close to shore or eyeing distant harvests, have all vied for the right to call long stretches of oceans and seas their own. The dispute over who controls the oceans may date back to the days when the Egyptians first plied the seas in papyrus rafts.[500] As the ancient Greeks were among the first in recorded history to explore the Mediterranean all the way to the Straits of Gibraltar – it is not surprising that Greek rulers were the first to proclaim themselves rulers of the sea.[501] Whilst Roman law provided that the sea was free and common to all as *res communis,* after disintegration of the Roman Empire this principle has been lost and forgotten.[502] By the Middle Ages many seas were subject to various forms of appropriation and control by powerful states.[503]

With the discovery of new territories far beyond the shores of Europe by Spain and Portugal in the late fifteenth century these two powers asserted that the sea was capable of being subject to dominion and sovereignty. Spain claimed exclusive dominion over the Pacific Ocean and the Gulf of Mexico,

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[499] M. Gavouneli. Functional Jurisdiction in the Law of the Sea. Martinus Nijhoff Publishers, 2007, pages 1–2.

[500] The United Nations Convention on the Law of the Sea – A historical perspective. Available online: http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (05.12.2012).

[501] H. Tuerk. Reflections on the Contemporary Law of the Sea. Martinus Nijhoff Publishers, 2012, page 6.

[502] R. P. Anand, Freedom of the Seas: Past, Present and Future. – H. Caminos (ed.). Law of the Sea. Ashgate, 2000, pages 216–217.

[503] T. W. Fulton, The Sovereignty of the Sea. Blackwood, 1911. Republished by The Lawbook Exchange LTD, New Jersey, 2002, page 3.

Portugal over the Atlantic Ocean, South of Morocco, and the Indian Ocean.[504] In 1493, Pope Alexander VI promulgated a Papal Bull "*Inter Caetera"* according to which the ocean space and territories discovered West of a line drawn down the Atlantic Ocean would belong to Spain and those to the East to Portugal. The two countries in 1494 concluded a bilateral treaty at Tordesillas (Spain) in line with the Papal Bull.[505] As T. W. Fulton observed: "It was those preposterous pretensions to the dominion of the immense waters of the globe that caused the great juridical controversies regarding *mare clausum* and *mare liberum*, from which modern international law took its rise."[506]

Thus, the doctrine of *mare clausum* or closed seas was unequivocally expressed by the major powers of the Medieval time, Spain and Portugal. Their monopolistic ambitions were protested against by then rising naval powers of England and Holland, adhering to the doctrine of *mare liberum* by underlying that the sea was incapable of appropriation as it was a *res communis*, belonging to all nations.[507]

The latter position was elaborated and reinforced in 1609 when the Dutch lawyer Hugo Grotius published his famous treatise "Mare Liberum". A young brilliant jurist associated with the East India Company, Grotius wrote and published "Mare Liberum", which was among the works that has earned him the title of "founder" or "father" of international law.[508] The treatise was written "in order to defend the interests of the Company and to influence unfavorably the negotiations then in progress between Spain and Holland for peace on reciprocally acceptable bases." [509] It was "intended to be used as moral ammunition" and designed to justify "in the eyes of the world the whole cause and methods of the Dutch as against Spain."[510]

In his treatise, Grotius has heavily relied on Roman law and Christian, especially Spanish, theologists.[511] Thus, he made extensive use of two Spanish theologians, Francis Alphonse de Castro, and Ferdinand Vasquis, who were the first to raise their voice against the prevailing practice in Europe to appropriate the sea. Castro, who wrote about the middle of the fifteenth century, protested against the Genoese and Venetians who prohibited other peoples from freely navigating in Ligurian and Adriatic Seas, as being contrary to the imperial law,

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[504] H. Tuerk (Note 501), page 6.
[505] T. B. Koh. The Origins of the 1982 Convention on the Law of the Sea. 29/1 Malaya Law Review, 1987, page 1. – H. Tuerk (Note 501), page 6.
[506] T. W. Fulton (Note 503), page 3.
[507] T. B. Koh (Note 505), page 6. – H. Tuerk (Note 501), page 6.
[508] R. P. Anand (Note 502), page 216.
[509] J. B. Scott. Introductory Note to Grotius, H. Freedom of the Sea or The right which belongs to the Dutch to take part in the East Indian Trade. New York, Oxford University Press, 1633 trans, 1916 rep, pages xxix-xliii.
[510] *Ibid.*
[511] R. P. Anand. Origin and Development of the Law of the Sea. Martinus Nijhoff Punlishers, 1983, page 81.

the primitive right of mankind and the law of nature. Vasquis, writing in 1564, was of the same opinion and for similar reasons.[512]

In Chapter V of his "Mare Liberum", Grotius observed how under the law of nations the sea had at various times been referred to as the property of no one (*res nullius*), a common possession (*res communis*), and public property (*res publica*).[513] However, it was clear to Grotius that the oceans could not be appropriated because "that which cannot be occupied, cannot be the property of any one, because all property has arisen from occupation."[514] Likening the sea to the air, which Grotius observed was not susceptible to occupation and whose use was destined for all, he also wrote: "for the same reason the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries".[515] He insisted that "the sea is one of those things which is not an article of merchandise and which cannot become private property. Hence, (...) no part of the sea can be considered as the territory of any people whatsoever."[516] Grotius maintained he was not talking of inner sea which was surrounded on all sides by the land, a gulf, or a strait, but the vast ocean which, "although surrounding this earth, ... can be neither seized nor enclosed; ocean, which rather possesses the earth than is by it possessed."[517]

Grotius' approach to the freedom of the seas is essentially based upon the conceptualization of the sea as *res communis* and accordingly not subject to territorial appropriation. Although the expression *res communis* implies common property, the concept can also be seen as essentially a negative one.[518] *Res communis* may in fact also be interpreted as *res nullius*, for, unless there is a structure to administer common property, it is something which may be used by everyone in the same manner and can therefore also be considered as belonging to no one.[519]

As Britain had, in the meantime, moved away from the position of *mare liberum* to that of *mare clausum*, legal scholars sought to refute the Grotian thesis, the most important of them being a brilliant British scholar John Selden with his book "Mare Clausum, seu de Dominio Maris Libri Duo" [Of The Dominion, or Ownership of the Sea in Two Books] published in 1635. It is generally admitted that *Mare Clausum,* written after prolonged labour by one of the most eminent lawyers of his time, an erudite scholar and a prominent historian, "is an elaborate and masterly exposition of the case for the sovereignty of

[512] *Ibid.*
[513] D. Rothwell, T. Stephens. The International Law of the Sea. Hart Publishing, 2010, page 3.
[514] H. Grotius. Freedom of the Sea or The right which belongs to the Dutch to take part in the East Indian Trade. New York, Oxford University Press, 1633 trans, 1916 rep, page 27.
[515] *Ibid.,* page 28.
[516] *Ibid.,* page 34.
[517] *Ibid.,* page 37.
[518] H. Tuerk (Note 501), page 7.
[519] *Ibid.*

the crown of England in the British Seas, which throws into the shade all the others numerous works which were written on that side of the question."[520]

Relying on historical data and state practice at that time in Europe, Selden tried to prove that the sea was not everywhere common and had in fact been appropriated in many cases. Among almost all the nations of antiquity, he asserted, it was the custom to admit private dominion in the sea, and many of them exercised maritime sovereignty. Amongst nations of his time, he mentioned numerous European states which claimed sovereignty in large areas of the sea.[521] Although Selden admitted that humanity would not deny freedom of all harmless navigation and commerce, he emphatically maintained that is was not contrary to the law of nature and the law of nations to forbid free navigation and commerce.[522] Selden rejected the argument that the sea cannot be appropriated, pointing to rivers, lakes, and springs as examples. He also denied that the sea is inexhaustible, and maintained that its usage – *e.g.* fishing, navigation, commerce and extraction of pearls and corals and the like – by others, may diminish its abundance and prejudice its use by its owner.[523]

Selden sought to prove not only that there was longstanding practice of dominion over the oceans, but also to assert the sovereignty and dominion of the crown of England in the British Seas. Yet, as observed by T. W. Fulton, "it was Selden's misfortune that the cause he championed was moribund, and opposed to the growing spirit of freedom throughout the world."[524] Two centuries later, Fulton characterized state sovereignty on the sea (with respect to the sovereignty of England) in a very similar way to Selden. According to Fulton, the sovereignty of the sea was a political sovereignty that existed as a matter of right, and was duly recognized as such, apart from an actual predominance of naval power at the time, just as the sovereignty of a state exists on land, though in both cases its maintenance may depend upon a sword.[525] "In this sense, the sovereignty of the sea signified the sole power of jurisdiction and rule as obtained on land, and also, in its extreme form, an exclusive property in the sea as part of the territory of the realm,"[526] Fulton wrote.

In the battle of doctrines of *mare liberum* and *mare clausum*, Selden at first seemed to be the victor, as all European powers followed his advice to try control as much ocean as their power would permit. In the words of Fulton, the supremacy on the sea, the position of a state as a sea-power, was a mastery by force of arms:

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[520] T. W. Fulton (Note 503), page 371.
[521] R. P. Anand 1983 (Note 511), page 81.
[522] *Ibid.*
[523] H. Tuerk (Note 501), page 7.
[524] T. W. Fulton (Note 503), page 370.
[525] *Ibid.*
[526] T. W. Fulton (Note 503), page 3.

> "in times of peace, the strength of the navy should be such as to safeguard the commerce that came to the realm and went from it, thus enabling merchants and traders to carry on their traffic in security. In time of war, the fleets should be strong enough to sweep the seas, so that, as it has been described, the bounds of the empire should then be the coasts of the enemy."[527]

It was, however, the Grotian concept of the freedom of the seas that gradually attracted general support and became predominant in the customary international law. The needs and demands of the Industrial revolution in Europe – larger markets, need for raw materials and surplus capital which could not be invested in Europe – led to huge colonial empires in Asia and Africa. As European got more interested in commercial prosperity and free trade, and even more Europeans needed to travel to Asia and Africa, Selden's *Mare Clausum* became an anachronism that was no longer necessary. It would be more useful to have free and open seas and jointly exploit vast Asia and Africa which no one nation could exploit alone. Pretensions of sovereignty over the sea and monopoly of trade slowly withered away.[528] The doctrine of *mare liberum* was peacefully accepted because freedom of the sea in essence meant freedom of navigation and the sea in itself was not seen as repository of resources and a source of economic wealth. The principle of non-appropriation of the seas only had the effect that coastal States were not entitled to intercept foreign ships on grounds that they were entering appropriated territory.[529]

However, although the balance between *mare clausum* and *mare liberum* had clearly tilted in the latter's favor, this doctrine was not carried to its extreme logical conclusion, namely, that no part of the sea is susceptible of being placed under coastal State jurisdiction. Such a conclusion would have been a practical absurdity, for States have a vital interest in the protection of their laws, their security, and as the case may be their neutrality in times of war, within a strip of the sea adjacent to their coasts.[530] Thus, neither the doctrine of *mare liberum* nor that of *mare clausum* could apply to the total exclusion of the other: a balance had to be struck between them. The initial balance was established in the seventeenth century: it minimized national authority – by establishing the coastal state jurisdiction over an adjacent belt of the sea which initially did not exceed three nautical miles limit based on the "cannon-shot" rule[531] – and maximized the extent of the high seas and freedoms.[532]

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[527] *Ibid.*
[528] R. P. Anand 1983 (Note 511), page 229.
[529] H. Tuerk (Note 501), page 8.
[530] *Ibid.*
[531] This distance was adopted originally during the early eighteen century, when the Dutch writer Bynkershoek enunciated the theory relating to it in his *De Dominio Maris Dissertatio* (1702), presenting it as being based on the range of a cannon-shot; it was retained until very recent times by most states. R.-J. Dupuy, D. Vignes (ed). A Handbook on the New Law of the Sea. Martinus Nijhoff Publishers, 1991, page 262. According to Bynkershoek, "the territorial sovereignty ends where the power of the arms ends". A. H. Dean. The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas. – 54 Am. J. Int'l L, 1960, 751,

The balance in favor of the doctrine of *mare liberum* was not really challenged until the twentieth century when the world witnessed a major shift towards national authority and the consequential diminution of the extent of the high seas, coupled with the attenuation of freedoms.[533] This was prompted by the growing realization – based on scientific research and technological progress – on the enormous resources and the great economical potential of the seas.[534] Gradually at first, coastal states began to claim a sovereign right to control the waters adjoining their coasts. Over time, these claims began to resemble those made over land and territory, such that by the latter part of the nineteenth century a distinctive sea area akin in legal status to land territory – the territorial sea – began to emerge. The territorial sea was an area over which the adjacent coastal state exercised jurisdiction and control, principally for the purpose of security, but also in relation to resources that may have been found close to the coast such as fisheries.[535] Thus, a process was sent into motion that gradually led to a transition of the law of the sea from what has been called a "law of movement" to a "law of territory and appropriation".[536]

The end of the Second World War presented multiple opportunities for the development of the law of the sea. In a proclamation made on September 28, 1945[537], the U.S. President, Harry S. Truman, said that "since the effectiveness of measures to utilize or conserve" the natural resources of the continental shelf "would be contingent upon cooperation and protection from the shore", it was "reasonable and just" that the coastal state should have exclusive jurisdiction and control over them. He, therefore, declared "the natural resources of the subsoil and sea-bed on the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States". Although the Presidential Proclamation specifically stated that this assertion of jurisdiction and control over the continental shelf in no way affected "the character as high seas of waters above the continental shelf and the right to their free and unimpeded navigation", this was certainly a novel claim

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pages 759–761 (noting that the cannon did not have a three-mile range during Bynkershoek's day but that the rule was based on military strength).

[532] D. Anderson. Modern Law of the Sea. Selected Essays. Martinus Nijhoff Publishers, 2008, page 6.

[533] *Ibid.*

[534] H. Tuerk (Note 501), page 9.

[535] D. Rothwell, T. Stephens (Note 513), page 4.

[536] R. P. Anand 2000 (Note 502), page 225.

[537] Presidential Proclamation Nr 2667, Policy of the United States with Respect to the Natural resources of the Subsoil and Seabed of the Continental Shelf, 28 September 1945, 10 Federal Register 12, 303 (1945). Available online: http://www.oceancommission.gov/documents/gov_oceans/truman.pdf (08.12.2012). On the same day, President Truman issued another proclamation which concerned fisheries off U.S. coasts, which, however, did not advance jurisdictional claims to the waters over the continental shelf, calling instead for the establishment of conservation zones in parts of the high seas contiguous to the coasts of the United States sea.

in the erstwhile common domain and a modification, if not violation of the generally accepted freedom of the seas doctrine.[538]

Indeed, the Truman Proclamation triggered a phenomenal change in the law of the sea – a doctrine of coastal state rights, jurisdiction and control over resources of adjacent continental shelf. The US was concerned to enjoy exclusive access to the oil and gas in the seabed situated just beyond the three mile limit in the Gulf of Mexico and off California.[539] Other States refrained from challenging the US doctrine and, after a pause of thought, many proceeded to make similar claims of their own.[540] This movement was said to be prompted by increased nutritional needs of coastal State populations, in particular the concern by developing countries that long-distance fishing fleets of industrialized countries would exhaust the fishing grounds off their shores, increasing energy needs and coastal States' desire to protect their national security as well as their marine scientific knowledge, perceived as a national wealth. This tendency resulted in establishing a continental shelf regime quickly accepted into international law, and let to the unilateral extension of the breadth of the territorial sea by the coastal States as well as the claim for an exclusive fisheries or economic zone.[541]

Further developments in the field of international law of the sea led to codification of the latter. The First UN Conference on the Law of the Sea held in Geneva from 24 February to 27 April 1958 resulted in conclusion of four, relatively short, conventions. These were the Convention on the Territorial Sea and Contiguous Zone,[542] the Convention on the Continental Shelf,[543] the

[538] R. P. Anand 1983 (Note 511), page 164.
[539] D. Anderson (Note 532), page 8.
[540] Mexico issued a similar proclamation one month after the United States. A year later, Argentina claimed an "Epicontinental Sea", comprising not only sovereignty over the continental shelf, but also over the water column above. Between 1946 and 1957, ten other States claimed sovereignty over their continental shelf and the superadjacent waters. Within that period five Latin American countries declared 200 nautical mile limits for exclusive fishing rights. In the Santiago Declaration of 1952, Chile, Ecuador and Peru proclaimed sovereignty and exclusive jurisdiction over the sea up to a minimum distance of 200 nautical miles from their coasts. Soon after the Second World Warm Egypt, Ethiopia, Saudi-Arabia, Libya, Venezuela and some Eastern European countries had departed from the traditional 3-mile limit by claiming a 12-mile territorial sea – which had already been claimed by Russia since 1927. The United Nations Convention on the Law of the Sea – A historical perspective. Available online: http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (05.12.2012).
[541] H. Tuerk (Note 501), page 10.
[542] The Convention on the Territorial Sea and Contiguous Zone, though giving for the first time significant content in treaty to the regime of the territorial sea, failed to indicate the breadth of the territorial sea. The proposals of the participants to the Conference on the breadth of the territorial sea ranged from 3 miles to 200 nautical miles, but none of them obtained the necessary two-thirds majority.
[543] The Convention on the Continental Shelf, agreed just 13 years after the Truman Proclamation, nationalized the most valuable areas of the seabed to the detriment of States

Convention on the High Seas, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. Whilst UNCLOS I achieved a great deal, there remained significant gaps in the legal framework, and the need for further elaboration and codification of the law of the sea was sensed. A Second UN Conference on the Law of the Sea was convened in Geneva only 2 years after UNCLOS I. The Conference was dominated by concerns with respect to security, fisheries, and associated economic problems, but failed to reach agreement on any reforms or modifications to the Geneva Conventions[544] of 1958.

The final stage of the process of codifying the norms of the international law of the sea was the Third UN Conference on the Law of the Sea, a truly global forum to which all States and many national liberation movements were invited, met between December 1973 and 1982 with an agenda that included almost all aspects of the law of the sea.[545] The decisive period turned out to be that between 1973 and 1976. The Conference set the aim of adopting a single comprehensive Convention, consolidating and reforming the entire law of the sea.[546] In 1982, the UNCLOS was adopted. After one of the lengthiest ever negotiations in international lawmaking, the end-product is considered to be truly impressive.[547] Much more than a codifying treaty in progressive development of a very old branch of international law or even simply "a constitution for the oceans," the new instrument created an integral normative system reconciliating the intellectual duel between Grotius's *Mare Liberum* and Selden's *Mare Clausum*.

As has been illustrated, the international law of the sea has developed from the notion of *communis omnium naturale iure* or "common to all humankind" into the national maritime zones division due to ascertainment of states of their sovereignty over world oceans and coastal waters. The following section shall confirm that the notion of sovereignty is deeply embedded into underlying principles and core concepts of the international law of the sea. Thus, UNCLOS contains many provisions establishing the limits of state sovereignty in various maritime zones.

7.2. Sovereignty in UNCLOS

7.2.1. State Sovereignty within its Territorial Waters

The state territory over which the sovereign state exercises its jurisdiction includes land areas, waters, rivers, lakes, airspace above the land, the sub-terranean areas and the sea. Under international law, the state sovereignty expands over territorial sea of a state and its subsoil. According to Article 2 of

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without long coastlines or with off-shore areas, but failed to clearly define the outer limits of the continental shelf in terms of depth.

[544] D. Rothwell, T. Stephens (Note 513), page 9.

[545] D. Anderson (Note 532), page 13.

[546] *Ibid.,* pages 13–14.

[547] M. Gavouneli (Note 499), page 1.

the Convention, (1) the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. (2) This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. (3) The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

In principle, the coastal state enjoys full sovereignty in its territorial sea. Sovereignty of a state over the territorial waters means that the state has *legislative competence*[548] in its territorial waters. It was already recognized as having such competence by virtue of custom, particularly in the customs and fiscal spheres. Thus, UNCLOS Article 21 allows the state to adopt laws "in respect of all or any of the following" – the following topics being, broadly, navigation, protection of cables and pipelines, fisheries, pollution, scientific research, and customs, fiscal, immigration and sanitary regulations. For example, the coastal state has always been recognized as being entitled to regulate fishing in its territorial waters and reserve the monopoly over such fishing to its own nationals. This entitlement includes the entitlement to fix the penalties imposed for infractions of such regulations. Foreign ships are bound to comply with coastal state laws enacted consistently with the Convention, as they are with sea lanes designated by the coastal state (UNCLOS Articles 21 (4), 22).

Also, the coastal state enjoys *jurisdictional competence*[549] in its territorial sea, although the exercise of that competence is subject to various restrictions. The recognition of the principle of the coastal State's competence arises from the use of words "should" in Articles 27 and 28 of the Convention, which constitute that the coastal state "should not" exercise its criminal or civil jurisdiction over certain circumstances, thereby suggesting that even though the coastal state is entitled to such competence, it is desirable that it should waive the exercise thereof in the interest of international navigation within its territorial waters.[550] This, in turn, leads to the traditional rules tending to guarantee freedom of innocent passage which were incorporated into the Convention.

As the concept of territorial sea was formed by taking into account that the sea expanse historically has been used for international navigation and that the sojourn of vessels in foreign territorial waters required uniform international legal regulation,[551] the sovereignty of the coastal state over the territorial sea has been effectuated and somewhat restricted by the right of foreign vessels to pass through such sea. Thus, the coastal state has an obligation to respect the passage in its territorial waters of vessels whose behaviour does not threaten its security, its public order or its customs and financial interests. In addition to the innocent

[548] *Supra.,* Note 55.
[549] *Supra.,* Note 56.
[550] R.-J. Dupuy, D. Vignes (ed). A Handbook on the New Law of the Sea. Martinus Nijhoff Publishers, 1991, page 258.
[551] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 22.

passage of the foreign vessels, UNCLOS contains a reference to the state's need to comply with all generally accepted rules for the prevention of collision of vessels.

