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MARITIME DELIMITATION IN THE BARENTS SEA AND INTERNATIONAL PRACTICE IN MARITIME DELIMITATION

Abstract

International legal practice provides that final delimitation should correspond to the notion of justice, but at the same time there are no explicit methods for delimitation of international maritime areas, the median line method being only one among others. In most cases the parties agree on points with lines derived from the median, or other types of lines guided only by the rationale of fair delimitation. The delimitation process in the Barents Sea concerns the issue of delimitation between the Arctic coastal states and the factors that should be included in the course of this process, as well the range of other international legal problems, such as the status of the Svalbard and its adjacent maritime areas. This article presents the background of the maritime boundary dispute between Norway and Russia and examines the 2010 Barents Sea Delimitation Treaty, discussing its key features in light of international maritime delimitation practice. The 2010 Russian-Norwegian Treaty defined the maritime borders of the Barents Sea between Norway and Russia in a compromise fashion, including solutions on fishery issues and maritime cooperation, but it did not resolve all the issues linked to the delimitation, especially status of the Svalbard maritime area.

INTRODUCTION

The delimitation process in the Barents Sea has been a very complicated process, covering the issue of delimitation of maritime areas between the Arctic coastal states and including a number of factors in the course of the process. It has

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included as well a range of other international legal problems, such as the status of the Svalbard and its adjacent maritime areas. The process has encompassed the delimitation of the territorial Arctic sea, continental shelf, exclusive economic zones (hereinafter sometimes "EEZ") and exclusive fisheries zones (hereinafter sometimes "EFZ").

This article examines a set of international legal issues regarding maritime delimitation. It first analyses the practice of delimitation that takes place both through negotiations between the interested parties and through international judicial bodies. This is a necessary introduction into a further analysis of the 2010 Treaty between Norway and Russia and the set of problems that existed with regard to the Barents Sea. The judicial practice in the first part of the article refers mainly to the core of delimitation practice, and the mode in which the elements are included and discussed in this article may also reflect a certain indirect expression of the authors' position, since maritime delimitation is an extremely broad and developing issue.

The further analysis, concerning the delimitation of maritime areas in the Arctic, has two dimensions. The first refers to the delimitation of maritime areas between states, and the second concerns the definition of the external borders of the continental shelf towards the North Pole, outside the EEZ. In the case of delimitation between States, the practice followed by the Arctic states included two main methods of delimitation: division based on the perpendiculars running along the meridian (sector line), and division based on the median and equidistance line.

The bilateral agreement between the Kingdom of Norway and the Russian Federation on the delimitation of maritime areas and cooperation in the Barents Sea and the Arctic Ocean, signed on September 15, 2010, finalized a dispute over the delimitation of maritime areas in the Barents Sea that lasted for more than four decades.[1] The agreement is a compromise and the result of concessions made by both parties in order to obtain a mutually acceptable solution. The final approval and demarcation of the maritime border between the parties is based on the Agreement which entered into force on July 7, 2011, and corresponds to contemporary trends in the application of the law of the sea. This agreement is also extremely interesting due to the fact that it applies to the Arctic region, which historically possessed its own specific characteristics in terms of delimitation.

As has been mentioned, Norway and Russia have been engaged in an almost forty-year negotiation process on a maritime delimitation line between the two states. The Russians have traditionally relied on the sector line principle in staking

[1] The text of the treaty is available on the webpage of the Norwegian Foreign Ministry: http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf.

out their position. Norway's original and traditional stance on this question was that the delimitation line should be based on an equidistance line between the coasts on either side of the border. The extensive on-again, off-again negotiations have been completed successfully and on September 15, 2010, the Foreign Ministers of Norway and Russia signed a treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. The 2010 Russian-Norwegian Treaty defines the maritime borders of the Barents Sea between Norway and Russia, as well as covering fishery issues and maritime cooperation at sea issues, effectively ending the territorial dispute between the two states. The area in contention has been shared almost equally, with both Russia and Norway making concessions in relation to their original position. The 2010 Agreement establishes a single maritime boundary that divides the two states' continental shelves (within and beyond 200 nautical miles, hereinafter "nm") and exclusive economic zones.