If one is to proceed from the patrimonial theory, more important than legislative and (restricted) jurisdictional competence of the state in its territorial sea shall be the state's right of property to its territory. If territory is regarded as *dominium* or a piece of property pertaining to the ruler,[552] the state can be considered to exercise its power over its territory much as in private law an owner would treat its possessions. This explains the right of a state for exploration, exploitation, conservation, management and control of resources found on its territory.

Hence, "possession" and "occupation" of water areas are not really possible in the same sense as possession and occupation of the land areas.[553] Water areas are valuable instrumentally, primarily for the opportunities they create for resource extraction. Especially now it is generally recognized that the oceans' resources are finite, states desire to own maritime zones in order to appropriate the resources present in the seabed and the water column.[554] Both direct consumption value of resources as a way of satisfying domestic needs, and the ability to market the resources internationally account for their high value. The owner of the maritime resources may wish to exploit the resources directly and sell them on world markets. Secondly, the state may wish to sell to someone else the right to exploit the resources in question. In order to reap the economic benefits of maritime space, coastal states may grant concessions or licenses to private companies or enter into joint venture arrangements with those companies.[555] Similarly, the states sell the right to fish in their waters to foreign fishing fleets.

Proceeding from the above one may conclude that the territorial sea, its seabed and subsoil are the extensions of state's sovereignty over the land to the sea with the specific restrictions of innocent passage for foreign vessels. The internal sovereignty of the state in the territorial sea endows the coastal state with legislative power and enforcement jurisdictions (though with certain restrictions) over the area. The external sovereignty of the state in its territorial waters means that all other international subjects and authorities are to respect and follow the laws, regulations and sea lanes established by the coastal state. The state owns all resources to be found in the territorial sea or its seabed and subsoil. As have been noted in the Commentaries to UNCLOS, the right of a

[552] M. N. Shaw (Note 413), page 18.
[553] This principle was first introduced by Dutch jurist Hugo Grotius his 1609 Mare Liberum (The Freedom of the Seas). In this work, Grotius set forth reasons why the "high seas", which came to be defined as the open ocean existing beyond national control, must be open for trade and exploration. All property, he wrote, is grounded upon occupation – the sea then, like the air, cannot be appropriated.
[554] L. Brilmayer, N. Klein (Note 399), page 732.
[555] *Ibid.,* page 733.

state to resources is inherent to the concept of sovereignty of the state.[556] Currently, 130 states have limited their territorial seas to 12 miles in accordance with UNCLOS.[557]

7.2.2. Sovereign Rights of the Coastal State in EEZ

Under Article 55 of UNCLOS, the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in the Convention, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention. The formulation of UNCLOS Article 55 unambiguously describes the legal status of the economic zone as a zone which is distinct from the territorial sea and to which sovereignty of the coastal state does not extend. This provision is confirmed in Article 58 thereof, stating that in the exclusive economic zone, all States enjoy the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention. The reference to Article 87 means that the freedoms operating in this economic zone are classified as freedoms of the high seas.[558]

The term "exclusive economic zone" gives no grounds to believe that this is an exclusive national zone of a coastal state in which the latter may enjoy exclusive rights or exclusive jurisdiction. Instead, the EEZ must be regarded as a separate functional zone of a *sui generis* character, situated between the territorial sea and the high seas. Being a part of what one may call the *zone of national jurisdiction*, which excludes an expanse of full sovereignty, that of internal waters and the territorial sea, it constitutes a zone of economic sovereignty. This means that sovereignty relates to the living and mineral resources, as well as to the sources of energy derived from water, the currents

[556] S. N. Nanden, S. Rosenne (ed.). United Nations Convention on the Law of the Sea 1982. A Commentary. Volume II. Martinus Nijhoff Publishers, 1993, page 441.

[557] For the beginning of the twenty first century 119 of the 151 coastal states worldwide had established 12-mile wide territorial seas. These states include the Russian Federation, China, India, France, Italy, Ukraine, Latvia and Lithuania. Even the United States, still not party to UNCLOS, has claimed its right and sovereignty over the 12-miles wide territorial sea. Some states have opted for territorial seas significantly less than 12 miles wide. As has been described above, by exchanging subsequent notes, the representatives of the Republic of Estonia and the Republic of Finland agreed to decrease the limits of their states' territorial seas to create a free passage for foreign vessels in the Gulf of Finland. Jordan and Singapore have limited their territorial sea to 3 miles, Norway – to 4 miles, Greece and Turkey – to 6 miles. In signing the Convention, some states (Argentina, Brazil, Chile, Ghana, etc) agreed to reduce their territorial seas to the 12 nautical miles agreed by the world community in 1982.

[558] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 54.

and the winds, but not no the marine space itself, which remains open for the traditional freedoms of navigation and communication.[559]

In the EEZ, a coastal state has *sovereign* rights for the purpose of exploration, exploitation, and preservation of natural resources, and also possesses jurisdiction with respect to marine scientific research and preservation of the marine environment. The granting to a coastal state of sovereign rights with respect to natural resources of the EEZ entails the following legal consequences. First, the other states have no right to explore for and exploit natural resources of the EEZ without the clearly expressed consent of the coastal state even if it does not itself exploit the resources. Second, a coastal state enjoys in the EEZ such rights as the issuance of respective laws and regulations concerning the exploration and exploitation of zone resources, a prohibition against taking certain species of living resources, and so on.[560] Thirdly, in exercise of its sovereign rights, coastal states have the right to ensure compliance with the laws and regulations adopted by them in conformity with the Convention.

However, UNCLOS establishes certain limits for the exercise of the abovementioned sovereign rights of the coastal states in its EEZ, which additionally underscores the peculiarities of the EEZ as an area not under sovereignty of any state. In accordance with UNCLOS Article 61 (2), the coastal state is obliged by taking proper measures to ensure the conservation of living resources in the zone so that the state thereof is not endangered as a result of over-exploitation. At the same time, the coastal state should promote the optimal use of living resources in the EEZ.[561] In other words, the coastal state is obliged to have "due regard" to the interests of other states in exercising its rights in precise conformity with UNCLOS. At the same time, in the EEZ of the coastal state all other states enjoy the freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms (see UNCLOS Article 58 (1)).

7.2.3. Coastal State Rights over the Continental Shelf

As has been noted above,[562] the continental shelf beyond the limits of territorial sea is not considered to be a part of the territory of the coastal state. In both the 1958 and 1982 Conventions the state's rights over the continental shelf beyond the territorial sea are described as "*sovereign*". Such rights, according to the International Law Commission, include "all rights necessary for and connected with the exploitation of the continental shelf (...) (including) jurisdiction in

[559] R.-J. Dupuy, D. Vignes (ed) (Note 550), page 291.
[560] A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 56.
[561] *Ibid.,* page 57.
[562] *Supra.*, section 1.8.1.

connection with the prevention and punishment of violations of the law".[563] These are rights for specific purposes and thus do not permit a state to exercise full state powers over these areas as "sovereignty" might allow. The lack of clarity about the precise legal character of "sovereign rights" is not an important matter for several reasons. By having these rights, the state "owns" the resources of the seabed and subsoil to the extent that sovereign rights over them are granted to the state by international law. "Sovereign rights" of a coastal state over the continental shelf mean that the coastal state is entitled to explore the shelf and exploit all natural resources such as oil, gas, sedentary species. In opposite to the exclusive economic zone, the coastal state exercises rights over the continental shelf itself, not only over its resources.[564] Thus, the rights of the coastal state also include the right to construct and authorize the use of artificial islands and installations and structures used for economic purposes, and the right to authorize drilling of the shelf.

Despite the fact that the continental shelf does not constitute "state territory" in its strict sense, some legal scholars believe that, as expressed by the Venezuelan Ambassador J.-F. Pulvenis:

> "if account is also taken of the continental shelf's character, as reaffirmed by the Court and confirmed by the Convention, as the "natural prolongation of the land territory" of the coastal state, it is conceivable that the somewhat subtle distinction between the "submerged land territory", *i.e.*, the bed and the subsoil of the territorial sea, and its natural prolongation, *i.e.*, the continental shelf, is bound to gradually disappear as we progressively move towards widespread recognition of genuine territorial sovereignty."[565]

As French Professor P.-M. Dupuy aptly put it,

> "this development was expected; the rights over the continental shelf are rights over territory; and this is not altered by the fact that it is submarine territory. And territory, even if it submerged, … requires sovereignty."[566]

From this perspective it should be concluded that even if the coastal state does not exercise full sovereignty over the continental shelf, the notion of sovereignty over it is definitely stronger than in all other maritime zones except for the territorial sea.

Under Article 77 (2) of UNCLOS, the sovereign rights of the coastal state are *exclusive* meaning that if a coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. These continental shelf rights do not depend on occupation, effective or notional, or on any express pro-

[563] ILC Yearbook, 1956, Vol II., p. 253 at 297. See Note 14 (R. R. Churchill, A. V. Lowe (Note 55), page 151).
[564] R.-J. Dupuy, D. Vignes (ed.) (note 550), page 369.
[565] J.-F. Pulvenis. Chapter 6. – R.-J. Dupuy, D. Vignes (ed.) (note 550), page 369.
[566] *Ibid.*

clamation (UNCLOS Article 77 (3)), but automatically attach to the coastal state. As stipulated by the International Court of Justice in the North Sea Continental Shelf cases,

> "[T]he rights of the coastal state in respect of the area of the 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 an inherent right."[567]

It follows that it is for the coastal state, through its own laws and regulations, to define the conditions under which exploration and exploitation of the shelf may be concluded. A wealth of such legislation exists, particularly to relation of offshore oil and gas and sedentary fisheries. Furthermore, many standards, on matters such as safety and pollution, are enforced through the incorporation of terms in licenses permitting the offshore activities in question.[568]

7.2.4. The High Seas and the Deep Seabed as Limits to National Sovereignty

Together with expansion of state's sovereignty and its property rights, UNCLOS establishes areas which are outside any state's jurisdiction. Thus, UNCLOS Article 86 provides that the high-seas rules apply to all parts of the sea that are not included in the internal waters, in the territorial sea or in the exclusive economic zone of a State, or in the archipelagic waters of an archipelagic State. UNCLOS Article 89 explicitly provides that no State may validly purport to subject any part of the high seas to its sovereignty. This is a rule of customary international law now that constitutes a limit to the state sovereignty. Currently, UNCLOS entitles all states, both coastal and land-locked, with the high seas freedoms of navigation, overflight, laying submarine cables and pipelines, construction of artificial islands and other installations permitted under international law, fishing and scientific research (Article 87 (1)). These freedoms of high seas are to be exercised with "due regard" for the interests of other States (Article 87 (2)).

The development of new technologies for the exploration and recovery of minerals and the improvement of economical methods for the exploitation of resources of the seabed have conditioned the need for special legal regulation of seabed resources and determination of the legal status of the seabed beyond the limits of national jurisdiction.[569] Thus, by UNCLOS it was declared that the seabed and ocean floor and subsoil thereof, behind the limits of national

[567] North Sea Continental Shelf Cases. Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands. International Court of Justice Judgement of 20 February 1969, page 22. Available online: http://www.icj-cij.org/docket/files/51/5535.pdf (30.10. 2012).
[568] R. R. Churchill, A. V. Lowe (Note 55), page 153.
[569] A. A. Kovalev, W. E. Butler (ed., transl.) (Note 15), page 105.

jurisdiction (hereinafter the Area), and its resources are common heritage of mankind (Articles 1 (1) and 136 of UNCLOS) where no 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 (Article 137 (1)). All activities in the Area, which in principle may be conducted both by the International Seabed Authority itself or by commercial operators, are to be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status (Article 140 (1)).

7.2.5. UNCLOS as the Basis for Expansion of Sovereignty or Establishment of Property Rights

Having illustrated the role that the concept of state sovereignty had to play in the historical development of international law of the sea and formation of its sources and main concepts and principles (*supra,* section 7.1.), and having shown how exactly is the notion of sovereignty engraved into the edifice of international law of the sea, *i.e*. UNCLOS (*supra,* sections 7.2.1. – 7.2.4.), it is time to re-ascertain the close connection and correlation that exist between the concept of the state sovereignty and the regulation of the law of the sea.

As noted above[570], the concept of sovereignty in international law has the meaning of sovereign authority of one state over a certain territory. Being sovereign within its territory, the state exercises its powers and performs its functions within the territory in accordance with its jurisdiction. Territory is thus one of the essential parts of sovereignty, there could be no state without sovereign territory. Together with land, internal waters and the subterranean areas, the territory of one state comprises its territorial sea and the seabed and subsoil thereof. This is the starting point for correlation between the doctrine of state sovereignty and the regulation of the law of the sea. As the result of historical extension of state sovereignty over the waters adjoining state's coasts, the coastal state is entitled to exercise full sovereignty over its territorial sea with the exception of the right of innocent passage granted to the foreign vessels and certain restrictions on the state's jurisdiction.

However, the further one moves from the land under the immediate source of state sovereignty towards the high seas where no state may validly purport any part of it to its sovereignty, the weaker the spread of state's sovereignty becomes. Thus, the coastal state exercises sovereign rights, but not full sovereignty, over the continental shelf and its resources. In the EEZ, the coastal state is entitled to exercise certain sovereign rights and jurisdiction as provided by UNCLOS. Sovereign rights are the rights for specific purposes. The sovereign rights of the coastal state over the continental shelf are exclusive and

[570] *Supra.,* section 6.2.

inherent, basically meaning that the state "owns" the resources of the continental shelf. The sovereign rights of a coastal state in the EEZ are of economic character and need to be exercised with the "due regard to the rights and duties of other states."[571]

In the days before UNCLOS, the disagreements regarding the legitimate extent of state sovereignty caused bitter and occasionally armed conflicts. The Convention, representing the culmination of thousands of years of international relations and conflict, can be seen as the codification of rules and principles that establishes fixed borders of state sovereignty over the territorial sea, and allows the state to expand its sovereignty both horizontally (from the land towards the high seas) and vertically (including the seabed, the subsoil and the continental shelf thereof).

As regulation for expansion of sovereignty, UNCLOS can also be seen as an attempt to establish true *erga omnes* property rules for ocean spaces. William Wertenbaker, reporting at large for *The New Yorker* in 1983, brilliantly synopsized the twelve year long negotiations for UNCLOS III as follows:

> "it was a debate over resources, a conference on property and ownership. It might, more informatively, have been titled the United Nations Conference on the Uses and Ownership of the Ocean and Its Resources. It was a conference on food, on oil, on energy, on minerals, on preservation of the environment, on freedom of navigation."[572]

If put like this, the Convention has established international property law *erga omnes* that, by legal and political necessity, required a bargained consensus to be effective. This bargain, in essence, provided the coastal states with extended but limited jurisdictions, while ensuring that the seabed and its mineral resources beyond were the "common heritage of mankind" that would peaceably and sustainably benefit all.[573]

That having been said, one reaches a justified conclusion that the notion of state sovereignty over sea spaces and resources located in the sea water and on the seabed is deeply embedded in the framework of contemporary law of the sea. This is to be confirmed by words of Professor J. N. Moore, a leading authority in the filed of the law of the sea, who has called UNCLOS the treaty that serves sovereignty.[574] Not only is the concept of sovereignty embedded into UNCLOS, it is currently exercised and applied by the states-parties to

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[571] UNCLOS Article 56 (2).

[572] W. Wertenbaker. The Law of the Sea – I. – The New Yorker, 1 August 1983, 38, pages 39-40.

[573] P. S. Prows. Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is To Be Done about It). – New York University School of Law, 2006, paper 1449.

[574] Professor J. N. Moore statement on the 34th Annual Conference of the Center for Oceans Law and Policy on "US Interests in Prompt Adherence to the Law of the Sea Convention" held on 21 May 2010 in Washington DC, USA. The video-record from the Conference is available online: http://www.c-spanvideo.org/program/293640-3 (20.02.2013).

UNCLOS over sea and ocean areas as provided in the Convention. Consequently, one should further think that the specifics of a state's approach to the doctrine of sovereignty and the desire to gain property rights over water and subsoil resources are relevant in determining the state's approach to the law of the sea by the means of adherence (or refusal to adhere) and application of law of the sea regulation.

Further consideration is given to the reflection of the concept of sovereignty (as understood by Russian legal scholars and state authorities) in Russian approach to the law of the sea. It must be noted that though both Russian and Western (for example, the Baltic German scholar Carl Bergbohm in his Tartu (Dorpat) dissertation "D i e B e w f f n e t e N e u t r a l i t ä t") legal experts have written on Russia's sovereign position in the history of the law of the sea, the author of the hereby thesis looks at the correlation of the concept of sovereignty to current Russian positions in the realm of the law of the sea. Thus, the current research takes advantage of most recent publications by Russian legal authors.

Chapter 8. Sovereignty in Russian Understanding of the Law of the Sea

8.1. Sovereignty over Territorial Sea

As has been described in Section 1.6., *supra*, the Constitution of the Russian Federation considers territorial sea to be an integral and indivisible part of the State's territory. Federal Act on the Internal Maritime Waters, Territorial Waters and Contiguous Zone of the Russian Federation[575] establishes that the sovereignty of the Russian Federation extends to the territorial sea, the airspace over it and also its seabed and subsoil, with recognition of the right of innocent passage of foreign ships through the territorial sea (Article 2 (4). As such, the Russian Federation has fully adopted the idea established in UNCLOS of extension of state sovereignty over the land territory to the adjacent belt of territorial waters.

Exercise of full sovereignty over territorial waters means first and foremost territorial sovereignty as expressed in integrity, supremacy and independence of the territorial sea. Being an integral part of the Russian Federation territory, the territorial sea within the established limits is constituent and inviolable, never subject to another state's territorial, legal or political claims. Protection of territorial integrity, *i.e.* protection of the territorial sea is one of the main functions of the Russian state. According to the Presidential Decree from 11 March 2003 nr 308 "On measures of improving state governance in the sphere of the Russian Federation security", the bodies of border guard service are included in the Federal Security Service of the Russian Federation (the FSB). Since that moment, the border guard has become one of the main fields of the FSB activities.

Territorial supremacy of the territorial sea means that the Russian Federation is entitled to establish jurisdiction over the area to which all natural and legal persons are subjects to. Thus, the territorial sea of the Russian Federation is subject to its federal jurisdiction (Article 71 (m) of the Constitution) and no other state may enact its jurisdiction upon Russian territorial sea. Russian Federation exercises its supreme, independent and indivisible state power over the territorial waters. The established territorial borders determine the scope of the Russian Federation jurisdiction, which is enacted in the Federal Act on the Internal Maritime Waters, Territorial Waters and Contiguous Zone of the Russian Federation.[576]

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[575] Федеральный закон о внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации (Note 59).

[576] The Act *i.a.* establishes the definition and the regulation for innocent passage of foreign ships, foreign warships and other governmental vessels through Russian territorial sea, search and rescue and ship-raising operations, the creation of artificial structures and the laying of submarine cables and pipelines in the internal maritime waters and the territorial sea. The Act also establishes the list of cases when the Russian Federation is entitled to exercise criminal jurisdiction on board of a foreign ship and grants the Russian Federation with a right to take any steps in accordance with its laws for the purpose of an arrest or

The theory of territorial independence holds that the land and other natural resources within state's sovereign territory cannot be used by another state without an explicit consent of the state-sovereign. According to UN Charter of Economic Rights and Duties of States and Article 9 of the Constitution of the Russian Federation in regards to the territorial sea, all natural resources and wealth found in Russian territorial sea belong to the Russian Federation. Elaborated by the Water Code and Law of the Russian Federation on the Subsoil,[577] these resources may belong to state property only. There are no restrictions on the depth of the resources. This is the expression of economic sovereignty that grants the state with rights of economic nature and confirms its economic independence from other states.

As such, the Russian Federation exercises both internal and external sovereignty over its territorial waters, with the former expressed in supreme, unilateral and independent state power applicable to all nationals and foreigners in the area, and the latter confirming Russian state power independence in its territorial sea. The limits of Russian sovereignty over its territorial sea are the right of innocent passage granted to the foreign vessels and the general rule on inapplicability of Russian jurisdiction on board of foreign vessels except for the cases specifically provided by law. Russia enjoys territorial supremacy, integrity and territorial independence as well as economic sovereignty in the waters, seabed and subsoil of its territorial sea. The international legal notion of Russian sovereignty over its territorial sea means that all states are bound to respect Russian border regime and the legislation enacted by the state in its territorial waters.

8.2. Sovereignty over Continental Shelf and EEZ

Article 67 (2) of the Constitution of the Russian Federation provides that "the Russian Federation shall possess sovereign rights and exercise the jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation according to the rules fixed by the federal law and the norms of international law". In consistence with the idea of UNCLOS that state exercises full sovereignty only in the territorial sea but not over the EEZ and the continental shelf, where the state is entitled to exercise certain sovereign rights, the Constitution of the Russian Federation and subsequent federal laws entitle Russian state with certain sovereign rights and restricted jurisdiction over its continental shelf and the EEZ.

These rights include sovereign rights of the Russian Federation for the purpose of exploring the continental shelf and exploiting its mineral and living resources; sovereign rights for the purpose of exploring, exploiting,

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investigation on board a foreign ship passing through the territorial sea after leaving its internal waters (Article 17). Similarly, the Act elaborates on conditions under which Russian state can exercise its civil jurisdiction over foreign vessels.

[577] Федеральный закон о внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации (Note 59).

commercializing, conserving and managing living and non-living resources of the EEZ as well as sovereign rights for the purpose of exploring the seabed and its subsoil and exploiting mineral and other non-living resources thereof; the exclusive rights to authorize and regulate drilling on the continental shelf and on the seabed and in the subsoil of the EEZ for all purposes and to construct, to authorize and regulate the erection, operation and use of artificial islands, installations and structures. In addition, the Russian state is entitled with jurisdiction over the continental shelf and the EEZ with respect to marine scientific research, protection and conservation of the marine environment, the laying and use of submarine cables and pipelines.

Thus it is explicitly provided that the Russian Federation does not exercise sovereignty over its continental shelf and EEZ, but the state is endowed with exclusive sovereign rights as specific rights for certain purposes. The Russian state is also entitled to exercise jurisdiction over specified matters in these areas. Remembering that jurisdiction as manifestation of state authority over specific territory is an essential element of state sovereignty, it becomes an interesting question whether one can equate the *jurisdiction* granted to Russia over its continental shelf and EEZ to *manifestation of Russian sovereignty* in the areas?

Jurisdiction is an aspect or an essential element of sovereignty, it co-exists with sovereignty, but at the same time it is peculiar to the state's sovereignty and limited by it. As the doctrine of jurisdiction is connected to the question whether and under which conditions a state may exercise regulative functions, then sovereignty is the basis for realization of jurisdiction. There is no jurisdiction without sovereignty as sovereignty is the *conditio sine qua non* for jurisdiction. Establishment of jurisdiction is one of the *sovereign* rights of the coastal state.[578] This leads to confirmation of the distinction made between concepts of sovereignty and sovereign rights. As such, the Russian Federation exercises both sovereign rights and (restricted) jurisdiction over its continental shelf and EEZ, but not state sovereignty.

As the Russian Federation does not exercise state sovereignty over the continental shelf and EEZ, to what extent do sovereign rights to explore and exploit natural resources refer to the notion of economic sovereignty? Some Russian legal scholars have taken a standpoint that economic sovereignty of a state equals to its sovereign rights over natural resources. In particular, Professor V. P. Shatrov, having studied the principle of inalienable sovereignty over natural resources and whole economic activity, believes that "the same principle in enacted in UNCLOS that confirms sovereign rights of states over natural and mineral resources in the EEZ and over the continental shelf (Articles 56, 77)".[579] Others, as Professor I. P. Blischenko, have found that this approach is contrary to international law. Professor Blischenko has held that the relevant parts of UNCLOS are to be considered the source of general confirmation of the principle of economic sovereignty, but not as the source of state's full

[578] С. Гландин (Note 93), page 36.
[579] В. Шатров. Международное экономическое право. Москва, 1990, page 18.

sovereignty over natural resources, wealth and whole economic activity as one of the general principles of international economic order.[580]

According to Professor Blischenko, this is due to the fact that the regime of protection of coastal state sovereign rights to dispose of its natural resources in the EEZ and on the continental shelf is different from the regime foreseen by the principle of inalienable sovereignty over natural resources. The latter reflects the peculiarity of international-legal territorial regimes, where the resources are protected. The principle of inalienable sovereignty over resources establishes the regime over resources located on the territory of a specific state, in the limits of which the state exercises its territorial supremacy (Article 2 of the UN Charter on Economic Rights and Duties), while the norms of international law of the sea concerning EEZ and continental shelf (Parts V and VI of UNCLOS) establish the regime over resources located in the territories with mixed regime, which do not fall under sovereignty of specific states nor constitute parts of state territories.[581] UNCLOS may be considered as the source of inalienable sovereignty over natural resources only in the provisions establishing state sovereignty over internal and territorial waters.

It is also important to remember that the functional nature of coastal state's sovereign rights in the EEZ and over continental shelf makes it impossible to view these rights in the frame of the principle of *absolute* sovereignty over resources, wealth and whole economic activity that is valid only within territory of a state. Even by granting the coastal state with an exclusive right to exploit natural resources of its EEZ, the Convention limits this right by enabling land-locked states to participate in the exploitation of such resources. Similarly, by endowing the coastal state with a right to claim an extended continental shelf, UNCLOS enacts obligation of payments to the International Seabed Authority of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. As such, the international legal norms securing a coastal state's sovereign rights are the reflection of a more general, customary rule of respect for economic sovereignty of states.[582]

Applying the considerations presented above to the concept of Russian sovereignty over its continental shelf and EEZ, one should conclude that possession of sovereign rights over the continental shelf and in the EEZ does not mean that Russia enjoys the principle of *absolute* sovereignty over the resources. As the continental shelf and the EEZ do not juridically constitute state territory, the territorial regime of full sovereignty over the resources does not apply. Nevertheless, from the absence of full sovereignty over the resources it does not follow that the Russian Federation is not entitled to use and dispose of the resources in its sole discretion or that other states have a right to claim ownership or dispose of the resources on Russian continental shelf or in its EEZ (except if specifically provided so).

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[580] И. Блищенко, Ж. Дориа (Note 448), page 63.
[581] *Ibid.,* page 64.
[582] *Ibid.,* page 63.

The sovereign rights granted to Russia over the continental shelf and the EEZ bear economic character: they confirm the possession, ownership and the right of unilateral disposal of the resources by the state. For instance, Article 2 of the Federal Law on the Subsoil[583] states that areas of subsoil being used or not used within the territory of the Russian Federation and on its continental shelf constitute the State fund of subsoil, that is possessed, used and disposed of in the interests of peoples of the Russian Federation by the Russian Federation and its subjects. The commentary to the Federal Law on the Subsoil elaborates that in essence this norm develops regulation of Article 1.2. of the Law that stipulates that subsoil within the territory of the Russian Federation, including underground space and minerals, energetic and other resources contained in the subsoil, are in the ownership of the State.[584]

As such, Russian sovereign rights over the continental shelf and the EEZ bear economic independence and can be viewed as the basis for general respect for Russian economic sovereignty in the eyes of the other states and world community. The notion of respect for Russian economic sovereignty is enacted in Article 6 (12) of the Federal Law on the Continental Shelf of the Russian Federation,[585] according to which one of the functions of federal agencies of state power with respect to the continental shelf includes "declaration of the closure of specific areas of the continental shelf to the conduct by foreign states, physical and juridical persons of the Russian Federation, physical and juridical persons of foreign states, and competent international organizations of marine scientific research connected with actual or planned exploration and exploitation of mineral resources in such areas and the harvesting of their living resources, and publication of the coordinates of the closed areas in the "Notices to Navigators".

In sum, the sovereign rights granted to the Russian Federation by UNCLOS and subsequent domestic laws over the Russian continental shelf and its EEZ are specific economic rights that guarantee Russia rights of possession, use and disposal of the resources found on its continental shelf and EEZ. These rights entail Russian economic independence over its resources and respect for Russian economic sovereignty. Also, the rights correspond to internal economic sovereignty of the State by granting the sole ownership over resources to the State and its subjects only. The external economic sovereignty, in turn, deprives the other states of any rights to claim exploration or exploitation of resources located within Russian continental shelf and the EEZ.

Having indicated how the concept of sovereignty and its core elements are dealt with in UNCLOS and have been enacted into Russian legislation, and having illustrated the implications of Russian sovereignty in its maritime zones, this thesis further proceeds with specific examples of Russian legal claims and practice based on and reasoned by the concept of sovereignty. Taking into

[583] Закон Российской Федерации О недрах (Note 464).
[584] А. Борисов. Постатейный комментарий к Закону Российской Федерации О недрах от 21 февраля 1992 Nr 2395-1, page 7.
[585] Федеральный закон о континетнальном шельфе Российской Федерации (Note 95).

account that the first part of this thesis has outlined the empirics of the factual situation in the Arctic Ocean, Caspian Sea, the region of the Black Sea and the Sea of Azov and the Baltic Sea from the stand taken by the Russian Federation, it is time to analyze specific examples of Russian legal claims and positions based on the notion of sovereignty in the abovementioned oceans/seas and draw conclusions.

8.3. Russian Legal Claims based on the Concept of Sovereignty

8.3.1. Russian Sovereign Claims in the Arctic

When looking at a picture of Russia's general behavior in the Arctic, it is difficult for one to argue with the obvious fact that the Russian Empire, the Soviet Union and later the Russian Federation have been expanding or making efforts to expand their sovereign domain in the Arctic region for centuries. Modern day, Russia is the only nation with millions of citizens living within the Arctic Circle, and it has by far the largest military presence in the area. The USSR, and now Russia have seen the Arctic like the United States viewed its Western frontier – as an expansion area.[586] The Soviet Decree from 1926 "On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR" explicitly proclaimed that all lands and islands previously discovered and also lands and islands that might be discovered are the territory of the Soviet Union. The USSR treated as its own territory the triangle between the North Pole and the extreme western (Kola Peninsula) and eastern (Chukotka) points of the littoral zone. The territorial and consequently, the economic, sovereignty of the Soviet Union over a polar sector was proclaimed unilaterally and due to long-term absence of objections from other states it was considered by many to be legally grounded and final.

Also, the Soviet sovereignty over the Arctic area has been deeply embedded in the sense of national sovereignty of many generations of Soviet people. Having grown up on romantic ideas of "conquest of the polar Arctic" and having been educated on "great deeds" of Soviet polar scientists and explorers who dared to master the far North (such as Wrangel, Kruzenshtern, Kolchak, Schmidt, Papanin, *etc*), the Soviet people considered themselves as the only nation with ownership of the Arctic Ocean.

Furthermore, though the Russian official position expressed on international arena tends to abandon the sectoral division of the Arctic – firstly, due to the absence of sufficient international legal grounds to confirm applicability of the sector method to the Arctic; secondly, because of inadequacy of the sector method in relation to determining the status of polar sector waters; and thirdly, relying on the fact that Russia has ratified the Convention in 1997 and has agreed to apply it without any limitations – Russia could be be seen as continuing expansion of limits of its sovereignty over the Arctic. The Russian

[586] S. Shackelford (Note 88), page 38.

Federation's state policy laid down in the "Foundations of Russian Federation State Policy in the Arctic through 2020 and Beyond"[587] takes a three-pronged approach to its Arctic sovereignty: (1) geological-geophysical, hydrographic, and cartographic work to substantiate its Arctic extended continental shelf claims; (2) boundary controls at points of passage through its borders; and (3) development of new security forces to guarantee a favorable operating regime in the Arctic under various military/political situations. The latter two approaches include development of the coastal capability of the Federal Security Service of the Russian Federation, increasing interoperability with its counterparts regarding suppression of smuggling, illegal migration, and fisheries conservation, and development of border infrastructure and outfitting of border security forces.[588]

Currently, the Russian Federation has been successfully applying UNCLOS in the Arctic, having established its territorial sea, the EEZ and the continental shelf in accordance with the Convention. In doing that, Russia has considered the Kara Sea, Laptev Sea, East Siberian Sea located along the northern coast of the Russian Federation to be its historical waters, so that the baseline for measuring the breadth of the territorial sea and EEZ will coincide with the outer limit of those waters.[589] This way Russia has preserved northern seas in its internal waters and has guaranteed its complete state and economic sovereignty over the internal water areas. However, many observers believe that hiding behind its adherence to UNCLOS, Russia has allowed itself large discrepancies in determination of basepoints and establishment of baselines (*supra,* Section 1.5.). One may further conclude that if considering Russian baselines in the Arctic Ocean as inconsistent with international law,[590] the Russian domain over the proclaimed historical waters does not correspond to UNCLOS.

Additionally, by preserving the polar seas within its internal waters, Russia has enabled the extension of its national domain or the territorial sovereignty over coastal waters to as long distance as possible. Though water areas granted to Russia under UNCLOS are smaller than the polar sector claimed by the Soviet Union, Russian sovereignty over its territorial sea and sovereign rights over the EEZ derive from an internationally accepted treaty and are thus indisputable. Being the sole authority in the region entitled to exploration and exploitation to possible natural resources within the area, as well as enjoying protection from interference of any third countries, by ratification and application of UNCLOS Russia has granted its economic sovereignty and security in the Arctic waters.

Furthermore, Russian submission to the CLCS on the outer continental shelf is widely considered as its "territorial expansion" and the pursuit to establish the

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[587] Основы государственной политики Российской Федерации в Арктике на период до 2020 года и дальнейшую перспективу (Note 70).

[588] I. G. Brosnan, T. M. Leschine, E. L. Miles. Cooperation or Conflict in a Changing Arctic? – Ocean Development & International Law, 2011, 42:1–2, page 181.

[589] С. Гуреев, И. Зенкин, Г. Иванов (Note 63), page 224.

[590] *Supra.,* section 1.5.

state sovereignty over rich resources of the Arctic continental shelf. It is believed that should the CLCS recognize Russian specified claim to the extensive Lomonosov Ridge, Russia will gain sovereign and exclusive rights to exploit and explore up to 60% of any hydrocarbons found in the High Arctic. A positive decision by the CLCS would allow Russia to expand the outer limits of its Arctic continental shelf by up to 1.2 million square kilometers and to start the development of oil and gas fields in the Chukotka-Murmansk-North Pole triangle.[591] It should be remembered, though, that Russia already exercises unquestioned control over enormous energy deposits in the Arctic. According to Minister Y. Trutnev, in today's term, Russia has sufficient reserves to cover production for the next 25–35 years, and it does not include newly discovered reserves.[592] Although one can and should assume that the country will strive to expand its sovereignty over as much as the new territories and resources as possible, just as the other Arctic states will, Russia is not pressed for time.[593]

Yet, if the Russian amended submission is to be satisfied, the resources within the outer limits of Russian continental shelf, with reference to Russian Federal Law on the Subsoil and its commentaries, shall be treated as "state fund of subsoil", that is possessed, used and disposed of in the interests of peoples of the Russian Federation by the Russian Federation and its subjects. Not only shall Russian sovereign rights to exploit and explore the resources of the extended Arctic continental shelf contribute to Russian economic sovereignty in the essence of specific economic rights, but in addition they shall increase Russian economic independence and constitute a basis for general respect for Russian economic sovereignty in the Arctic.

What if the Commission does not endorse the Lomonosov Ridge as a natural prolongation of Russia's continent? Even if the planting of Russian flag on the sea bottom of the North Pole carried no international legal implications, the act has symbolized the importance that Russia places on ascertaining that the Lomonosov ridge, the area where the flag was planted, forms a part of Russian adjacent continental shelf. "Those who argue that Russia will enclose the feature as part of its continental shelf, whatever the Commission recommends, may have a point,"[594] writes the Finnish professor and Arctic researcher T. Koivurova. As there are now three coastal states (Russia, Denmark and Canada) that consider parts of the Lomonosov Ridge as their continental shelf, there will likely be some sort of political disagreement as to which parts of the ridge belong to which state's shelf. It should be noted that the CLCS has no authority to adopt recommendations whenever there exist overlapping claims, making it most likely that the states will need to resolve any disagreement jointly or

[591] E. Gerder. A New Cold War. – Oilweek Magazine, June 2011. Available online: http://www.oilweek.com/articles.asp?ID=841 (20.09.2011).
[592] K. Zysk. The Evolving Arctic Security Environment: An Assessment. – S. J. Blank (ed.). Russia in the Arctic. Strategic Studies Institute, 2011, page 106.
[593] *Ibid.,* page 106.
[594] T. Koivurova. The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay. – Ocean Development & International Law, 2011, 42:3, page 220.

possibly resort to the dispute settlement avenues in Part XV of the Convention.[595] In that case Russia would need to use best means of negotiations to achieve its territorial and economic sovereign goals. The process of achievement of a mutual compromise on delimitation of Arctic continental shelf by all the countries that currently show an immense interest in it may turn to be even more complicated than consideration of Russian specified submission by the CLCS.

Russian policy in the Arctic is generally considered expansionist, reflecting the state's willingness and desire to strengthen and enlarge its sovereignty in the region. The same goal has been posed as the purpose of recent political maneuvres. For example, the Barents Sea border Treaty with Norway, though widely perceived as the beginning of Russian Arctic dialogue, may also be interpreted as a sly legal-political step indirectly purporting Russian sovereignty expansion in the North. Having made concessions to Norway regarding the fisheries field, which led to conclusion of the bilateral maritime border treaty in the Barents Sea, Russia, in fact, has gained support for its position from Norway. As has been noted by O. Khlestov, the vice-president of Russian Association of International Law,

> "this agreement goes beyond the bilateral relations between Russia and Norway, and opens up additional opportunities for cooperation among the Arctic states. Russia gets a definite advantage in the struggle for the Arctic shelf prior to the re-examination of its application in the UN. Certainly, resolution of this issue in the western Arctic has a positive impact for Russia".[596]

According to D. Abzalov, a leading Russian expert in the field of geopolitics, the existence of the Russian-Norwegian treaty may force Canada to deal with a European alliance of Russia and Norway in the competition for Arctic resources,[597] which in turn may result in strengthening of the Russian sovereign position in the Arctic. Thus, one might unveil Russia's possible hidden intention behind the Norwegian border treaty, which was to settle the ongoing dispute with Norway so that Russia can apply all its powers and competences to the major "fight" for the Arctic extended continental shelf. Though there is no direct evidence to that, it is possible that having terminated the territorial dispute with Norway and gained certain support and credibility from Norway and other subjects on the international arena, Russia shall devote more time and effort to its claims over Arctic continental shelf. However, whether this supposition is true shall become evident in the nearest future.

One may further think that the refusal of the Russian State Duma to ratify the 1990 Border Treaty in the Bering and Chukchi Seas between the U.S. and the Russian Federation is likewise a thoroughly considered political step toward establishment of the Russian sovereignty in the Arctic. Russian reluctance to

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[595] *Ibid.*
[596] E. Gerder (Note 591).
[597] *Ibid.*

ratify the treaty hiding itself behind the principle of changed circumstances together with the initiatives proclaiming for re-negotiations on the matter indicate the desire of Russian State for a more favorable border treaty. Russian position of denial of a legally binding treaty entitles it with a right to initiate negotiations on developing a treaty that would benefit Russian interests. Hence, the success of such negotiations, if once initiated, is strongly dependent on position of the U.S. and the possible compromises the States may achieve.

There is also an interesting opinion expressed by a Russian political scientist Pavel Baev that Russian economic interest in resources "camouflages the 'lofty ideal' of Russian sovereignty over the Arctic. (…) While the lure of oil and gas wealth is no doubt attractive, the romantic idea of establishing a hold over new territories possessing the ocean depths and icy expanses holds greater appeal,"[598] finds P. Baev. This view correlates with the previously described idea of national sovereignty shared by generations of Soviet people. If to consider Russian "patriotic desire to expand frontiers" as the reason for its claims under UNCLOS, one should conclude that together with the expansion of state territorial sovereignty Russia is driven by the notion of national sovereignty and the right of Russian people to self-determination as the "great people who have conquered the North".

However, the sovereignty that Russia desires to exercise over Arctic cannot bear the *absolute* character due to several restrictions. First and rather controversial is the fact that both the grounds for legal extension of state sovereignty from the land into the sea as well as the limitations to the Russian sovereignty in the polar areas arise from UNCLOS itself. These are the obligations of Russian state to grant innocent passage to foreign vessels in Russian Arctic territorial waters and freedoms of navigation and communication to other states in Russian Arctic EEZ; to take proper measures to ensure the conservation of living resources in the EEZ; to pay contributions to the International Seabed Authority from the exploration of the extended continental shelf non-living resources.

Also, even though the Convention grants Russia with the right and possibility to claim "ownership" over extended continental shelf, there are factual difficulties for amassing a real basis for Russian legal claims. No-one has been able to collect rock samples from the Lomonosov Ridge, even from a depth of just a few meters. Geophysical and seismological methods – as well as numerous samples of sediment from the seabed – provide no conclusive evidence of the continental origin of these ridges, and Russia does not have the technical capability for deep drilling.[599] The only way to resolve this problem would be to take part in international programs studying the ocean floor,[600] which would require co-operation as well as huge financial investments from the participants.

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[598] P. Baev, Russian Policy in the Arctic. A Reality Check. The Arctic. A view from Moscow. Carnegie Endowment for International Peace. 2010, page 25.
[599] I. Nossova (Note 388), pages 118-119.
[600] M. Rajabov (Note 112), page 27.

Second, the Russian desire to extend its sovereignty over the Arctic is limited by the presence and claims put forward by other Arctic players. The five major Arctic states – the United States, Canada, Russia, Norway, and Denmark – have recently published new or updated their existing Arctic strategies and policies. One of the themes common to the statements of all Arctic countries is the notion of sovereignty. Under the theme of sovereignty, the Arctic coastal states contend with two issues: the determination of the extent of their extended continental shelves and the projection of sovereign presence in the Arctic. With the exception of Norway, all the states emphasize the need to map and delimit the extent of their continental shelves. This is not an easy assignment, as the current ice conditions in the Arctic make gathering of precise and detailed information to meet UNCLOS continental shelf prolongation requirements almost impossible. The lack of evidence proving that the Lomonosov Ridge is a natural prolongation for any particular party to the disputes makes Russian, Canadian, and Danish claims to the North Pole extremely vulnerable.[601]

Nevertheless, the United States, Russia, Canada, and Denmark are clear that delimiting their continental shelves is a national priority, though it is recognized that collaboration would likely permit the states to realize a more optimal outcome: geopolitical stability supportive of development, conservation, and protection of a potentially resource rich shelf, in a more timely and perhaps less costly manner.[602] Just recently, Russian Vice President Dmitry Rogozin expressed his fear that "by the middle of twenty-first century the fight for resources in the Arctic between different states will turn completely 'uncivilized'". According to him, "Russia may lose its sovereignty in about 40 years if it fails to clearly set out its national interests in the Arctic."[603]

All five states address sovereign Arctic presence. Sovereign presence refers to efforts to deter, detect, and interdict illegal activities such as smuggling, terrorism, and illegal fishing. These are activities that require combinations of enforcement vessels (aircraft and ships), trained personnel, and monitoring and surveillance capabilities. Again, it is believed that cooperation of Arctic states can enhance individual state effort to stem illegal activity.[604] As such, not only is Russian sovereignty restricted by the presence and claims of other Arctic countries, but the very realization of Russian sovereignty issues is way better achieved by the means of international cooperation (or collaboration) that restricts both Russian internal and external sovereignty over the Arctic.