Before moving to the substance of this article, two preliminary remarks should be made. First, the issues that do not directly relate to the legal problems posed by delimitation process (such as global warming and its impact on the negotiations between Russia and Norway, more general political considerations, etc.) were consciously omitted because of concerns about the length of this article. Secondly, for the same reasons, the review of the extensive international judicial practice in the first section is restricted only to that case law which the authors regarded as essential to the topic of this article.

1. THE GENESIS OF SECTORAL DELIMITATION IN LIGHT OF CONTEMPORARY PRACTICE OF MARITIME DELIMITATION

The first agreement that used the sector line in delimitation was concluded between Russia and the United Kingdom in 1824 on the border delimitation in North America, and again in 1867 between Russia and the United States of America. Both agreements provided that the boundary between the possessions of the parties would be marked in accordance with the line running along 141° W meridian "on the whole of its length until the Frozen Sea."[2] The question of whether

[2] "… dans son prolongement jusqu'à, la mer Glaciale …", "… въ своемъ продолженіи до Ледовитаго моря …", Конвенція, заключенная въ Санктпетербургѣ между Императоромъ Всероссійскимъ и Королемъ Великобританскимъ, 17/5 IV 1824 (The Convention concluded in St. Petersburg between the Emperor of Russia and the King of Great Britain, signed on 17/5 April 1824, Code of Law of Russian Empire (edited by Speransky), No. 30233a, Part I. Vol. 40, pp. 72-74, Art. III para. 2), available at: http://explorenorth.com/library/history/bl-ruseng1825fr.htm, http://www.pszri.ru/.

the application of the 1824 Convention applies only to the land or only in relation to marine areas remains open. Nevertheless, it is possible to speak about the beginning of delimitation of the Arctic land and maritime areas according to the perpendiculars running along the meridians. The Russian-American Agreement on the sale of Alaska in 1867 provided exactly the same formula for the determination of borders.[3] The original boundary drawn between the Russian and British possessions in North America was retained as the boundary between the United States and Canada (as a British dominion). In addition, Russia and the United States agreed that the border between the countries would run in the Arctic along the meridian, which is drawn in the direction of the North Pole. This mode of delimitation in the Arctic performed along meridians was initially designed rather for the delimitation of land areas that fall within the sector. This kind of delimitation seemed to be the most appropriate, convenient and relatively easy to carry into effect, especially taking into account the sparsely populated areas adjacent to the Arctic Ocean. It can therefore be assumed that the colonial UK-Russian and US-Russian delimitation constituted the basis for the further use of perpendiculars running along meridians as a method of delimitation of maritime areas in the Arctic.

The first claims on Arctic areas were put forward by Canada in 1904 and 1906. The Canadian Ministry of the Interior prepared maps that included the land areas lying to the west of Greenland and north of the Canadian mainland into the territory of Canada between 60° and 141° W, regardless of whether they were discovered or not. The Canadian claims to the land areas were confirmed and expressed in its internal legislation in the form of amendments to the Act on the Northwest Territories of July 1, 1925. The amendments introduced a ban on any activity of other countries in the designated area without the consent of Canada.[4] These claims did not cover any maritime areas. There is no link between the claims from 1925 and the claims made today to the exclusive economic zone and continental shelf, since the latter concepts were not yet known in international law in 1925. A similar approach was adopted by the USSR in 1926, when

[3] Treaty concerning cession of the Russian Possessions in North America (signed on June 20, 1867). Art. 1 uses the same formula: "… in its prolongation as far as the Frozen Ocean …". Later the Parties defined more precisely the line of delimitation along 168°58'37" W (available at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=573).