Third, economic sovereignty and economic independence of Russia in the Arctic is currently under question. It has been often stressed that Russia is unable to effectively develop resources of the continental shelf by itself due to lack of financial means. As Professor Y. N. Maleev writes, for a long time, during almost one hundred years, Russia shall not be able to explore underwater

[601] I. Nossova (Note 388), page 117.
[602] I. G. Brosnan, T. M. Leschine, E. L. Miles (Note 588), page 189.
[603] Battle for Arctic key for Russia's sovereignty – Rogozin (Note 71).
[604] I. G. Brosnan, T. M. Leschine, E. L. Miles (Note 588), page 191.

resources of the Arctic. Too limited are its financial possibilities and too great are the goals set for the polar regions – especially where over a half of the population lives on the verge of the subsistence minimum.[605] In the words of Gleb Ovsyannikov, the head of Lukoil Oil Company Public Relations Department, "Arctic shelf is like the ride into unknown. You come and see untouched snow virginland. Nobody knows how hard the resource [development] in the Arctic shall be."[606]

This seems to be understood by Russian political leaders. In December 2010, then-Russian prime minister Vladimir Putin said that harsh restrictions on foreign ownership of strategic companies introduced in 2008 would be relaxed. "We understand that we need foreign direct investment", he said, "but we need not just capital, we need 'smart' investment, accompanied by technology transfer and job creation."[607] In evidence of that in January 2011 it was unveiled that international energy company BP has swapped a 16 billion dollar share with Rosneft, the Russian state oil company, as part of an ambitious strategic alliance that will see the two companies explore in the Russian Arctic continental shelf. Under the terms of the agreement, unveiled in London, Rosneft will take a stake of about 5% in BP in exchange for about 9.5% in the Russian group. BP already has a 1.2% stake. The two companies have also agreed to explore and develop three license blocks in the Russian Arctic, an area equivalent in size and prospectivity to the United Kingdom's North Sea.[608] The proposal for allowing foreign oil companies not only to operate on its Arctic shelf, but also to own licenses for exploration in the country's Arctic waters is currently being discussed in Russia's Energy Ministry, although no final decision had been taken. It is believed that if the plan is approved, it would make Russia the world's second largest oil producer, more attractive to foreign investors.[609]

Thus, it is evident that without foreign investment, Russia shall not be able to exercise its economic rights; the use of foreigner investment, in turn, shall deprive Russia of some of its economic sovereignty and independence over Arctic resources. In addition, though in the strictest sense there is no legal need for the coastal states to cooperate with each other or anyone else, in reality getting access to the bulk of Arctic Ocean resources, especially those lying in the areas of overlapping territorial claims, may require close cooperation of all

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[605] Ю. Малеев (Note 100), page 13.

[606] А. Разинцева. Стоит ли России спешить с освоением арктического шельфа. Vedomosti.Ru, 04 March 2013. Available online: http://www.vedomosti.ru/library/news/9693221/ostorozhno_arktika (04.03.2013).

[607] Russia: Oil on Icy Waters. Business Eastern Europe, a Weakly Report to Managers of East European Operations. – Economist Intelligence Unit. 17 January 2011, Volume XL, No 2.

[608] S. Pfeifer. BP in $16bn share swap with Rosneft. – Financial Times, 14 January 2011. Available online: http://www.ft.com/cms/s/0/4839b782-2015-11e0-a6fb-00144feab49a.html#axzz1YlrL2pTH (23.09.2011).

[609] Russia discusses Arctic oil licenses for foreign companies. 05.10.2012. Available online: http://rt.com/business/news/russia-arctic-foreign-companies-713/ (10.12.2012).

coastal states. Such cooperation alone shall play as a restrictive factor for the Russian State and economic sovereignty in the Arctic.

8.3.2. Russian Sovereignty over the Northern Sea Route

Section 1.6.1. of this thesis described the Russian position concerning the NSR. Notwithstanding the fact that this transport alley runs through areas outside of Russian sovereign jurisdiction, *i.e.* outside of both Russian territorial sea and EEZ, the Russian Federation considers the NSR to be its national transportation route governed by national legislation. The question that rises here is whether consideration of the NSR as a *historically formed national transportation route* and establishment of the state jurisdiction over it should be understood as extension of Russian sovereignty over the NSR? That notwithstanding the fact that this transportation route lies outside the established and limited territory over which Russia exercises its full sovereignty?

As Russia implies its supreme, indivisible and independent state power on the whole length of the NSR, it exercises state authority inherent to the concept of sovereignty. Also, Russian political and legal strategies for the following years grant the state's economic sovereignty over the wealth of the NSR and state its inviolability and independence from authorities of other states. Though one cannot speak of territorial sovereignty exercised over the NSR – as the route is not an explicit and integral part of the Russian Federation's territory, it is certain that Russian position concerning the NSR bears certain elements of territorial supremacy (as no other state may enact its legislation upon the NSR and all foreign vessels passing the route are obliged to follow Russian jurisdiction), integrity (as Russia treats the NSR as indivisible, *national* transportation system) and independence (as only Russia is entitled to economic benefits to be received from the NSR). One may thus conclude that the Russian Federation has extended its sovereignty (though not territorial sovereignty it its strict sense) over the NSR, has entitled itself with certain sovereign rights and economic benefits and, as such conduct has been accepted by the largest part of the world community, has been performing its sovereignty both on internal level and the international arena.

8.3.3. Russian Claims in the Caspian Sea based on the Concept of Sovereignty

The case of legal determination of the Caspian Sea is a perfect example of how Russia "plays" with the law of the sea in order to protect its sovereign interests. Proceeding from the above, in determining Russian position concerning the legal status of the Caspian Sea, Russia has by all means evaded application of all provisions of UNCLOS to the Caspian basin. Thus, if Caspian is to be considered a "sea" with UNCLOS applicable, it would likely result in Russian losses of maritime zones and continental shelf as well as increased presence of

foreign vessels in these strategically important waters. However, if Caspian is to be considered "enclosed or semi-enclosed sea" sea under UNCLOS, the latter would prescribe for cooperation between coastal states but shall not settle for any specific regime how to use the sea. Though this might seem like a favorable solution to Russia, with UNCLOS applicable each littoral state would have the right to exclusive jurisdiction over a territorial sea extending out to 12 miles and specific economic rights in the EEZs. As has been noted before, application of UNCLOS to the Caspian Sea benefits the states with the longest coastline, and according to the formula "more coast = more seabed" grants them with larger areas of territorial and economic sovereignty. Russian coastline in the Caspian Sea is far from being the longest. It is thus evident that Russian Federation favors the position of keeping the Caspian Sea within sovereignty of littoral states. Russia seems to be ready to protect every legal stand purporting this position. The peculiarity here lies within the fact that Russia is signatory to UNCLOS while other states (except for Iran) are not.

The same pattern can be observed in Russian stand regarding the legal regime of the Caspian. Originally, Russian position in the Caspian presupposed the validity of 1921 and 1940 treaties till the new legal regime of the Caspian is adopted. The main goal of this position may be seen in continuous exercise of almost *absolute* Russian sovereignty over the Caspian basin likewise to Soviet times. As the treaties of 1921 and 1940 are out-dated and do not provide for specific regulations in the regions, Russia experienced more possibilities to influence its neighbors. It is widely believed that from the political point of view Russia benefits from the absence of a precise treaty in the Caspian: on the one hand, it enables Moscow – as well as Tehran – to impede building of a trans-Caspian pipeline, a project that would be in the interest of diversifying the energy supply in the European Union, thereby raising the importance of Turkmenistan and Azerbaijan. On the other hand, current *status quo* allows Russia to put pressure on both Turkmenistan and Kazakhstan as the latter still use oil and gas energy supply resources via Russian territory.[610]

Later on, another stand was taken to support Russian sovereign claims in the Caspian, the position of "divided bottom, common waters". After having concluded bilateral and trilateral agreements with Azerbaijan and Kazakhstan, Russia deems the northern Caspian seabed to be divided amongst the parties with most possible benefit to Russian territorial and economic sovereignty. Not only has Russia laid a course on granting its sovereignty over 19% of the Caspian seabed, but it has also opened the possibilities for realization of it economic rights and independence. Thus, the agreements between the northern Caspian states facilitate the extraction of hydrocarbon resources in their areas. As one Russian analyst stated in July 2003, "the problem of the Caspian Sea, from the point of view of energy resources, has been settled for those countries

[610] Э. Велиев. Прикаспийские страны договорились. – Зеркало. 13 March 2010. Available online: http://www.zerkalo.az/2010-03-13/politics/7871-kaspiy-more-status (31.10.2012).

[the northerners]. The northern part of the sea is fully open for business and investment, and has legal protection,"[611] the latter meaning that the sovereignty issues of northern Caspian states have been settled down. The state of the current conflict can then perhaps best be summed up by the words of the Iranian Deputy Oil Minister Akbar Torkan in April 2003, who announced during ongoing drilling operations that the dispute pertained "only to a small [disputed] section of the sea", mostly the exploitation sites along the Azerbaijan-Iran-Turkmenistan border.[612]

Furthermore, if Russian current legal argument regarding the status of the Caspian Sea becomes codified in international law – either as a system of bilateral agreements, or as the basis for a new Caspian Convention – Russia will likely to be the biggest winner for several reasons. First, playing a visible role in securing a legal regime will allow Russia to be seen as a stabilizing force in the region.[613] Second, Russia's close cooperation with Azerbaijan and Kazakhstan on this narrow legal question will facilitate reciprocal cooperation from those states on problems Russian leaders care deeply about, such as instability in Northern Caucasus.[614] Third, the division of the seabed into national sectors helps influential Russian oil companies to pursue development of recently discovered reserves in the Russian sector, as well as to engage in joint activities with Azerbaijan and Kazakhstan counterparts.[615] Additionally, this position favors Russian aspirations to maintain veto power over underwater pipeline construction efforts.[616] Finally, the "common waters" approach will give Moscow a free hand to patrol the Caspian and fight what it calls "crime and terrorism" as it deems necessary[617] by deploying its troops throughout the Caspian region.

However, the path that Russia has chosen for settling sovereignties in the Caspian in absence of a valid general legal regime – the bilateral agreements – is quite widely criticized. It is considered that Russia's conclusion of agreements with its immediate neighbors can only create a false perception of addressing the unresolved issue of dividing the Caspian Sea, while practically leaving most of the sources of conflicts intact. At best, these agreements could temporarily settle territorial disputes in the northern Caspian Sea for as long as the development of the oil fields in the disputed zones is not feasible for any

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[611] *Ibid.*

[612] M. P. Amineh, H. Houweling. Global Energy Security and Its Geopolitical Impediments. – The Case of the Caspian Region. – Perspectives on Global and Technology. 2007, Volume 6, Numbers 1–3, page 374.

[613] C. Saivetz. Caspian Geopolitics: The View From Moscow. – Brown Journal of World Affairs, 2000, 53, 54-55, page 59 (Reference by B. Dunlap (Note 206), page 120).

[614] S. Blagov. Russia's Asian Policy Gains Momentum. – Asian Times, 14 November 2002 (Reference by B. Dunlap (Note 206), page 120).

[615] F. Hill. Russia: the 21st Century's Energy Superpower? – 20 Brooking Review, 2002, 28 (Reference by B. Dunlap (Note 206), page 120).

[616] C. C. Joyner, K. Z. Walters (Note 202), page 191.

[617] J.-C. Peuch. Caspian: 'Militarization' of the Sea – Myth or Reality? – Radio Free Europe – Radio Liberty. 10 June 2002 (Reference by B. Dunlap (Note 206), page 120).

one, for one reason or another. Any future unilateral attempt for their development will surely lead to conflicts. Even though this arrangement may be suitable for its signatories for a while, it has not resolved the legal issue forever.[618]

In addition, another important legal question relating to bilateral agreements in the Caspian may be asked. Are the states free to conclude separate agreements for division of the Caspian seabed in the light of the Vienna Convention on the Law of Treaties from 1969 and the general norms of international law? The Vienna Convention on the Law of Treaties stipulates that the treaties like the ones concluded between the Russian Federation, Azerbaijan and Kazakhstan are to be compatible with the earlier treaties concluded on the same subject matter. Doctrinal international law explicitly provides that the state is obliged not to conclude agreements that would be incompatible with obligations arising from the previous treaties. As the Caspian Sea remains in joint use of its littoral states, or under sovereignty of the latter, any unilateral action or bilateral agreements aimed at granting specific rights to certain parties ought to be taken only upon mutual consent of the littoral states. This, in turn, raises the objection on validity of the Russian-Azeri and Russian-Kazakhstan treaties on the Caspian seabed delimitation.

Despite the bundle of fundamental legal and political issues that still make the Caspian Sea case a conundrum, it is evident that Russia is by all means trying to assert its pre-eminence and sovereignty in the region. Though accused of yielding to corporate interests in its agreements with Kazakhstan and Azerbaijan, Russia actually revealed pragmatic and consistent pursuit of its national interests through strategic co-operation. By compromising, it has effectively "streamlined its Caspian policy". Moscow vetoed the chance for external governments to participate or mediate delineation negotiations.[619] Though failing its former almost *absolute* sovereignty over the Caspian basin, Russia has established its territorial sovereignty and granted itself economic rights over an enviable portion of the Caspian seabed. Moreover, Russia seeks to establish military superiority throughout the Caspian region and deploy its troops in the northern part of the Caspian Sea, the right that Russia insisted upon and has effectively employed[620].

8.3.4. Russian Claims in the Region of the Black Sea, the Sea of Azov and the Kerch Strait based on the Concept of Sovereignty

Historically, the Russian portion of the Black Sea, the Sea of Azov and the Kerch Strait has been under entire sovereignty of the Russian Empire and later

[618] H. Peimani. Growing Tension and the Threat of War in the Southern Caspian Sea: the Unsettled Division Dispute and Regional Rivalry. – Perspectives on Global and Technology. 2003, Volume 2, Number 3-4, page 583.
[619] C. C. Joyner, K. Z. Walters (Note 202), page 208.
[620] *Ibid.,* page 207.

the Soviet Union. After the dissolution of the Soviet Union and its sphere of influence, Russia is unable to unilaterally control and exercise full and *absolute* sovereignty over these areas due to Ukrainian presence. Moreover, as both the Black Sea and the Sea of Azov are considered "seas", the international law of the sea and the legal regime for maritime zones is to be applied in the region. Though Russia has lost its full sovereignty due to the emergence of a new coastal state, independent Ukraine, with its lawful right to the national maritime zones in these seas, Russia is still struggling to retain its lapsed control where possible, as in the case of the Kerch Strait and the Sea of Azov.

Denial of Ukrainian arguments on Soviet administrative border and continuous support of a modified median line as the delimitation of the Sea of Azov could grant Russia a portion of resource-rich seabed that is currently claimed by Ukraine. However, the resource factor is not the only one leading Russian position on the issue, the following aspects playing an important role. At first, Russia is not interested in losing the sale market of its own gas. If Ukraine is to explore and exploit the largest portion of the continental shelf of the Sea of Azov, it will become less dependent on Russian gas.[621] Secondly, Russian is not interested in the presence of competitive foreign oil and gas companies in the area.[622] Thirdly, exploration and exploitation of new oil and gas reserves shall decrease the resources price on the world market, which is also not anticipated by the Russian Federation.[623] Consequently, if Russia manages to persuade Ukraine to apply the modified median line to the delimitation of the Azov Sea, it will be Ukraine who shall lose its current sovereignty over the area as well as the hope for its energetic independence from Russia[624].

The fear expressed by Ukrainian international political scientist G. Kuhaleishvili that Russia will "persuade" Ukraine to accept Russian terms of the delimitation treaty by the promise to review the terms of existing Russian-Ukrainian gas arrangements[625] is very strong on the Ukrainian side. Continuous dependence on Russian gas and financial inability to develop the resources of the Sea of Azov by itself may become the crucial denominators to lead Ukraine to the loss of its legal and justified positions in the Sea of Azov. As the preliminary agreement between Russia and Ukraine from July 2012 does not focus on delimitation of the Sea of Azov, the question of sovereign power over this area and its resources remains open.

On the other hand, having agreed with Ukraine upon consideration of the Kerch Strait to be the territorial waters of both Russia and Ukraine, or at least having declared the Kerch Strait an area of joint use in mutual interests of the states, Russia shall be able to control the passage of the third state ships to the Sea of Azov, as well as gain benefits from financial payments currently collected by Ukraine from the use of the Kerch Strait. According to the

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621 Г. Кухалейшвили (Note 257).
622 *Ibid.*
623 *Ibid.*
624 *Ibid.*
625 *Ibid.*

agreement reached by Russian and Ukrainian presidents in July of 2012, the Kerch-Yenikalskiy Channel shall be governed by joint efforts of both countries, with the details on responsibility and distribution of profit to be yet agreed.[626] Ukrainian political scientist G. Kuhaleishvili believes that having agreed to joint exploitation of the Kerch-Yenikalskiy Channel, Ukraine has lost its monopolistic control over the area, has deprived itself of further exercise of its full sovereignty over the Kerch Strait and has voluntarily given away a part of charges gathered for the passage through the Kerch-Yenikalskiy Channel.[627] In the light of the above, the Russian-Ukrainian preliminary agreement can be considered to be strongly in favor of Russian sovereign interests. How precisely the joint use of the Kerch-Yenikalskiy Channel shall be regulated is still to be settled by the parties.

8.3.5. Russian Claims in the Baltic Sea based on the Concept of Sovereignty

The present state of affairs in the Baltic Sea is such that Russian state sovereignty as its supreme power over certain maritime spaces is limited, first of all, by the precise compliance to the regime of international law of the sea as established in UNCLOS. Historically though, Russia has exercised unlimited state and economic sovereignty over its portion of the region, *e.g.* at the time when the Baltic Sea was declared Russian and Soviet *mare clausum*. One may further claim that it was due to the actions of the Soviet Union that the scope of extension of territorial sovereignty from land onto the Baltic Sea has changed.

According to the historians, the traditional breadth of adjacent waters under sovereignty of coastal Baltic State has varied from 3 to 4 nautical miles. The practice of the states at the Baltic Sea regarding this limit was continuous and homogenous for centuries, so that it came to be considered as the Nordic custom.[628] In the midst of twentieth century the Soviet Union was the first to introduce the 12 nautical miles territorial sea to the Baltics. At the time this enlargement proposed by the USSR found strong opposition of the neighbors. Nevertheless, the Soviet Union continued to apply the 12 nautical miles territorial sea limit, and rejected the Danish and Swedish arguments that 3 miles territorial sea breadth had to be treated as a generally recognized customary international law norm (which it was indeed during most of the nineteenth and the first half of the twentieth century). Such actions of the USSR can be interpreted as *dually illegal*: not only there were no international legal grounds for such practice, but also it was an explicit rejection of the existing customary international law. However, as history indicates, the 12 nautical miles territorial sea became legally justified in 1982 with UNCLOS. At first applied by the USSR contrary to international law, the breadth of 12 miles is now the general

[626] С. Сидоренко. Двое из Дворца. – Газета "Коммерсантъ Украина", 13 July 2012, nr 109 (1599). Available online: http://kommersant.ua/doc/1979261 (30.10.2012).
[627] Г. Кухалейшвили (Note 257).
[628] *Supra.,* Note 324.

limit of territorial sea in the Baltics (except for Finnish and Estonian territorial seas in the Gulf of Finland).

Second, Russian sovereignty over the Baltic Sea is limited by the presence of other littoral states, all parties to UNCLOS and thus entitled to and having established their sovereignty or sovereign rights over specific maritime zones in the area. However, one might characterize the balance of coastal states' sovereignties in the Baltic Sea by a famous quote from G. Orwell's "Animal Farm": "all animals are equal, but some animals are more equal than others". Namely, Russian sovereign presence in the Baltic Sea is served by the Estonian-Finnish agreement to limit their territorial seas so that a 6 nautical mile wide corridor in the middle of the Gulf of Finland is created. This channel belongs to the coastal states' EEZ, where all ships and aircrafts enjoy the freedom of high seas with respect to navigation and overflight, and all countries are entitled to lay submarine cables and pipelines. Initially the agreement was established to maintain the route for free passage of ships and aircrafts through the Gulf of Finland, especially those travelling to the port of St Petersburg and from St Petersburg to Russian Kaliningrad. As of today, this agreement specifically profits the described Nord Stream gas pipeline project, which is essential for Russian internal (being one of the major pipelines to dispose Russian to Europe) and external economic sovereignty.

One could speculate here whether Estonia and Finland could, upon mutual consent and following the term for advance notice, return to the maximum possible limit of the territorial sea and thus eliminate the passage in the status of EEZ through the Gulf of Finland. As has been discussed above, though theoretically possible (and such proposals have been made, for example, by a group of Estonian public figures in 2005[629]), it is highly unlikely to happen. One could further rephrase the question and ask whether in case if both Estonia and Finland declared their territorial sea to the maximum limit possible and established the delimitation line between their adjacent territorial seas, would the Nord Stream gas pipeline have been built under these conditions? Though purely speculative, proceeding from categorical position of Estonia regarding the rejection of Nord Stream's application to start the gas pipeline planning process by conducting surveys in Estonian EEZ, Estonia would likely prohibit any pipeline planning and laying activity in its territorial sea. The position of Finland on this issue is unpredictable, though, if Finland would have agreed and let the Nord Stream building in its territorial sea, the latter would fall under full territorial and economic sovereignty of the Finnish state.

It seems that having unilaterally limited their sovereignty by narrowing the limits of territorial sea, Estonia and Finland have created a prevailing position for Russian economic sovereignty in the Baltic Sea. The question remains whether Russia shall use it with due regard and respect to the interests of other countries, or shall try to exercise influence over the Baltic and other States by unilateral ascertainment of new gas prices, intentional and voluntary inter-

[629] *Supra.,* Note 361.

missions of gas supplies or unsanctioned military actions of Russian navy in the Baltic Sea. So far the Nord Stream consortium headed by Russia and Germany has been law-obedient and trustworthy; whether it is its "true face" shall become evident in the nearest future.

8.4. New Meaning of Russian Sovereignty over World Oceans and Seas

Russian imperial sovereignty and its Soviet dominion over territories of the former Russian Empire (with exception to Finland and most of Poland) and few provinces that tsars have never conquered (Western Ukraine, the Kaliningrad region, Tuva)[630] can be traced to Russia's present claims on far-reaching quasi-territorial sovereignty over the Arctic. As has been illustrated, Russia claims a large portion of extended continental shelf in the Arctic Ocean, and considers the Northern Sea Route as its national transportation line. Similarly, Russia plays the game of *divide et impera* with the Caspian littoral States in pursuing control over almost 1/5 of the Caspian sea and seabed. Moreover, Russia obeys international border agreements signed by the Soviet Union only if the latter do not endanger its territorial sovereignty and entail any territorial losses.

Likewise, Russia aims to extend its economic sovereignty by concluding an economically beneficial preliminary agreement with Ukraine on the border in the Kerch Strait, and by having built a profitable Nord Stream gas pipeline to the seabed of the Baltic Sea. The Russian concept of national sovereignty has always been inclined to exaggerations (remember here the words of F. F. Martens on the Great and Powerful Russia, and both Soviet and Russian anthems calling the State "mighty" and "great"). As has been illustrated above, the general approach to the concept of sovereignty taken by Russian legal and political scholars and reflected in certain state documents bears a rather *absolute* character. Accounting on all these factors and proceeding from the historical perspective and Russian current interests in the realm of law of the sea, one could speak of *extensive* concept of sovereignty (with the extensiveness reflected in aspects of the notion of sovereignty), that has so far determined Russia's approach to the law of the sea and the State's subsequent legal practice in the sea and ocean areas.

Furthermore, if one returns to the assumption that Russian behavior in the seas/oceans researched in this thesis (as prompted by the concept of sovereignty) falls under rational choice theory, it shall become evident that the ultimate goal that Russia wants to achieve by its legal claims and practices is the *absolute* sovereign domain (in the words of Professor N. Grachev, "ownership") over resources, mostly hydrocarbons like oil and gas. In 2011 Russia has once again proven its status of the world leader in export of hydrocarbons. The profit that the Russian Federation received in 2011 from export of oil alone amounted to 171.7 billion USD, whereas the export of Russian gas has risen by 34.3% and

[630] D. Lieven (Note 383), page 288.

replenished the State treasury by 58.473 billion USD.[631] In total amount of Russian export as of November 2011, the export of oil constitutes 53% and the export of gas more that 12%.[632]

In the light of world's scarcity of resources and States' selfishness,[633] State's economic and commercial wealth has become one of the leading factors in determining the State's position as a "Great Power". This race to obtain sole jurisdiction over vast supplies of hydrocarbons and sole jurisdiction underlies Russia's motives for *extensive* territorial and economic sovereignty. As the "title to exercise jurisdiction rests in State's sovereignty",[634] it is vital for Russia to establish extensive territorial and economic sovereignty over the water areas to reach the desired control. One could further interpret Russian contemporary notion of sovereignty over seas and oceans as dependent on supremacy over hydrocarbons that in turn shall support political-legal selfsufficiency of the Russian Federation on the international arena. Such a conclusion may be evidenced in the cases of all discussed four seas/oceans. Thus, Russia aims to reach *absolute* sovereign control over oil and gas fields through numerous measures: it presents legal claims over the resource-rich Arctic continental shelf; engages itself in cooperation games in the Caspian in order to agree with the littoral States on a larger portion of Caspian seabed; purports to retain its economic control in the Black Sea by influencing Ukraine to enter into agreements that favor first and foremost Russian interests; and finally, uses the Baltic Sea seabed to maximize its present and potential economic benefits.

Acting as a rational player, Russia understands that its – once full – sovereignty over resources in the discussed four seas/oceans is restricted by the presence and behavior of other States. In order to justify its claims in the eyes of the international community, Russia turns to the tools offered by international law of the sea. One could conclude that Russia's approach to the law of the sea, as determined by State's notion of *extensive* sovereignty and directed to increase its control over vast supplies of hydrocarbons, as well as Russian application of UNCLOS and correspondent domestic legal regulation and policies in the chosen water areas, serves as an instrument for justification of Russia's claims and the State practice in the areas. Russia's position in the realm of the law of the sea is thus instrumental; but it is just one of the means, together with political, strategical and military influence, that Russia uses to get closer to its goal of sovereign supremacy over hydrocarbons.

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[631] Е. Струкова. Россия топит мир: экспорт нефти и газа из РФ снова бьет рекорды. – Информационный портал РБК, 07 February 2012. Available online: http://top.rbc.ru/economics/07/02/2012/636603.shtml (11.01.2013).

[632] *Ibid.*

[633] J. M. von Dyke. Sharing Ocean Resources – In a Time of Scarcity and Selfishness. – Law of the Sea: The Common Heritage and Emerging Challenges. Ed. By H. N. Scheiber. Martinus Nijhoff Publishers, 2000, page 36.

[634] Judgement No 9 of Permanent Court of International Justice from 7 September 1927. France vs Turkey. The Case of The S.S. Lotus. Available online: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (12.01.2013).

Russia's approach to the law of the sea and subsequent State practice relying on the latter, both influenced by Russia's impetus for *extensive* sovereignty, are no doubt *sui generis*. Without diminishing the importance of UNCLOS regulation in Russia's approach to the law of the sea, this thesis has illustrated that Russia's attitude and implementation of the Convention is not uniform and homogenous. In addition to the conclusions drawn in the first part of this thesis, the following observations can be made. On one hand, Russia has adopted the regulation of UNCLOS into the subsequent domestic regulation in order to use it as the legal grounds for extension of Russian state sovereignty from the land to the sea. On the other hand, besides providing for grounds for sovereign extension, UNCLOS sets limits to Russian sovereignty and its *absolute* character (*e.g.* by providing the right of innocent passage of foreign ships in Russian territorial waters, establishing the sovereign rights – and not full sovereignty – over the continental shelf, *etc*). Therefore Russia seems to rely upon UNCLOS in the instances it favors Russia's interests more that it restricts them. Similarly, Russia's adherence to legal and binding international treaties is sometimes rather voluntary depending on the outcomes Russia aims to achieve; therefore Russia's claims and legal practice in the Arctic Ocean, the Caspian Sea, the region of Black and Azov Seas and the Baltic Sea are not always continuous and legitimate. Russia's position in the law of the sea is the position of a "Great Power" that sees international law as a tool used to establish and reach its utmost goals. Russia as a "Great Power" seems to comply with the international law to the extent it is useful for the State and its citizens. In this sense Russian legal practice could be compared to another "Great Power", the United States, who acts rather arbitrarily regarding ratification of UNCLOS.

Namely, notwithstanding a very strong initiative expressed in US for ratification of the Convention,[635] the US Senate has not yet voted for it, relying *i.a.* on the fear that the US adherence to UNCLOS shall result in serious loss of the state's economic sovereignty over the extended continental shelf and its resources. As Professors H. Kalmo and Q. Skinner suggest, in the "effort to get to the political behind sovereignty speech, to what it actually refers, at least most of the time, (…) the argument is about allocating power."[636] Together with national sovereignty argument, the anti-ratification proponents put forth the concerns over deep seabed mining, protection of the marine environment, taxation questions, navigation rights, harm to de-militarizing operations, dispute settlement etc. By not ratifying the Convention, the United States exercises its sovereignty over its continental shelf with no such restrictions as provided by UNCLOS in accordance with U.S. laws (the Truman Proclamation, the U.S. Outer Continental Shelf Lands Act (OCSLA) from 1953, the Deep Seabed Hard Mineral Resources Act from 1980) that declare the mineral resources on and

[635] See for instance J. N. Moore. United States Adherence to the Law of the Sea Convention. A Compelling National Interest. A prepared testimony Before the House Committee on International Relations. 12 May 2004. Available online: http://www.virginia.edu/colp/pdf/house-testimony.pdf (13.01.2013).

[636] H. Kalmo, Q. Skinner (ed.) (Note 400), page 9.

below the surface of the continental shelf to be held by the federal government for the benefit of the American people.[637] One could thus observe that the US approach to the law of the sea is likewise determined by the State's notion of extensive sovereignty, and is rather selfish and arbitrary due to its status of a big player on the international arena.

Motivated by their history, both the Russian Federation and the United States rely on the concept of sovereignty in formation of their approach to the law of the sea. Both States are major powers in today's world, and seek to strengthen their positions with territorial control over vast areas and economic supremacy over resources. The Russia's notion of sovereignty is *extensive*; Russia's application of UNCLOS and other international treaties, as well as Russia's legal practice in the sphere of the law of the sea is not uniform and largely depends on the gains Russia desires to achieve. The Russian approach to the international law of the sea may be characterized as instrumental, for Russia uses it to justify its legal claims and interests.

Nevertheless, in exercise of its *extensive* sovereignty in the realm of the law of the sea, Russia is limited by the presence and claims of other States. Moreover, it is restricted by the generally sensed fear for the future of ocean ecosystems that is enacted in many environmental regulations and legal frameworks. The oceans, the place where life originated, should not be the place where it ends,[638] is the world's slogan today. Therefore, there is minimal risk that that Russia may abuse its strive for extensive sovereignty, or shall somehow damage the Earth ecosystems and the future of following generations by exercise of extensive supremacy over supplies of hydrocarbons. Calling to the epigraph chosen for this thesis, Russia's "clear and simple religion – Russia" that, if threatened, "shall depart from this world with its enemies" shall not be feared. The Russian Federation and its leaders today seem to understand that only cooperation can lead to circumstances that shall grant Russia its desired resources and control. Despite some rather emotional actions (such as the one involving the titanium flag at the North Pole) or loud political statements, there are sufficient grounds for expecting Russia to be open to negotiations over the new treaties (perfect examples being the Russian-Norwegian border treaty or the Caspian bi- and tripartite agreements), to hold back some of its pretentious claims, and to remain in line with its legal obligations and grounded promises (like the law-obedient project of Nord Stream gas pipeline) – all these in order to reach solutions that shall in one way or another maximize Russia's benefits.[639]

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[637] S. Groves. U. N. Convention on the Law of the Sea Erodes U. S. Sovereignty over U. S. Extended Continental Shelf. Backgrounder. Published by The Heritage Foundation. 2011, No 2561, Page 5. Available also online: http://thf_media.s3.amazonaws.com/2011/pdf/bg2561.pdf (16.08.2012).

[638] R. Friedheim. The Ocean Policy Future. Sharing Ocean Resources. – Scheiber, H. N (ed.). Law of the Sea: The Common Heritage and Emerging Challenges. Martinus Nijhoff Publishers, 2000, page 304.

[639] I. Nossova (Note 388), page 119.

CONCLUSION

The research objective set in this thesis was twofold. First, the thesis aimed to examine and analyze how Russia uses the framework and principles of the law of the sea to justify its claims and legal practices in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov, and the Baltic Sea. The thesis demonstrates how Russia "speaks" the universal language of the law of the sea from the position it has taken in the four researched maritime areas. Second, the thesis tests the hypothesis that the "Great Powers," or former Empires such as Russia, tend to have an *extensive* concept of sovereignty, which determines their approach to the law of the sea and is reflected in their extensive claims over the seas and oceans. The thesis presumed that international law of the sea is still ambiguous enough to allow for different interpretations and applications, so that the States with greater power (*e.g.*, Russia), often achieve their goals under international law of sea. As such, Russia may be using the tools offered by the international law of the sea to justify its interests as determined by Russia's *extensive* concept of sovereignty.

The first part of this thesis laid down the empirics, *i.e.*, mapped and described contemporary Russia's legal claims, on-going debates and the State's practice in the four maritime regions adjacent to the Russian Federation. An objective, complex and multilateral picture of Russia's legal past and present in the Arctic Ocean and the three seas is an interesting and informative value in itself. For the objective of this research, it has served as the basis for further analysis of legality of Russian State practice in the Arctic Ocean, the Caspian Sea, the region of Black Sea and the Sea of Azov, and the Baltic Sea in the light of universally recognized norms and principles of international law of the sea. The analysis allowed the author to compare the pattern of Russia's legal behavior in the chosen maritime areas, and to draw certain conclusions on Russia's approach to the law of the sea in various factual circumstances, *i.e.* the conditions of four oceans/seas.

The factual material and the analysis presented in the first part of the thesis have led the author to the following conclusions. The Russian Federation has been subject to UNCLOS since 1997. The Convention is applicable to all of the maritime regions chosen in this thesis except for the Caspian Sea. As has been observed, the application of UNCLOS by the Russian Federation lacks universality and homogeneity. Thus, Russia insists on implementation of the Convention to the Arctic Ocean, but is ready to violate the rules of UNCLOS with respect to establishment of baselines and basepoints or to consideration of the Northern Sea Route as an international straight, not as its "national transportation communication". Russia rejects application of the Convention to the Caspian Sea, though there is no universal accepted stand on the status of the Caspian Sea as an international lake where the Convention would not be applied. Likewise, Russia treats the Black Sea as a Russian-Ukrainian lake, notwithstanding the fact that under international law, the Black Sea is strictly a "sea" that falls within the scope of UNCLOS regulation. Even in the Baltic Sea,

where the country seems to duly follow the Convention, Russia has managed to violate its certain provisions.

Moreover, there is no general agreement concerning application and interpretation of UNCLOS within the Russian Federation itself. For example, the official position taken by Russian Federation in the Arctic Ocean differs from the approach supported by the majority of the Russian legal scholarly elite. The position of the latter, as expressed by Professor A. N. Vylegzhanin and others, is to treat the Arctic with respect to its history and the dominant position of the Russian Federation, and consequently apply the method of sectoral division of the Arctic area and seabed. Russian MID, in turn, led by the need to play and win on the international arena, is solely relying on UNCLOS and the tools offered by it. Likewise, the stand of majority of Russian legal scholars concerning the legal status of the Caspian Sea differs from the official position of the Russian Federation: the former see the Caspian as a sea and subject to UNCLOS regulation, while the latter view the area to be a completely landlocked lake open to condominium regime of five littoral states.

Russia's ambiguous approach to the regulation of the law of the sea can further be observed in Russia's adherence to the border treaties signed by the Soviet Union. Notwithstanding its official state continuator status nor the principle that the change of sovereignty does not affect boundaries, Russia seems to accept the boundary agreements signed by the USSR as final and binding only in the cases when such agreements reward Russia with a favorable position. In the example of the Sea of Azov, Russia continues to reject the administrative border established in the Soviet times between the Crimean oblast of the Ukranian SSR and Krasnodar krai of the RSFSR, as the admittance of such borderline would deprive Russia of certain economic benefits. Here a parallel could be drawn with Tartu Peace Treaty from 1920 between independent Republic of Estonia and Russian RSFSR, which established the border between two countries, and which has not been recognized by the Russian Federation today.

Though the rationale underlying Russia's legal practice appears to vary on a case-by-case basis, generally it can be concluded that Russian approach to UNCLOS and the law of the sea is not universal and homogenous, but largely depends on the economic and political outcomes that Russia aims to achieve. For example, adherence to UNCLOS in the Arctic Ocean secures Russia with a internationally accepted legal opportunity to justify its claims over the resource-rich extended continental shelf, whereas advocating for the Russian Arctic sector would have set Russia, both in legal and political terms, apart from the rest of the world community. Division of the Caspian Sea as an international lake under the modified meridian method awards Russia with a larger portion of Caspian seabed in comparison to the maritime zones Russia would be entitled to under UNCLOS. Additionally, denial of UNCLOS' application to the Caspian Sea and the Sea of Azov eliminates the risk that third states shall gain certain rights in the area that could jeopardize Russian sphere of influence. Russian pattern for renouncement of border treaties previously signed by the Soviet

Union seems to rely on potential land or other economic losses that acceptance of such treaties would entail to Russia.

Moreover, having once been the dominant power in the Arctic Ocean, the Caspian Sea, the Baltic Sea and the Sea of Azov, Russia's current State practice in the four oceans/seas in the realm of the law of the sea can be seen as relatively "imperialistic", striving for continuous dominion over the adjacent water spaces and support of Russian "Great Power" position. This conclusion reached in the first part of the thesis has determined the hypothesis tested in the second part herewith, namely, that the "Great Powers" or former Empires like Russia tend to have an *extensive* concept of sovereignty, which dictates their approach and extensive claims in the realm of the law of the sea.

In order to prove the hypothesis as stipulated above and to connect the doctrine of sovereignty to the state's approach to the law of the sea, the following method has been followed. First, the thesis has established that Russia's current position of a leading power on the international arena is the "echo" of Russia's imperial past, having been influenced by the country's strong strive for sovereign, territorial and economic dominion over land and sea. Second, the thesis has researched the historic and contemporary understanding of the concept of state sovereignty in the understanding of Russian legal scholars and state authorities. As the thesis revealed, the Russian doctrine of state sovereignty places specific attention to the elements of state sovereignty (such as supreme, independent and indivisible state power; territorial supremacy, territorial independence and territorial integrity; state jurisdiction); speaks of internal and external state sovereignty; and differentiates between the concepts of economic and national sovereignty. The doctrine of state sovereignty is deeply embedded in the Constitution of the Russian Federation. The author concluded that the concept of state sovereignty in the mindset of the majority of Russian legal scholars, as supported by the subsequent Russian legislation, bears a rather *absolute* character, meaning that a sovereign state (such as the Russian Federation) is politically, legally and economically self-sufficient and independent, both internally and externally, from any other states.

Third, the thesis has described and proven the close connection that exists between the concept of sovereignty and a state's approach to the law of the sea. Namely, the very development of the international law of the sea can be seen as a historical transition from the concept of *communis omnium naturale iure* or "common to all humankind" into the national maritime zones division due to ascertainment of states of their sovereignty over world oceans and coastal waters. The notion of state sovereignty is enacted in the provisions of UNCLOS regarding Territorial Sea (by providing for state sovereignty of the coastal state in the adjacent belt of the territorial sea and its subsoil), Exclusive Economic Zone (by entitling the coastal state with sovereign rights for the purpose of exploration, exploitation, and preservation of natural resources), Continental Shelf (by granting the coastal state with sovereign, exclusive and inherent rights to explore the continental shelf and exploit all its natural resources). The Convention offers legal justification for expansion of the coastal state's

sovereignty horizontally (from the land towards the high seas) and vertically (including the seabed, the subsoil and the continental shelf thereof), and serves as the legal basis for exercise of state sovereignty in realm of the law of the sea. Having ratified the Convention and having enacted its provisions into national legislation, the Russian Federation is entitled to exercise its state sovereignty over adjacent maritime areas.

Finally, proceeding from previous analysis, the research has connected the doctrine of state sovereignty in the understanding of Russian legal scholars and state authorities to the Russian Federation's approach to the law of the sea and the State's contemporary position in the four oceans/seas under scrutiny. Russia can be seen expanding its territorial sovereignty in the Arctic region by preserving the polar seas (the Kara Sea, Laptev Sea, East Siberian Sea) in its internal waters; allowing itself large discrepancies in determination of base-points and establishment of baselines; treating the Northern Sea Route, though falling outside of Russian sovereign jurisdiction, to be its historically formed national transportation route. Furthermore, Russia's submission to the CLCS on the outer continental shelf is widely considered as its "territorial expansion" and the pursuit to establish Russian state sovereignty over rich resources of the Arctic continental shelf. It is believed that should the CLCS recognize Russian specified claim to the extensive Lomonosov Ridge, Russia will gain sovereign and exclusive rights to exploit and explore up to 60% of any hydrocarbons found in the High Arctic. This, in turn, shall significantly contribute to Russian economic sovereignty in the Arctic. Russian recent political steps – establish-ment of border treaty with Norway in the Barents Sea – may also be interpreted in the light of Russian sovereignty expansion. However, the sovereignty that Russia desires to exercise over Arctic cannot bear the *absolute* character due to several restrictions, such as limitations of sovereignty enacted in UNCLOS, claims of the other stakeholders to the Arctic Ocean, and lack of sufficient financial means for exploitation and exploration of the Arctic resources.

Similarly, Russia is striving for establishment of its sovereign interests in the questions concerning the legal status and legal regime of the Caspian Sea. Denying application of UNCLOS to the Caspian basin – that would result in smaller portion of Caspian waters and resource-rich subsoil – and claiming the Caspian to be an international lake favors Russian territorial and economic sovereignty, as does Russian support to the "divided bottom, common waters" regime of the Caspian. By entering into bi- and tripartite agreements with the Caspian littoral states that favor Russian interests, Russia tries to assert its pre-eminence and (once *absolute*) territorial and economic sovereignty in the region.