[4] D. G. Shelagh, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950*. University of British Columbia Press, Vancouver: 1988, pp. 306-307.

the Presidium of the USSR Central Executive Committee issued a decree which stated similar claims by the USSR between 32° E to 168° W.[5] In 1933 Denmark put forward their claims to land areas between 10° and 60° W. The US did the same in the proclamation of President Truman of September 28, 1945, whereby it was decided that the mineral resources located on the continental shelf of the United States should stay under the jurisdiction of the US.[6] It should be noted that the state practice in the 1920s and 1930s used the sector principle for maritime delimitation in the Arctic. A similar process also took place in claims made in the Antarctic, following the sector principle as well, with the sectors being determined along the meridians. Looking at events from a historical perspective, it should be acknowledged that the initial maritime delimitation procedure did not set any fixed criteria or rules. The first delimitation agreements usually applied to the points located between the shores defined during the negotiations and lines that ran between the mentioned points and constituted, in most cases, either perpendiculars or a median line.[7]

Later on, when economic activity in the Arctic was intensified, the Arctic states expanded their claims in the region. The adoption of four Geneva Conventions in 1958 on the law of the sea constituted a new stage in the process of maritime delimitation. In accordance with Article 6.1 of the 1958 Convention on the Continental Shelf, the delimitation of the exclusive economic zone and continental

[5] Resolution of the Presidium of the Central Executive Committee of the USSR, "On the declaration of the lands and islands in the Arctic Ocean as territory of the Union of SSR", April 15, 1926, "Izviestia VCIK", April 16, 1926.

[6] The term "continental shelf" as a legal institution was introduced by the Truman Proclamation in September 1945, where the US President stated that mineral resources of the US continental shelf are under the jurisdiction of the US Government. The US Presidential Proclamation 2667 of September 28, 1945, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", September 28, 1945, 10 Fed. Reg. 12303; XIII Bulletin, Dept. of State, No. 327, September 30, 1945, p. 485. *See, e.g.*, R. Anand, *Origin and Development of the Law of the Sea*, Martinus Nijhoff Publishers, the Hague: 1982, pp. 163-166. *See also*, Ř. Jensen, *Kontinentalsokkelens avgrensning utenfor 200 nautiske mil: Norske og russiske perspektiver i de nordlige havområder*, 66(4) Internasjonal Politikk (2008), p. 565.

[7] *See e.g.*, Art. 5 of Accordo italo-turco relativo alla delimitazione delle acque territoriali tra l'Isola di Castelrosso e la Costa d'Anatolia (Italo-Turkish Agreement on the delimitation of territorial waters between the island of Kastellorizo and the coast of Anatolia), Regio Decreto Legge 14 Aprile 1932, N. 379. Text available at http://www.hri.org/MFA/foreign/bilateral/italturc.htm; *see also*, Treaty between His Majesty in respect of the United Kingdom and the President of the United States of Venezuela relating to the submarine areas of the Gulf of Paria, signed on February 26, 1942, UNTS 4829, Art. 3.

shelf is carried out in accordance with median line, unless special circumstances are present. At the same time it should be noted that in accordance with the provisions of the 1958 Convention on the Continental Shelf delimitation was done primarily on the basis of an agreement between states. Also, the 1958 Convention on the Territorial Sea and Contiguous Zone provided that delimitation should be carried out through the median line unless an agreement between the states otherwise is concluded. A delimitation based on median line can be changed in cases when so-called "special circumstances" are present. The *travaux préparatoires* of the 1958 Conference on the Law of the Sea demonstrate that originally the concept of "special circumstances" referred to a delimitation that leads to an equal partition of the disputed areas.[8]

The earlier procedures on delimitation were based on customary rules and practice, but this changed after the adoption of the 1958 Convention. It should be noted that the Convention was the first international legal instrument that provided rules on the delimitation of continental shelf. The adoption in 1958 of the Convention on the Continental Shelf and the Convention on the Territorial Sea and Contiguous Zone significantly strengthened the role of the median line as the main method of delimitation of maritime areas. Such a situation did not last long however, because state practice began to later question the median line status as the main method of delimitation. Moreover, though the median line was the most common method of carrying out delimitation, the Convention on the Law of the Sea of 1982 (hereinafter "UNCLOS")[9] does not directly state (as opposed to the Convention of 1958) that the median line should be applied during the delimitation procedure.