Likewise, Russia seems to struggle to retain its lapsed full sovereignty in the region of the Black Sea, the Sea of Azov and the Kerch Strait. Denial of the Ukrainian arguments on Soviet administrative border and continuous support of the modified median line for delimitation of the Sea of Azov would grant Russia a portion of resource-rich seabed that is currently claimed by Ukraine. If Ukraine is to explore and exploit the largest portion of the continental shelf of

the Sea of Azov, it will become less dependent on Russian gas and may invite competitive foreign oil and gas companies to the area. Additionally, exploration and exploitation of new oil and gas reserves shall decrease the resources price on the world market. Consequently, if Russia manages to persuade Ukraine to apply the modified median line to the delimitation of the Azov Sea, it will Ukraine who shall lose its current sovereignty over the area and Russia who gets an additional trump in support of its territorial and economic sovereignty.

Russian extension of state sovereignty in the Baltic Sea may be seen in the historical establishment of Soviet territorial sea of 12 nautical miles, as opposed by traditionally applied territorial sea of 3–4 nautical miles; or by making use of the 6 nautical mile corridor created by Estonia and Finland in the middle of the Gulf of Finland in the status of coastal states' EEZ. Initially the agreement between Estonia and Finland to limit their territorial seas in the Gulf of Finland was established to maintain the route for free passage of ships and aircrafts through the channel, especially those travelling to the port of St Petersburg and from St Petersburg to Russian Kaliningrad. As of today, this agreement specifically profits the Russian-German Nord Stream gas pipeline project, which is essential for Russian internal (being one of the major pipelines to dispose Russian to Europe) and external economic sovereignty.

Thus, having considered Russian behavior in the Arctic Ocean and the three seas as influenced by the doctrine of state sovereignty, the author of this thesis has come to the conclusion that Russia may be said to apply a modern, *extensive* approach to the notion of sovereignty over seas and oceans. Russia's strive for *extensive* territorial and economic sovereignty over maritime spaces, in turn, sees its utmost goal in the establishment of *absolute* control over vast supplies of hydrocarbons, mostly oil and gas. Thus, Russia aims to reach *absolute* sovereign control over oil and gas fields by presenting legal claims over the resource-rich Arctic continental shelf; plays cooperation games in the Caspian in order to agree with the littoral States on a larger portion of resource-rich Caspian seabed; purports to retain its economic control in the Black Sea by influencing Ukraine to enter into agreements that favor first and foremost Russian interests; finally, uses the Baltic Sea seabed to maximize its present and potential economic benefits via Nord Stream gas pipeline project. Therefore one could speak of Russian contemporary notion of sovereignty over seas and oceans as dependent on supremacy over hydrocarbons that, in turn, shall grant political-legal selfsufficiency of the Russian Federation on the international arena.

As a rational player restricted by the presence and actions of other rational players on the international arena, Russia uses the tools of international law of the sea as an instrument for justification of Russia's claims and the State practice in its maritime areas. The ways Russia uses tools of international law of the sea depend on the sovereign interests that Russia wants to achieve. In this sense Russian legal behavior in the realm of the law of the sea is similar to another "Great Power", the United States, who acts rather arbitrarily regarding

ratification of UNCLOS. Nevertheless, in exercise of its *extensive* sovereignty in the realm of the law of the sea, Russia is limited not only by the other States, but also by the generally sensed fear for the future of ocean ecosystems that is enacted in many environmental regulations and legal frameworks. The danger that Russia may abuse its strive for *extensive* sovereignty over seas and oceans, or shall somehow damage the Earth ecosystems and the future of following generations by exercise of extensive and absolute supremacy over supplies of hydrocarbons, is minimal. Notwithstanding their imperial ambitions, the Russian Federation and its leaders today seem to understand that only cooperation can lead to circumstances that shall grant Russia its desired resources and control over hydrocarbons. Therefore Russia seems to be open to initiate dialogue, engage in cooperation and hold back some of its pretentious claims in the realm of law of the sea.

SUMMARY IN ESTONIAN

Venemaa rahvusvahelisest õigusest tulenevad nõuded riigiga külgnevates meredes: mereala kui suveräänsuse laiendus

Venemaa Föderatsioon on kaasaegse maailma territooriumi suuruselt suurim riik, mis paikneb Põhja-Jäämere (edaspidi ka „Arktika Ookean“) ja Vaikse Ookeani vahel ning on ümbritsetud 12 mere ja Kaspia mere/järvega. Viimasel ajal on Vene Föderatsiooni hääl riigiga külgnevates merealades kõlanud üsna valjult ja nõudlikult. Nii on Venemaa esitanud mitmes riigiga külgnevas meres täiendavaid nõudeid mere- ja allveealade suhtes. Tänapäeva maailmas, kus riigivõim merealade üle võimaldab riigil “omada” vee- ja merepõhja loodusvarasid ning toob kaasa riigi majandusliku-, territoriaalse-, poliitilise-, strateegilise- ja sõjalise ülemvõimu, on Venemaa nõuded merealadel tekitanud suurt ärevust nii teiste riikide seas kui ka rahvusvahelises ühiskonnas.

Iseseisva riigina teiste sõltumatute riikide keskel on Venemaa rahvusvahelise õiguse subjekt. Selleks, et õiguslikult põhistada merealades esitatud nõudmisi teiste rahvusvahelise õiguse subjektide ees, toetub Venemaa rahvusvahelise mereõiguse regulatsioonile. Kuid siiski, milline on Venemaa arusaamise kohaselt rahvusvaheline mereõigus ja kuidas seda kohaldada? Käesoleva doktoritöö esmaseks uurimiseesmärgiks on uurida kuidas Venemaa kasutab rahvusvahelise mereõiguse regulatsiooni ja põhimõtteid enda nõudmiste ja õigusliku praktika argumenteerimiseks riigiga külgnevates veealades: Põhja-Jäämeres, Kaspia- ja Läänemeres, Musta mere ja Aasovi mere regioonis. Teisisõnu soovib antud uurimus näidata, kuidas Vene Föderatsioon “räägib” rahvusvahelise mereõiguse universaalset keelt nelja valitud mereala näitel.

Uurimuseks võetud merealade valik on põhjendatav sellega, et (i) Venemaa on kõigi valitud merealade rannikuriik; (ii) valitud merealad omavad suurt tähendust ülejäänud maailma jaoks (s.t Põhja-Jäämeri ja Kaspia meri kui tähtsad majandusressursside ja energia allikad, Aasovi meri kui oluline transpordimarsruut regioonis, ning Läänemeri kui maailma üks intensiivseim laevatav ala ning paljude Läänemere rannikuriikide ainus mereühendus maailmaookeaniga); (iii) ajalooliselt on Venemaa nautinud täielikku või peaaegu täielikku ülemvõimu kõigis neljas merealas, mistõttu on Venemaa kohalolek valitud meredes pikaajaline ja kaugeleulatuv; (iv) kaasajal on Venemaa esitanud teatud mereõiguslikke nõudeid või on kaasatud mereõiguslikesse vaidlustesse kõikides valitud regioonides; (v) rahvusvaheline üldsus ei saa ega soovi ignoreerida Venemaa nõudeid ja riigi käitumist valitud merealades, ning Venemaa nõuetele adekvaatse, kompetentse ja õiguspärase vastuse esitamise võtmeks on Venemaa õigusliku positsiooni mõistmine ja detailne analüüs. Siiski ei püüa doktoritöö olla selles esitatud faktiliste asjaolude põhjal ammendav (nii ei ole käesolevas uurimuses käsitletud näiteks Venemaa ja Jaapani vaidlust merepiiride üle), kuid lähtub eeldusest, et valitud nelja mereala uurimisel võib jõuda tulemusteni, mis üldiselt iseloomustavad Venemaa tegevust rahvusvahelise mereõiguse valdkonnas. Samuti peab käesoleva uurimuse autor oluliseks rõhutada, et doktoritöö

põhineb nii Venemaal kui ka Lääne maailmas kättesaadavatel kirjandus- ja meediaallikatel – nimetatud asjaolu on autori hinnangul võimaldanud tal käsitleda uurimisobjekte võimalikult mitmekülgselt ja objektiivselt.

Käesoleva töö teiseks uurimiseesmärgiks on, praktikalt teooriasse minnes, seostada Venemaa kaardistatud lähenemist mereõigusele ja riigi vastavat praktikat mereõiguse vallas (valitud merede näitel) riigi suveräänsuse doktriini kontseptsiooniga. Doktoritöös püstitatud hüpoteesi kohaselt suurriigid (inglise keeles "*Great Powers*") või endised impeeriumid nagu seda on Venemaa kalduvad kohaldama *ekstensiivset* suveräänsuse kontseptsiooni, mis määrab ka nende lähenemise rahvusvahelisele mereõigusele ning peegeldub toaliste riikide ekstensiivsetes nõuetes merede ja ookeanide üle. Antud uurimus eeldab, et rahvusvaheline mereõigus on mõnedes aspektides jätkuvalt mitmetähenduslik, võimaldades erinevaid tõlgendusi ja kohaldamisviise, mistõttu suurima võimuga riigid – nagu seda on Vene Föderatsioon – saavad tugineda mereõiguse regulatsioonile, et viia ellu enda tahtmist merede vallas. Selliselt võib Venemaa kasutada rahvusvahelise mereõiguse meetmeid kui instrumente õigustamaks *ekstensiivse* suveräänsuse kontseptsiooni mõjul määratud huve riigiga külgnevates merealades.

Nimetatud uurimiseesmärkide saavutamiseks on doktoritöö jagatud kahte ossa. Esimeses osas, pealkirjaga „Venemaa õiguslikud positsioonid nelja mere vallas", on kõigepealt kaardistatud, kirjeldatud ja uuritud Venemaa kaasaegseid nõudmisi, käimasolevaid vaidlusi ja riigi õiguslikku käitumist neljas valitud meres. Taoline täielik ja objektiivne pilt tegelikest asjaoludest on huvitav ja informatiivne väärtus omaette kuivõrd see sisaldab nii valitud merealade faktilise olustiku kirjeldust, keskendudes Venemaa käitumisele neljas meres, kui ka teiste riikide ning maailma üldsuse reaktsiooni Venemaa vastavale praktikale ning Venemaa ekspertide arvamusi ja seisukohti.

Olles hinnanud Venemaa õiguslikku minevikku ja tänapäeva reaalsust valitud merealadel, jätkub doktoritöö esimene osa Vene riigi käitumise õiguspärasuse analüüsiga rahvusvahelise mereõiguse üldtuntud normide ja põhimõtete valguses. Analüüsi läbiviimisel uurib doktoritöö Ühinenud Rahvaste Organisatsiooni 1982. aasta Mereõiguse Konventsiooni (edaspidi ka „UNCLOS" või „Konventsioon") ja rahvusliku mereõigusliku regulatsiooni normide kohaldamist ja kohaldamise õiguspärasust Venemaa Põhja-Jäämeres asuva territoriaalmere, Kirdeväila (inglise keeles „*Northern Sea Route*", vene keeles „С е в е р н ы й м о р с к о й п у т ь"), majandusvööndi ja mandrilava suhtes. Kaspia mere osas uuritakse argumente, millele Venemaa tugineb eitades UNCLOS-i kohaldamist Kaspia basseinile ning argumente, mis õigustavad Venemaa riigi ja õigusspetsialistide lähenemist „ühine vesi, jagatud merepõhi" – režiimile Kaspia meres. Autor võrdleb Venemaa õiguslikku positsiooni Kaspia meres teiste riikide ametlike positsioonidega, ning rõhutab vajadust riikide koostööks regioonis. Doktoritöö selgitab Musta ja Aasovi merede õiguslikku režiimi, ja annab õigusliku tõlgenduse Venemaa positsioonile antud merealadel. Viimasena esitab antud töö ülevaate Venemaa ajaloolisest ülemvõimust Läänemerel ning analüüsib Vene-Saksa Nord Stream gaasijuhtme projekti õiguspärasust UNCLOS-i

valguses. Doktoritöö esimese osa lõpus analüüsitakse Venemaa poolset rahvusvahelise mereõiguse kohaldamist erinevates faktilistes oludes (s.t valitud nelja mere kontekstis), eesmärgiga jõuda üldiste järeldusteni Venemaa rahvusvahelise õiguse lähenemise ja UNCLOS-i kohaldamise suhtes.

Venemaa ajalooline ja kaasaegne õiguslik positsioon valitud merealadel on tõepoolest olnud väga intrigeeriv. Nii näiteks võib Venemaa nõudeid Põhja-Jäämere üle kaardistada alates kuueteistkümnendast sajandist, mil tsaar Ivan Julm keeldus andmast Inglismaale viimase poolt taotletud ainuõigust kaubelda põhjajõgede suuetes. Venemaa õigusi Arktika Ookeani üle kordasid ka paljud hilisemad rahvusvahelised lepingud (näiteks Vene-Rootsi lepingud aastatest 1806 ja 1826, Venemaa-Ameerika Ühendriikide konventsioon 1824. aastast, Alaska loovutusleping 1867. aastast jne). Nõukogude ajal kehtestas Venemaa enda õigused Arktika sektorile – s.o. kolmnurksele alale, mille alus ühtib rannikujoonega ja mille külgpiirid langevad põhjapooluse poole suunduvatele meridiaanidele pindalaga umbes 5.8 miljonit ruutkilomeetrit – 1926. aasta dekreediga "Arktika Ookeani põhjaosas asuvate maade ja saarte deklareerimine Nõukogude Liidu territooriumiks". Nimetatud dekreedi kohaselt kuulusid Nõukogude Liidu sektori koosseisu kõik avastatud ja seni avastamata maad ja saared Põhja-Jäämeres. Vaatamata tugevale vastasseisule Ameerika Ühendriikide poolt käsitles Nõukogude Liit praktiliselt kogu kahekümnenda sajandi jooksul suurimat osa Arktika Ookeanist enda polaarsektori piires olevaks, põhjendades seda sellega, et Põhja-Jäämere sektoraalne jaotamine viie rannikuriigi vahel on kujunenud rahvusvaheliseks tavanormiks. Siiski on viimaste aastakümnete jooksul Venemaa ametlik positsioon loobunud nn sektoriteooria kohaldamisest ja toetamisest, lähtudes nüüd arusaamast, et Põhja-Jäämerele kui ookeanile kohaldub UNCLOS.

Konventsiooni kohaldades sai Venemaast 2001. aastal esimene Arktika Ookeani rannikuriik, kes esitas taotluse mandrilava välispiiri määramiseks Mandrilava Piirikomisjonile (edaspidi „CLCS") vastavalt UNCLOS-i Artiklile 76 (8). Venemaa soovitud laiendatud mandrilava hõlmab 460 000 ruutmiili ehk 1.2 miljonit ruutkilomeetri suurust ala. Venemaa taotlus CLCS-i tekitas protestilaine teiste riikide seas: nii esitasid Kanada, Taani, Jaapan, Norra ja Ameerika Ühendriigid ÜRO peasekretärile arvamusi Venemaa taotluse kohta, kus ühel või teisel viisil väitsid, et viimase taotluses puudub piisav informatsioon lugemaks Lomonossovi seljakut Venemaa maismaamassiivi looduslikuks pikenduseks. Riikide protestidele järgnes Venemaa üsna emotsionaalne, kuid õiguslikult mittesiduv titaanlipu püstitamine merepõhja Põhjanaba kohal 2007 aastal, mis omakorda tingis rahvusvahelise meedia suurenenud tähelepanu Arktika Ookeanis toimuvale.

Siiski ei olnud nimetatud välisriigid ainsad, kes Venemaa 2001. taotlust CLCS-le kritiseerisid. Nimelt hindasid antud taotluse esitamist negatiivselt mitmed silmapaistvad vene õigusteadlased. Viimased, kelle eestvedajaks on MGIMO Ülikooli rahvusvahelise õiguse õppetooli juhataja professor A. N. Võlegžanin, on arvamusel, et Venemaa peab võtma tagasi CLCS-ile esitatud taotluse ning käsitledes Põhja-Jäämerd selle ajaloolisest spetsiifikast lähtudes,

esitama rahvusvahelise tavaõigusega kooskõlas oleva nõudmise Venemaa Arktika sektori (mille piirid määrati Nõukogude ajal) tunnustamiseks. Need Vene õigusteadlased on seisukohal, et Põhja-Jäämere merepõhi tuleb jagada viie Arktika riigi vahel kokkuleppeliselt, lähtudes üheksateistkümnendal sajandil kokkulepitud piiridest. Vaatamata professor Võlegžanini ja teiste vene õigusspetsialistide poolt moodustatud argumenteeritud opositsioonile, pooldab Vene Föderatsiooni Välisministeerium kui riigi ametliku positsiooni esindaja, UNCLOS-i kohaldamist Põhja-Jäämerele. Vastusena Venemaa 2001. aasta taotlusele on CLCS nõudnud riigilt täiendavaid teaduslikke andmeid ning hetkel on Venemaa kogumas uut materjali kinnitamaks enda õigusi Põhja-Jäämere laiendatud mandrilavale.

Vaidlused Kaspia mere õigusliku staatuse, režiimi ja merepiiride üle on olnud mitte vähem tulised. Kaspia mere suurim müsteerium läbi sajandite on olnud tema õiguslik staatus – kas meri või järv? Õigusarvamused Kaspia mere olemuse kohta on olnud erinevad. Ka Venemaa õigusteadlased ei ole omavahel ühel meelel. Kui suurem osa spetsialistidest (nende hulgas ka Vene Impeeriumi silmapaistev jurist F. F. Martens) on seisukohal, et Kaspia on "suletud või osaliselt suletud meri" UNCLOS Artikli 122 tähenduses, siis teine osa teadlastest (R. Mamedov, A. L. Kolodkin) arvavad, et tegemist on rahvusvahelise järvega. Kaspia mere õiguslik staatus on oluline ka kohaldatava režiimi määramiseks: nimelt, kui Kaspiat käsitleda merena, on selle rannikuriigid UNCLOS-ist tulenevalt õigustatud rahvuslike meretsoonide määramiseks. UNCLOS-i sätete kohaldamine soodustab eeskätt pikema rannajoonega rannikuriikide positsioone. Konventsiooni kohaldamisel jaguneks kontroll Kaspia mere üle järgnevalt: Kasahstani kontrolli all oleks 29,9% Kaspiast; Aserbaidžaani kontrolli all 20,7%; Turkmenistanile jääks 19,2%; ning Venemaa ja Iraanile – ainult 15,6% ja 14,6%. Venemaa ametliku positsiooni kohaselt on Kaspia mere näol tegemist "unikaalse suletud veehoidlaga", millele ei kohaldu UNCLOS ning mida tuleb kasutada ühiselt ja jaotada riikidevaheliste kokkulepete abil.

Käesolev doktoritöö kirjeldab tänapäeva õiguslikku situatsiooni Kaspia merel, kus rannikuriikide positsioonid on erinevad: kui Venemaa soovib jagada Kaspia merepõhja rannikuriikide vahel modifitseeritud mediaani meetodi abil, ühiselt kasutada Kaspia mere veeala, ning antud positsiooni toetavad ka Aserbaidžaan ja Kasahstan, siis Turkmenistan pooldab Kaspia jagamist sektoriteks ning Iraan näeb hoopiski Kaspiale ühisrežiimi (inglise keeles "*condominium approach*") kohaldamist. Kaspia õiguslik tulevik peitub aga eeskätt riikidevahelises koostöös, näiteks Kaspia Konventsiooni koostamises. Sellise Kaspia riikide ühisdokumendi vastuvõtmiseni on Venemaa aga võtnud suuna reguleerida Kaspia mere loodusvarade ja merevee kasutamist kahe- ja kolmepoolsete lepingute abil, mis siiamaani on olnud sõlmitud eeskätt Vene riigi huvide tagamiseks Kaspia merel.

Järgnevalt käsitletakse antud doktoritöö raames Musta ja Aasovi merede regiooni faktilist olustikku, kus Venemaa ja Ukraina vaidlevad Kertš-Jenikalski väina piiri üle. Kuni Nõukogude Liidu lagunemiseni oli Aasovi meri ja merepõhi liidu täieliku ülemvõimu all; alates 1991. aastast on Aasovi meri ja Kertši

väin Venemaa ja Ukraina delimiteerimisvaidluste objektiks. 2012. aasta suve poliitiste sündmuste valguses on antud piirivaidluse tasakaal kaldumas Venemaa huvide kaitsele. Nimelt on Venemaa president Vladimir Putin ja tema Ukraina kolleeg Viktor Janukovitš 12. juulil 2012. aastal sõlminud eel-lepingu kahe riigi vahelise merepiiri määramiseks Kertši väinas, mis tõenäoliselt küll jääb Ukraina territooriumiks, kuid Venemaa laevad saavad õiguse vabalt, takistamatult ja tasuta antud mereala läbida.