In accordance with the provisions contained in both UNCLOS and the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1958 Convention on the Continental Shelf, delimitation of marine areas should be performed based on bilateral agreements between the states concerned. Both parties should reach agreement on this issue through negotiations conducted in good faith. The 1958 Convention on the Continental Shelf provides the legal ground for the median line delimitation of the continental shelf and exclusive economic

[8] *See e.g.*, A. O. Elferink, *The Law of maritime boundary delimitation: a case study of the Russian Federation*, Martinus Nijhoff Publishers, Dordrecht: 1994, pp. 19-25. U. Leanza, *La delimitation du plateau continental et la zone économique exclusive: une introduction*, in: D. Pharand, U. Leanza, *The continental shelf and the exclusive economic zone*, Martinus Nijhoff Publishers, Dordrecht: 1993, pp. 37-45.

[9] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 396.

zone. The subsequent practice of maritime delimitation showed parties putting forward claims justified by the application of the median line.[10]

Articles 74 and 83 of UNCLOS provide that the delimitation of the continental shelf and exclusive economic zone should be performed by agreement according to international law in such a way that the outcome of the delimitation would be a fair solution for both parties. This is a more comprehensive approach than was provided for in the 1958 Convention and constitutes the rule applied in cases where coastal states are opposite or adjacent to each other. However, in the case of delimitation of the territorial sea between States with coasts that are opposite or adjacent to each other, "neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured". This rule, embodied in Article 15 of UNCLOS, does not apply in cases of historical title or other special circumstances where the delimitation of the territorial waters of both states can be performed in another way other than using the median line.

It should be noted that a substantial part of the UNCLOS provisions evolved from international customary law, *inter alia,* the principle of just delimitation. The international practice of maritime delimitation confirmed that the contemporary rules of the law of the sea include several elements that are rooted historically in international custom.[11] Owing to the ambiguous practice of carrying out delimitation, UNCLOS does not establish any specific rules on either the delimitation of the continental shelf or the exclusive economic zone. It should be also noted that the Convention has confirmed and consolidated the status of the median line as the main method for carrying out the delimitation of territorial sea in the absence of special circumstances (Article 15). UNCLOS provides that during the delimitation of the EEZ and continental shelf, one should strive to achieve an equitable solution (Articles 74.1 and 83.1, respectively). The delimitation of maritime areas (territorial waters, EEZ, and continental shelf) should be performed using a single line, regardless of their status. The International Court of Justice (hereinafter "ICJ") noted that "the court observes that the concept of a single maritime

[10] *See, e.g.*, D. Colson, R. Smith, *International Maritime Boundaries*, Vol. V, Martinus Nijhoff Publishers, Leiden: 2005, pp. 3200-3202.

[11] *Award of the Arbitral Tribunal in case between Eritrea v. Yemen (second stage)*, PCA 17 December 1999, p. 40, para. 130 (available at http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF); *Case concerning the continental shelf (Libya v. Malta)* [1985], ICJ Reports 1985, p. 30, para. 27.

boundary does not stem from multilateral treaty law but from State practice, and it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them."[12]

International judicial practice proves that the procedure for delimitation is based mostly on the median line, while the burden of proof for showing the presence of special circumstances rests with the state which argues the existence of such circumstances.[13] It should also be noted, however, that international practice has shown that the use of the median line in the course of the delimitation procedure is not a settled *a priori* conclusion, which has also been proven in international jurisprudence. A similar opinion was expressed by the ICJ in the delimitation of the continental shelf in the North Sea. In that case, the ICJ did not refer to the median line, and it stated that justice "… finds its objective justification in considerations lying not outside but within the rules."[14] Here one may ask whether such an approach is applicable to the formula of "equitable solution". In the same case the ICJ actually favored using perpendiculars as a method of delimitation. The use of perpendiculars is to a large extent similar (but not identical) to sectoral delimitation.[15] It seems reasonable to ask whether the concept of "justice" should be interpreted in terms of equitable delimitation or in the sense of legality and reliance on legal rules, as was stated in Grisbådarna case.[16]

Taking into account the analysis of international practice with regard to the delimitation of maritime areas (territorial waters, EEZ and the continental shelf), it should be noted that there are three stages to the delimitation procedure, as was confirmed in the *Libya v. Malta* judgment, as well as in the *Qatar v. Bahrain* case.[17] The first stage refers to the choice of which delimitation method will be used as the main one in the final delimitation.