Viimasena keskendub doktoritöö Venemaa ajaloolisele positsioonile ja tänapäeva huvidele Läänemeres. Nimelt on Venemaa alates kaheksateistkümnendast sajandist olnud domineerivaks võimuks regioonis, nimetades Läänemerd koguni enda suletud mereks. Teise maailmasõja järgselt kontrollis Nõukogude Liit praktiliselt kogu Läänemere lõunarannikut. Nõukogude Liit oli esimene riik, kes kohaldas 12 meremiili laiust territoriaalmerd Läänemeres, seda vaatamata teiste rannikuriikide (Taani ja Rootsi) protestidele ning väidetele, et traditsiooniliselt on rannikuriikide territoriaalmeri Läänemeres olnud vaid 3–4 meremiili. Nõukogude Liidu lagunemisel aga situatsioon muutus ning uute Läänemere rannikuriikide tekkimisel ilmnes vajadus panna paika sellised merepiirid, mida varem ei eksisteerinud: merepiirid Venemaa ja Leedu, Leedu ja Läti, Läti ja Eesti ning Eesti ja Venemaa vahel. Vaatamata sellele, et Balti riigid eksisteerisid *de jure* ja *de facto* maailmasõdadevahelisel perioodil, ei sätestanud nende lepingud Nõukogude Venemaa (Liiduga) merepiire Läänemerel. Nimetatud merepiiride määramine pärast NSVL-i lagunemist polnud kerge kuna mitmel juhul puudus riikide vahel kokkulepe maismaal kulgeva riigipiiri kohta. Nõukogude Liidu lõppemisel tekkis küsimus ka Nõukogude Liidu poolt sõlmitud merepiiride kokkulepete kehtivusest. Huvitava arenguna Läänemere merepiiride määramise protsessis võib pidada Eesti ja Soome Vabariikide kokkulepet Konventsiooniga lubatud 12 meremiili laiuse territoriaalmere piiramiseks, eesmärgiga säilitada "vaba väljapääs Soome lahele" ning tekitada Soome lahte 6-meremiili laiune koridor, kus teistel riikidel oleks läbisõidu ja ülelennu vabadus. Käesolev doktoritöö illustreerib, et antud koridorist on kasu eelkõige Venemaale, seda näiteks hiljutise Vene-Saksa Nord Stream gaasijuhtme ehitamisel ja kasutamise alustamisel.

Nord Stream gaasijuhe on 1224 kilomeetri pikkune Läänemere põhjas asuv Venemaalt Saksamaale kulgev kahetoruline maagaasi torujuhe, mis alustas gaasi tarnimist 2012. aasta oktoobris. Antud projekt tagab Venemaale kindla maagaasi ekspordituru Euroopas ning lubab seejuures vältida transiitriike Ukrainat ning Valgevene Vabariiki. Nord Stream projekti peetakse majanduslikult kasumlikuks, seda eeskätt Venemaa ja Saksamaa jaoks mistahes arengustsenaariumi juures. Doktoritöö analüüsib, milline UNCLOS-i regulatsioon on kohaldatav erinevaid rahvuslikke meretsooni läbivale Nord Stream gaasijuhtmele, ning kirjeldab olukordi, kus Eesti Vabariik on tuginedes Konventsioonile vältinud nii gaasijuhtme ehitamist kui ka ehitamisele eelnevate mereuuringute teostamist enda mandrilaval ja majandusvööndis. Eesti ja Soome kokkulepet territoriaalmerede laiuse piiramise ja majandusvööndi koridori loomise kohta Soome lahes peetakse eriti tähtsaks Nord Stream gaasjuhtme

projekti jaoks, kuivõrd selle puudumisel pidanuks Nord Stream alluma rannikuriigi (Eesti resoluutsel vastasseisul Soome) otsesele kontrollile ja rahvuslikule regulatsioonile.

Kirjeldatud Põhja-Jäämere, Kaspia-, Musta-, Aasovi- ja Läänemere faktilise olukorra kaardistamise ja selle analüüsi tulemusena jõuab doktoritöö järgmiste järeldusteni. Venemaa Föderatsioon on olnud UNCLOS-i osaliseks alates 1997. aastast. Vene riik kohaldab Konventsiooni kõikides antud uurimuseks valitud merealades, v.a. Kaspia meres. Antud doktoritöö illustreerib ilmekalt, et Venemaa poolt UNCLOS-i kohaldamine pole universaalne ega ühetaoline. Nii näiteks kohaldab Venemaa Konventsiooni regulatsiooni Arktika Ookeanis, olles samal ajal valmis UNCLOS-i sätteid eirama nii territoriaalmere laiuse mõõtmiseks vajalike lähtepunktide ja lähtejoonte määramisel kui ka Kirdeväila käsitlemisel rahvusvaheliseks laevaliikluseks kasutatava mereteena (mitte Venemaa „rahvusliku transpordimarsruudina"). Venemaa eitab Konventsiooni kohaldamist Kaspia mere suhtes, kuigi rahvusvahelises õiguses puudub universaalselt aktsepteeritud arusaam Kaspia mere „rahvusvahelise järve" staatusest, millele kohalduksid rannikuriikide vahelised rahvusvahelised kokkulepped, mitte UNCLOS. Sarnaselt käsitleb Venemaa Musta merd kui Vene-Ukraina järve ning seda vaatamata tõsiasjale, et rahvusvahelise õiguse mõistes on Must meri rangelt „meri", mis kuulub UNCLOS kohaldamisalasse. Isegi Läänemeres, kus Venemaa näib Konventsiooni nõuetekohaselt kohaldavat, on riik suutnud rikkuda mõningaid UNCLOS-i sätteid (näiteks 2005. aastal avastas Eesti Piirivalve Vene laeva *Pjotr Kotsov,* mis teostas uuringuid Eesti majandusvööndis ilma Eesti Vabariigi vastava nõusolekuta, mis on Konventsiooni sätete ilmselge rikkumine).

Ühetaoline ja universaalne lähenemine Konventsiooni tõlgendamisele ja kohaldamisele puudub Venemaal ka riigi siseselt. Nagu kirjeldatud, on Venemaa ametlik positsioon Põhja-Jäämeres erinev lähenemisest, mida pooldab valdav osa Vene akadeemilisest õiguseliidist. Viimaste (Professor Võlegžanini ja teiste) positsiooni kohaselt on Venemaa, lähtudes selle ajaloolisest kohalolekust ja pikaajalisest ülemvõimust Arktikas, õigustatud nõudma Põhja-Jäämere merevee ja merepõhja sektoraalset jagamist ja Venemaa polaarsektori tunnustamist ja kinnitamist. Venemaa ametlik ehk Välisministeeriumi positsioon tugineb aga ainuüksi UNCLOS-i ja selles esitatud meetmete kohaldamisele Põhja-Jäämeres. Sarnaselt erineb Vene õigusteoreetikute valdav positsioon Kaspia mere õigusliku staatuse suhtes Vene Föderatsiooni ametlikust käsitlusest: kui esimeste jaoks on Kaspia meri „meri" Konventsiooni tähenduses ja selle kohaldamisalas, siis viimaste jaoks on Kaspia eeskätt ja ainuüksi maismaaga ümbritsetud järv, mida tuleks kasutada selle rannikuriikide poolt kokkulepitud ühisrežiimi alusel.

Venemaa rahvusvahelise mereõiguse lähenemise mitmetähenduslik iseloom väljendub lisaks ka Venemaa poolses Nõukogude Liidu poolt sõlmitud piirilepingutest kinnipidamises. Vaatamata enda ametlikule Nõukogude Liiduga õigusliku järjepidevuse säilitanud riigi staatusele, *pacta sunt servanda* printsiibile ning põhimõttele, et suveräänsuse muutmine ei mõjuta kokkulepitud

piire, tundub, et tänapäeva Venemaa järgib Nõukogude Liidu poolt sõlmitud piirileppeid kui siduvaid ja lõplikke lahendusi ainult juhtudel, kui sellised lepped soosivad Vene positsiooni. Nii näiteks keeldub Venemaa tunnistamast Nõukogude Liidu ajal paikapandud administratiivset merepiiri Ukraina NSV Krõmskaja oblasti ja Vene NSV Krasnodari krai vahel Aasovi meres, kuivõrd antud merepiiri tunnistamisel jääks Venemaa teatud majanduslikest kasudest ilma. Siinkohal võib paralleeli tõmmata 1920. aastal iseseisva Eesti Vabariigi ja Vene NSV vahel sõlmitud Tartu rahulepinguga, mis samuti määras kahe riigi vahelised maismaa- ja merepiirid, ning mida tänapäevane Venemaa keeldub kehtiva ja siduva lepinguna tunnistamast, eitades ka selles kokkulepitud riigipiiride siduvust.

Kuigi põhjused Venemaa kirjeldatud õigusliku käitumise õigustamiseks on igal konkreetsel juhtumil detailides erinevad, järeldatakse antud doktoritöös üldiselt, et Venemaa lähenemine UNCLOS-ile ja rahvusvahelisele mereõigusele pole mitte ainult universaalne ja ühetaoline, vaid suuresti sõltub nendest majanduslikest ja poliitilistest tulemustest, mille poole Venemaa parasjagu püüdleb. Näiteks tagab UNCLOS-i kohaldamine Põhja-Jäämeres Vene Föderatsioonile rahvusvaheliselt tunnustatud õigusliku võimaluse põhjendada enda nõudeid laiendatud ja ressurssiderohkele Põhja-Jäämere mandrilavale, samal ajal kui Venemaa polaarsektori tunnustamise nõudmine jätaks Venemaa rahvusvahelise toetuseta ja seaks riigi nii õiguslikult kui poliitiliselt ülejäänud maailmast lahku. Kaspia mere kohtlemine „rahvusvahelise järvena" ja selle jagamine rannikuriikide vahel modifitseeritud meridiaani meetodi abil tagab Venemaale suurema osa Kaspia merepõhjast eeskätt võrreldes UNCLOS-i alusel tagatava osaga. Lisaks elimineerib Venemaa poolne UNCLOS-i kohaldamise eitamine nii Kaspia kui Aasovi mere suhtes ohu, et kolmandad riigid omandaksid teatud õigusi antud aladel, mis omakorda võinuks ohustada Venemaa mõjuvõimu nimetatud regioonides. Venemaa käitumismuster Nõukogude Liidu poolt sõlmitud piirilepete tunnustamisel ja mitte-tunnustamisel tundub olevat sõltuvuses võimalikest territoriaal- ja majanduslikest kaotustest, mida ühe või teise piirileppe tunnustamine tänapäeva Venemaale kaasa tooks.

Lisaks eeltoodule on töös täheldatud teatud sarnasusi Venemaa ajaloolises positsioonis kõigis neljas veekogus. Nii on Venemaa Impeerium ja seejärel Nõukogude Liit pikemat aega olnud ülimaks võimuks Põhja-Jäämeres, Kaspia meres (kuigi *de facto* jagades seda Iraaniga) ja Läänemeres. Ajalooliselt on Venemaa väitnud omavat omandiõigusi Musta mere ja Läänemere üle, nimetades neid koguni enda "suletud meredeks". Kuni kahekümnenda sajandi lõpuni on Venemaa (Nõukogude Liit) olnud ainsaks Aasovi mere rannikuriigiks. Aastatuhandete vahetumisel aga muutusid asjaolud drastiliselt, ning Venemaa lakkas olemast "mere ja maa impeerium", muutudes üheks paljudest maailmariikidest. Seda nii Arktika Ookeanis, mille vastu tunneb huvi aina suurenev arv riike ja rahvusvahelisi organisatsioone, kui ka Kaspia, Aasovi ja Läänemeres, kus Nõukogude Liidu lagunemise tulemusena tekkisid uued või taastati maailmasõdadevahelisel ajal eksisteerinud rannikuriigid, kes õigustatult sätestavad enda õigusi rahvuslike meretsoonide üle nimetatud veekogudes. Kuigi

Venemaa on kaotanud oma juhtiva positsiooni neljal merealal, on riik üritanud ühel või teisel moel taastada enda kontrolli nimetatud meredes. Selliselt võib Venemaa kirjeldatud nüüdisaegset praktikat Arktika Ookeanis, Kaspia meres, Läänemeres ja Aasovi meres nimetada üsna "imperialistlikuks", otsides toetust Venemaa kui suurriigi staatusele. Käesoleva doktoritöö esimese osa selline järeldus on määranud töö teises osas püstitatud hüpoteesi, nimelt, et maailma suurriigid ehk endised impeeriumid nagu Venemaa kalduvad kohaldama *ekstensiivset* suveräänsuse kontseptsiooni, mis määrab ka nende lähenemise rahvusvahelisele mereõigusele ning peegeldub taoliste riikide ekstensiivsetes nõudmistes merede ja ookeanide üle. Selleks, et kontrollida doktoritöö raames püstitatud hüpoteesi ning seostada suveräänsuse doktriin riigi lähenemisega rahvusvahelisele mereõigusele, on antud töö teises osas (pealkirjaga: „Venemaa lähenemine rahvusvahelisele mereõigusele läbi suveräänsuse laiendamise nelja ookeani/mere näitel) järgitud järgmist mõttekäiku.

Esiteks on doktoritöös lähtutud tõsiasjast, et Venemaa kui ühe maailma juhtiva riigi positsioon tänapäeval on suuresti Venemaa imperialistliku mineviku "järelkaja". Geograafiliselt on Venemaa eeskätt maismaariik, kuid läbi aastasadade on venelased püüdnud teha sellest ka „mereriiki". Tihe jõgede võrgustik on võimaldanud Venemaal laieneda maismaalt merede poole ning juba tsaar Peeter I ajast on Venemaast räägitud kui maa- ja mereimpeeriumist. Seega on tugev püüdlus suveräänse, territoriaalse ja majandusliku võimu laiendamiseks alati olnud Venemaale kui riigile omane tunnus, mis on paratamatult mõjutanud Venemaa „tähtsa mängija" rolli tänapäeva rahvusvahelisel areenil ja ka riigi lähenemist rahvusvahelisele mereõigusele sellega külgnevatel merealadel.

Teiseks on doktoritöös uuritud Vene õigusteoreetikute ja riigivõimude ajaloolist ja kaasaegset arusaama riigi suveräänsuse kontseptsioonist. Suveräänsuse kontseptsioonist on Venemaa õiguseliidi seas räägitud palju ja kaua, nii Tsaaririigiajal (näiteks F. F. Martens) kui Nõukogude Liidu ajal (näiteks N. Ushakov, D. Levin, G. Tunkin). Kaasajal on suveräänsuse kontseptsiooni kõige laialdasemalt defineerinud Moskva Diplomaatilise Akadeemia professor A. Moisejev, kes mõistab suveräänsust iseseisva riigi "lahutamatu õigusliku omadusena, mis sümboliseerib riigi poliitilist-õiguslikku enesemajandamist ja ülimat väärtust rahvusvahelise õiguse esmase subjektina; ning mis on vajalik riigi ainuvõimu teostamiseks ja kinnitamaks allumise puudumist mistahes teise riigi võimule". Venemaa suveräänsuse doktriin pöörab erilist tähelepanu riigi suveräänsuse elementidele nagu ülim, sõltumatu ja jagatamatu riigivõim; territoriaalne ülemvõim ja territoriaalne jagamatus; riigi jurisdiktsioon. Sarnaselt Läänemaailma õigusteoreetikutele eristavad Vene õigusteadlased riigi suveräänsuse sisemist ja välist külge, samuti räägivad riigi majanduslikust suveräänsusest kui õiguspoliitilisest omadusest, mis määrab ühe riigi sõltumatust ja isemajandamist suhetes teiste riikidega. Riigi suveräänsuse doktriin on lahutamatu osa Vene Föderatsiooni Konstitutsiooni regulatsioonist, sätestades näiteks riigi territoriaalse lahutamatuse ja sõltumatuse printsiibid, rõhutades föderaalse jurisdiktsiooni ülimuslikkuse põhimõtet ning luues aluse riigi

majanduslikule suveräänsusele. Doktoritöö autor järeldab, et suveräänsuse kontseptsioon Vene õigusteoreetikute arusaamises (mis on kinnitatud riigi vastava seadusandlusega) kannab küllaltki *absoluutset* iseloomu, seda eriti võrreldes Lääne õigusteadlastega, kelle arusaama järgi on suveräänsus tänapäeval eelkõige *relatiivne*, maailma reaalsusega kaasas käiv ja muutuv kontseptsioon. *Absoluutne* riigi suveräänsus Venemaa õigusteadlaste mõistes tähendab, et suveräänne riik (seda eeskätt Venemaa Föderatsioon) on poliitiliselt, õiguslikult ja majanduslikult isemajandav ja iseseisev, nii sisemiselt kui väliselt kõikidest teistest riikidest sõltumatu.

Kolmandaks on käesoleva uurimuse raames kirjeldatud ja tõendatud lähedast seost, mis eksisteerib suveräänsuse doktriini ja riigi rahvusvahelisest õigusest arusaama vahel. Nii võib rahvusvahelise mereõiguse arengulugu ennast vaadelda kui ajaloolist üleminekut *communis omnium naturale iure* kontseptsioonilt (ehk „ühine kogu inimkonnale“) rahvuslike merealade jaotusele, eeskätt tänu riikide suveräänsuse kinnitamisele merede ja ookeanide üle. Athensi Ülikooli õppejõud Dr M. Gavouneli nimetab rahvusvahelise mereõiguse arengut (mille kõrgpunktiks on kujunenud UNCLOS) koguni “raskeks võitluseks rannikuriigi suveräänsuse ja avamere vabaduste vahel”. Doktoritöös esitatakse ülevaade rahvusvahelise mereõiguse ajaloolisest kujunemisest riigi suveräänsuse kontseptsiooni mõjul. Erilist tähelepanu väärib siinjuures *Mare Liberum* (“vaba meri”) ja *Mare Clausum* (“suletud meri”) mõistete rivaliteet. *Mare Liberum* kontseptsiooni kõnelejaks oli Hollandi päritolu jurist Hugo Grotius, keda peetakse ka rahvusvahelise õiguse rajajaks. Kaitstes toona eeskätt enda tööandja, Hollandi Ida-India Kompanii huve, väitis Grotius 1609. aastal avaldatud teoses “Mare Liberum”, et läbi aegade on merd peetud ei-kellegi asjaks (*res nullius*) ning kuivõrd see ei saa olla kellegi omandis, on tegemist kõigile kuuluva asjaga. Vastus Grotiuse Mare Liberumi doktriinile tuli Inglismaa juristilt John Seldenilt, kes väitis, et ajalooliselt on mered olnud erinevate riikide ülemvõimu all. Seldeni esmaseks ülesandeks tema teose “Mare Clausum, seu de Dominio Maris Libri Duo” (“Võimust, või Omandist Merel Kahes Raamatus”) avaldamisel 1635. aastal oli kaitsta Inglise krooni ainuvõimu Inglismaa meredel. Kuigi alguses näis, et kahe lähenemise võitluses on riikide poolehoidu võitmas Seldeni “suletud merede” kontseptsioon, siis aastate möödudes on toetust saanud ja rahvusvaheliseks tavaõiguseks kujunenud Grotiuse “avatud mere” doktriin. Siiski kohaldati antud kontseptsiooni piirangutega – nimelt, juba seitsmeteistkümnendal sajandil muutus rahvusvaheliseks tavanormiks rannikuriikide õigus jurisdiktsiooni teostamiseks sellega külgnevas meres mitte rohkem kui 3 meremiili (niinimetatud “kahurilasu” vahemaa) ulatuses.

Kõige olulisemad muudatused rahvusvahelise mereõiguse vallas toimusid kahekümnenda sajandi jooksul. Üha rohkem rannikuriike laiendasid enda riigi suveräänsust maismaaga külgneva territoriaalmere vööndi üle, kehtestades selle laiuseks traditsioonilise 3 meremiili asemel 12 meremiili. Suuri muudatusi tõi endaga kaasa Ameerika Ühendriikide Presidendi H. Trumani proklamatsioon 1945. aastast, milles viimane sätestas, et merepõhja ja maapõue loodusvarad USA rannikuga piirneval mandrilaval kuuluvad Ameerika Ühendriikidele. USA

avaldusele järgnesid teiste riikide sarnased nõuded. Kaheteistkümnenda sajandi teisel poolel leidis aset kolm ÜRO mereõiguse konverentsi, kus pikkade läbirääkimiste tulemusena võeti 1982. aastal vastu ÜRO Mereõiguse Konventsioon, mida peetakse ühe "vanima õigusharu progressiivseks arenguks" ning merede ja ookeanide "konstitutsiooniks".

Riigi suveräänsuse kontseptsioon, mis on oluliselt mõjutanud kogu rahvusvahelise mereõiguse arengut, on leidnud peegelduse mitmetes UNCLOS-i sätetes. Nii näiteks sätestab Konventsiooni Artikkel 2, et rannikuriigi suveräänsus laieneb lisaks tema maismaaterritooriumile ja sisevetele (ning saarestikuriigi puhul tema arhipelaagivetele) ka külgnevale merealale, mida nimetatakse territoriaalmereks (1), ning lisaks ka territoriaalmere kohal asuvale õhuruumile ja territoriaalmere põhjale ning selle all asuvale maapõuele (2). Vastavalt UNCLOS Artiklile 56 (1) on rannikuriigil enda majandusvööndis suveräänne õigus uurida, kasutada, kaitsta ja majandada meres ja merepõhjas ning selle all asuvas maapõues leiduvaid elus- ja eluta loodusvarasid ning muul viisil vööndi kasutamisel ja uurimisel tegutseda, näiteks toota vee-, hoovuse- ja tuuleenergiat (a); samuti õigus kohaldada jurisdiktsiooni tehissaarte, rajatiste ja seadmestike rajamisele ja kasutamisele; teaduslike mereuuringute tegemisele; merekeskkonna kaitsmisele ja säilitamisele. Konventsiooni Artikli 77 (1) järgi on mandrilava loodusvarade uurimine ja kasutamine rannikuriigi suveräänne õigus. Samas aga sätestab UNCLOS piirid riikide suveräänsusele merealadel, sätestades näiteks Artiklis 136, et süvamerepõhi ja selle loodusvarad on inimkonna ühisvara – seega ei kuulu nad ühegi maailmariigi suveräänsuse alla.

Tuginedes eespool toodud regulatsioonile annab Konventsioon rannikuriigile õiguslikud mehhanismid selleks, et õiguspäraselt laiendada riigi suveräänsust horisontaalselt (maismaalt avamere poole) ja vertikaalselt (hõlmates merepõhja, maapõue ja mandrilava) ning on õiguslikuks aluseks riigi suveräänsuse kasutamisele mereõiguse vallas. Tunnustatud rahvusvahelise mereõiguse autoriteedi, Virginia Ülikooli professori, Suursaadik John N. Moore'i sõnul, on UNCLOS rahvusvaheline "leping, mis teenib riigi suveräänsust". Olles ratifitseerinud Konventsiooni ning sisestanud mitmed selle sätted enda rahvuslikku seadusandlusesse, on Venemaa Föderatsioon õigustatud laiendama ja kasutama enda suveräänsust riigiga külgnevates merealades, seda nii vertikaalselt kui horisontaalselt.

Viimaks, lähtudes uurimise käigus töö esimeses osas läbiviidud analüüsist, on käesolevas doktoritöös ühendatud riigi suveräänsuse doktriin (Vene õigusteadlaste lähenemises) Venemaa lähenemisega rahvusvahelisele mereõigusele ning riigi kaasaegsete positsioonidega neljas valitud meres. Näiteks võib Venemaad näha kohaldamas UNCLOS-i regulatsiooni Arktika Ookeanis selliselt, et võimalikult laiendada riigi territoriaalset suveräänsust Põhja-Jäämere regioonis. Nii on Venemaa aastakümnete jooksul säilitanud põhjamered (Kara meri, Laptevi meri, Ida Sibeeria meri) enda sisevete koosseisus, mis ainuüksi annab Venemaale suured territoriaalsed eelised rahvuslike meretsoonide määramisel nimetatud merealal. Samuti on Venemaa lubanud endale suuri lahknevusi territoriaalmere laiuse mõõtmise aluseks võetavate lähtepunktide ja lähtejoonte

määramisel, mis seab Venemaa rahvuslike meretsoonide piiride õiguspärasuse Põhja-Jäämeres küsimuse alla. Lisaks on Venemaa alati pidanud Kirdeväila, mis osiiti asub väljaspool Vene suveräänset jurisdiktsiooni, ajalooliselt kujunenud rahvuslikuks transpordimarsruudiks, mitte rahvusvaheliseks meresõiduks kasutatavaks väinaks, millele kohalduks UNCLOS-i vastav regulatsioon. Enamgi veel, Venemaa taotlust CLCS-le välise mandrilava piiri määramiseks on laialdaselt käsitletud "territoriaalse ekspansioonina" ning püüdlusena saavutada ning kinnitada Vene suveräänsus loodusvaraderikka Arktika mandrilava üle. Kui CLCS peaks tunnistama Venemaa täiendatud taotlust välise mandrilava piiride määramiseks Lomonossovi seljakul, annab see õigusspetsialistide arvamuse kohaselt Venemaale suveräänsed ainuõigused uurida ja kasutada kuni 60% Kõrgarktikas asuvatest süsivesinike varudest. See omakorda aitab oluliselt kaasa Venemaa majandusliku suveräänsuse kehtestamisele Põhja-Jäämeres. Venemaa hiljutised poliitilised sammud – näiteks piirilepingu allkirjastamine Norraga Barentsi meres – võivad Venemaa suveräänsuse laiendamise valguses olla tõlgendatud mitte niivõrd poliitilise dialoogi algusena, kuivõrd Venemaa kavatsusena Norra poolehoiuga tugevdada enda suveräänset positsiooni Arktikas. Siiski ei saa Venemaa ihaldatav suveräänsus Põhja-Jäämere üle olla *absoluutse* iseloomuga mitmete piirangute tõttu, nagu näiteks suveräänsuse piirangud UNCLOS-ist tulenevalt, teiste Põhja-Jäämere rannikuriikide nõudmised Arktikas, või piisavate rahaliste vahendite puudumine iseseisvaks Arktika loodusvarade uurimiseks ja kasutamiseks.

Sarnaselt on Vene Föderatsioon püüdmas suveräänsete huvide kinnitamise poole Kaspia mere õigusliku staatuse ja õigusliku režiimi määramise küsimustes. Eitades UNCLOS-i kohaldamist Kaspia basseinile – vältimaks olukorda, milles Venemaa saaks väiksema portsjoni Kaspia vetest ja merepõhjast – ning väites, et Kaspia näol on tegemist rahvusvahelise järvena, soovib Venemaa laiendada ja kinnitada enda territoriaalset ja majanduslikku suveräänsust regioonis. Samasugust eesmärki järgib ka Venemaa ametlik poolehoid "jagatud merepõhi, ühised veed" – režiimile Kaspia meres. Sõlmides kahe- ja kolmepoolseid lepinguid teiste Kaspia rannikuriikidega valdavalt Venemaa poolt soovitud tingimustel püüab Venemaa kinnitada ja tõestada enda (kunagi *absoluutset)* võimu ja territoriaalset ja majanduslikku suveräänsust regioonis.

Samuti võib Venemaad näha püüdlemas kunagi kaotatud täieliku suveräänsuse taastamise poole Musta ja Aasovi mere ning Kertši väina regioonis. Ukraina argumentide eitamine Nõukogude aja administratiivse riigipiiri kehtivusest ning järjepidev toetus Aasovi mere delimiteerimiseks modifitseeritud mediaani meetodi abil tagavad Venemaale suurema osa loodusvaraderikkast Aasovi mere merepõhjast, millele praegu pretendeerib Ukraina. Kui Ukraina peaks uurima ja kasutama suuremat osa Aasovi mere mandrilavast, muutub ta Venemaa gaasitarnetest vähemsõltuvaks ning võib lisaks avada regiooni Venemaa poolt mitte-soovitud välismaa nafta- ja gaasiettevõttetele. Lisaks võib täiendavate gaasi- ja naftavarude uurimine ja kasutamine vähendada varade hinda maailmaturul, mis pole samuti Venemaa huvidega kooskõlas. Järelikult juhul, kui Venemaa peaks veenma Ukrainat kohaldama modifitseeritud

meediani meetodit Aasovi mere delimiteerimiseks, on just Ukraina see, kes kaotab enda praeguse suveräänsususe valitud mereala üle, ning Venemaa see, kes saab täiendava trumbi enda territoriaalse ja majandusliku suveräänsuse teostamiseks regioonis.

Venemaa suveräänsuse laiendamise näiteks Läänemeres on ajalooline tõsiasi, et Nõukogude Liit oli esimene Läänemere rannikuriik, kes sätestas territoriaalmere laiuseks 12 meremiili, ning seda vaatamata ajalooliselt kujunenud põhjamaade tavale 3 või 4 meremiili laiuse territoriaalmere kohta. Samuti on Vene suveräänsuse laiendamise näiteks Eesti ja Soome kokkuleppega Soome lahte 6 meremiili laiuse, majandusvööndi staatust kandva koridori kasutamine. Esialgu oli Eesti ja Soome Vabariikide eesmärgiks kokkuleppe kaudu riikide territoriaalmerede ulatuse piiramisel Soome lahes tagada vaba läbisõidu- ja ülelennuvõimalusi, eriti laevadele ja lennukitele, mis suundusid Sankt-Peterburi sadamasse või Sankt-Peterburist Kaliningradi poole. Tänapäeval teenib nimetatud riikide kokkulepe ka Nord Stream gaasijuhtme projekti, mis on ülioluline nii Venemaa sisemisele (olles üks suurimaid gaasijuhtmeid transportimaks Vene gaasi Euroopasse) kui välisele majanduslikule suveräänsusele.

Olles käsitlenud Venemaa suveräänsuse doktriini mõjul kujunenud riigi õiguslikku käitumist Põhja-Jäämeres, Kaspia, Aasovi ning Läänemeres, jõutakse käesolevas doktoritöös järelduseni, et Venemaad võib näha kohaldamas *ekstensiivset* lähenemist suveräänsuse kontseptsioonile riigiga külgnevates ookeani- ja merealades. Venemaa püüdlus *ekstensiivsele* territoriaalsele ja majanduslikule suveräänsusele merealade üle omakorda seab ülimaks eesmärgiks *absoluutse* kontrolli saavutamise suurte süsivesinike, valdavalt gaasi ja naftavarude üle. Nii soovib Venemaa saavutada *absoluutset* suveräänset kontrolli loodusvaraderikka Arktika mandrilava üle, mängib "koostöömänge" (inglise keeles "*cooperation games*") Kaspia merel, eesmärgiga saavutada kokkulepe teiste Kaspia rannikuriikidega suurima Kaspia merepõhja osa kohta, üritab säilitada majanduslikku kontrolli Musta ja Aasovi mere regioonis mõjutades Ukrainat sõlmima lepingut, mis teeniks eeskätt Venemaa huve, ning viimaks kasutab Läänemerd ja selle merepõhja enda majanduslike tulude suurendamiseks Nord Stream gaasijuhtme ehitamise ja funktsioneerimise kaudu. Selliselt võib rääkida Venemaa kaasaegsest suveräänsuse kontseptsioonist ookeanides ja meredes kui sõltuvast ülemvõimust süsivesinike varade üle, mis omakorda tagab Vene Föderatsiooni poliitilis-õigusliku sõltumatuse rahvusvahelise areenil.

Rahvusvaheliste suhete ratsionaalse osalejana, kelle tegevus on piiratud teiste osalejate olemasolu ja tegevusega, kasutab Venemaa rahvusvahelise mereõiguse meetmeid kui instrumente õigustamaks enda nõudmisi ja riigi õiguslikku käitumist merealadel. Viisid, kuidas Venemaa rahvusvahelist mereõigust kasutab, sõltuvad suveräänsetest huvidest, mille poole Venemaa püüdleb. Sellises valguses sarnaneb Venemaa õiguslik käitumine mereõiguse vallas teise suurriigi, Ameerika Ühendriikide praktikaga, kes suhtub UNCLOS-i ratifitseerimise küsimusse üsna meelevaldselt. Siiski, Venemaa *ekstensiivse*

suveräänsuse kontseptsiooni kohaldamine merealadel on piiratud nii teiste riikide olemasoluga kui ka üldtunnustatud hirmuga ookeanide ökosüsteemide tuleviku üle, mida peegeldavad mitmed keskkonnaõiguslikud regulatsioonid ning vastav rahvusvaheline seadusandlus. Oht, et Venemaa võib kuritarvitada enda püüet *ekstensiivse* suveräänsuse poole ookeanides ja merealadel või võib kuidagi ohustada Maa ökosüsteeme ja tulevaste põlvkondade tulevikku, kasutades ekstensiivset ja absoluutset ülemvõimu süsivesinike varude üle, on minimaalne. Vene Föderatsioon ja selle juhid näivad mõistvat, et ainult riikidevahelises koostöös saab Venemaa saavutada soovitud kontrolli ressursside üle. Antud doktoritöö on esitanud mitmeid näiteid Venemaa avatusest kompromissidele. Selliselt võib Venemaad näha kui rahvusvaheliseks dialoogiks avatud riiki, kes on valmis koostööks mereõiguse valdkonnas ning enda pretensioonikate nõudmiste tagasihoidmiseks ning *ekstensiivse* suveräänsuse kontseptsiooni kohaldamise piiramiseks.

ABBREVIATIONS

Am. J. Int'l L	American Journal of International Law
CLCS	Commission on the Limits of Continental Shelf
EEZ	Exclusive Economic Zone
CNN	Cable News Network
EIA	Environment Impact Assessment
EU	European Union
ICJ	International Court of Justice
ILC	International Law Commission
FSB	Federal Security Service of the Russian Federation
Госгортехнадзор	Государственный Горный и Технический Надзор [Federal Committee for Mining and Industrial Supervision]
MID	Russian Ministry of Foreign Affairs
MGIMO	Moscow State Institute of International Relations
МИНЭКОНОМРАЗВИТИЯ	Министерство Экономического Развития [Ministry of Economic Development]
NATO	North Atlantic Treaty Organization
NSR	Northern Sea Route
РАН	Российская Академия Наук [Russian Academy of Science]
RSFSR	Russian Soviet Federative Socialist Republic
TEN-E	Trans-European Energy Networks
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
Ukranian SSR	Ukrainian Soviet Socialist Republic
USSR	Union of Soviet Socialist Republics

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APPENDIX I

Maritime Jurisdiction and Boundaries in the Arctic Region[640]

IBRU International Boundaries Research Unit

Durham University

Maritime jurisdiction and boundaries in the Arctic region

www.durham.ac.uk/ibru

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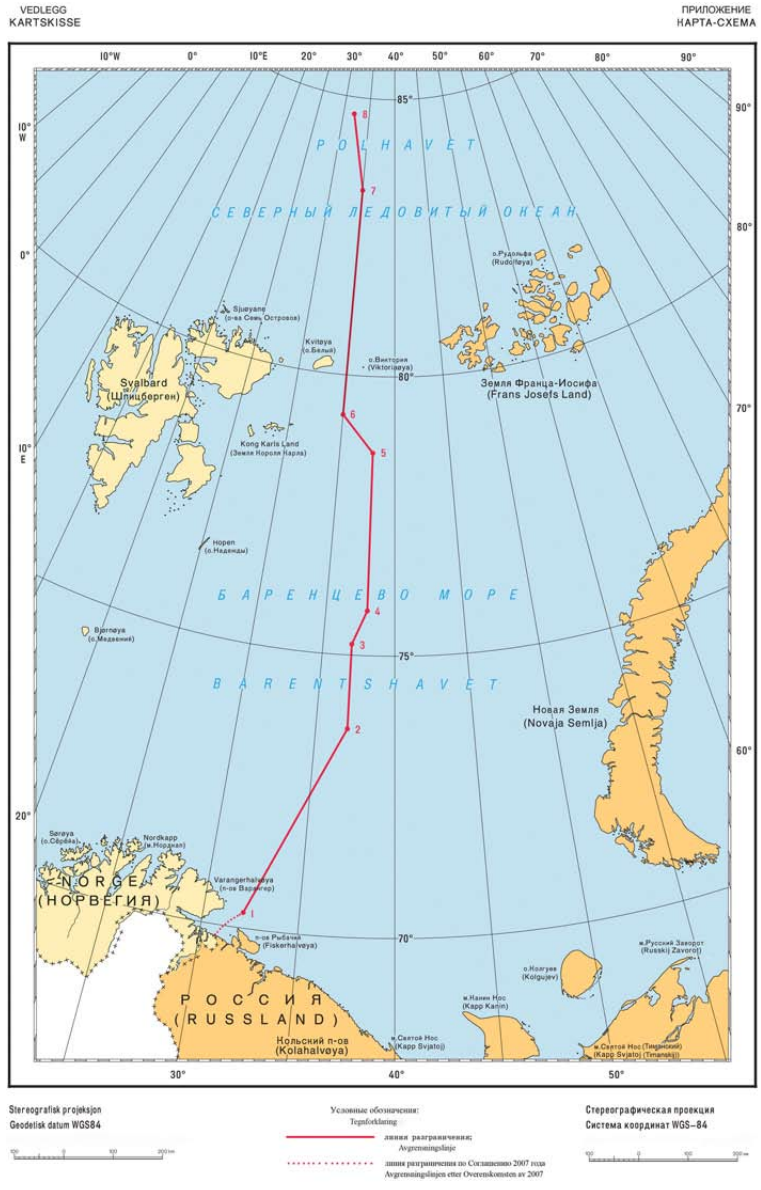
APPENDIX 2

Russian-Norwegian Maritime Boundary in the Barents Sea[641]



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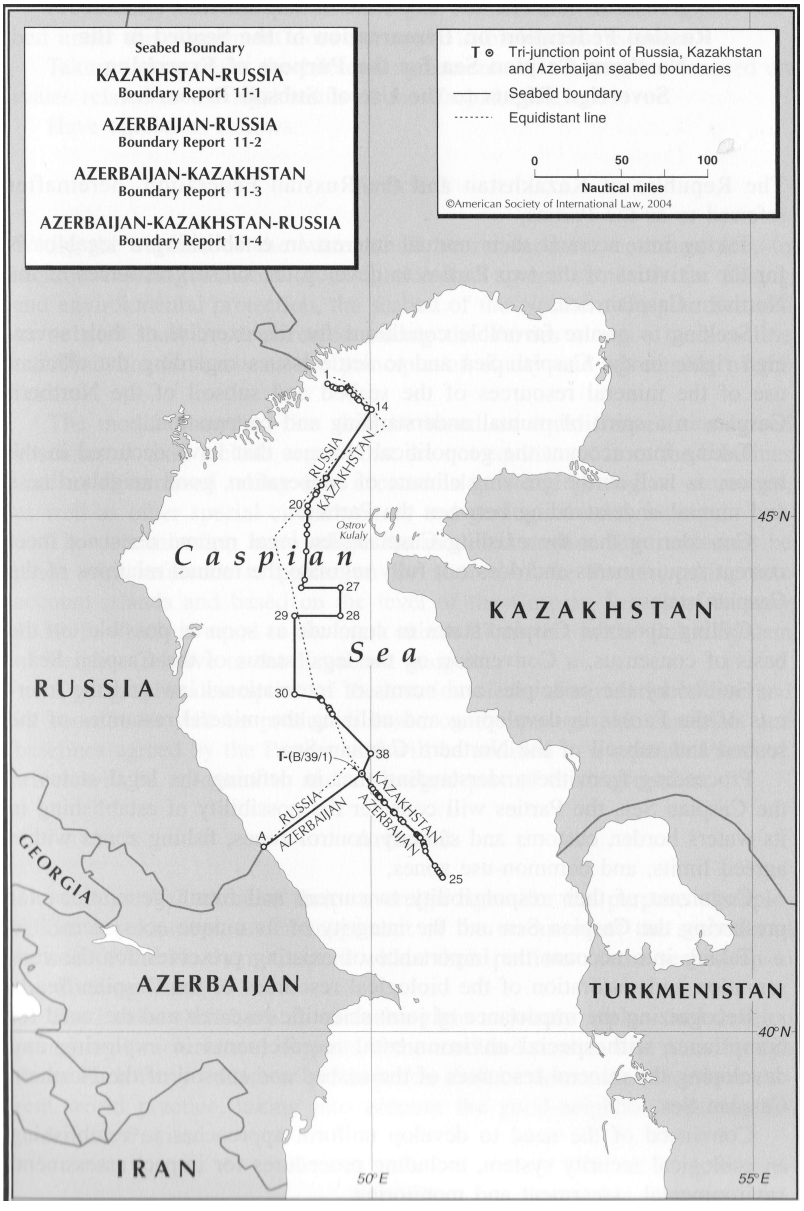
APPENDIX 3

Maritime Boundaries in the Caspian Sea[642]



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APPENDIX 4

Maritime Delimitation in the Kerch Strait[643]

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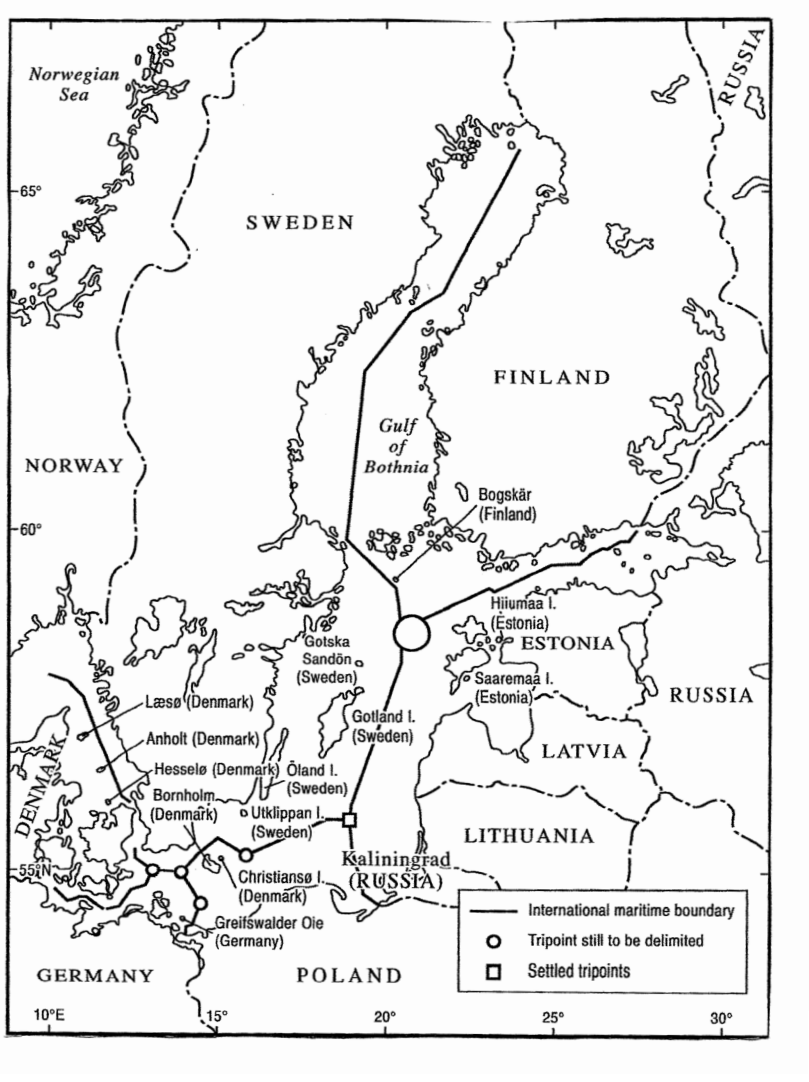
APPENDIX 5

Post-World War II Maritime Delimitation in the Baltic Sea[644]



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