The second stage of the delimitation procedure takes into account the existence of special/relevant circumstances. This issue was acknowledged in the

[12] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)* [2001] ICJ Reports 2001, p. 93, para. 173.

[13] N. Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, Brill Academic Publishers: Leiden, 2003, p. 34.

[14] *North Sea Continental Shelf cases (Germany v. Denmark/Netherlands)* [1969] ICJ Reports 1969, p. 49, para. 88.

[15] *Ibidem*, p. 46, paras. 81-85.

[16] *Award of the Arbitral Tribunal in Grisbådarna case (Sweden v. Norway)*, PCA 23 October 1909, p. 5 (available at http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF).

[17] *Case concerning the Continental Shelf (Libya v. Malta) (final judgement)* [1985] ICJ Reports 1985, pp. 46-48, paras. 60-64; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)*, p. 94, para. 176.

delimitation of the continental shelf between the Norwegian island of Jan Mayen and Greenland. The ICJ noted that the 1958 Conventions on the Territorial Sea and Contiguous Zone and on the Continental Shelf require the examination of special circumstances, while according to customary law it is important to take into account relevant circumstances in order to achieve a just delimitation result.[18] The interpretation of the term "special circumstances" before the entry into force of UNCLOS was applied on the basis of treaty law, while the interpretation of "relevant circumstances" evolved from customary law. UNCLOS uses the definition "special circumstances" only with regards to territorial waters, whereas as regards maritime areas beyond territorial waters, the Convention uses the term "relevant circumstances".[19] The question here arises whether these two types of circumstances can be regarded as similar and could be applied to the entire set of delimitation processes of marine areas, i.e. territorial waters, exclusive economic zones, and continental shelf. The delimitation line between the states constitutes a single delimiting line for all maritime areas that are subject to partition, and "special" and "relevant" circumstances cannot be applied separately despite the formal distinction in their wording.[20]

The ICJ on several occasions has expressed its position regarding the interpretation of "relevant" and "special" circumstances.[21] A set of factors are taken into consideration while carrying out the delimitation: the geology and geomorphology of the bottom (for the delimitation of maritime areas over 200 nautical

[18] *Case concerning Maritime delimitation between Greenland and Jan Mayen (Denmark v. Norway)* [1985] ICJ Reports 1985, p. 62, paras. 54-56. In the *Case concerning the Delimitation of the Continental Shelf*, the Court stated that the median line and special circumstances cannot be applied separately from each other (*Case concerning the Delimitation of the Continental Shelf (France v. United Kingdom)* [1978] 31 ILM 1149 (1992), p. 1169, para. 70).

[19] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Merits)* [2007] ICJ Reports 2007, p. 39, paras. 103-104. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the ICJ stated that special circumstances concern territorial sea while relevant circumstances, which evolved from the international judicial practice after 1958, refer to the exclusive economic zone and continental shelf (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 111, para. 229).

[20] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 93, para 171.

[21] *Case Concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)*, p. 28, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 75, para. 229; *see also*, L. Sohn, *The Use of Geophysical Factors in the Delimitation of Maritime Boundaries*. in: J. Charney, L. Alexander (eds.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Leiden: 1996, pp. 163-202.

miles from the baselines),[22] access to mineral resources,[23] coastline configuration and its length,[24] historic title,[25] and safety considerations.[26]

During the third stage of the delimitation procedure the length and shape of the coastline are taken into account in relation to the surface of the marine areas subject to partition. If the disparity between the length of the state coastline and their marine areas is large, the competent adjudicating authority can determine whether these disparities may constitute circumstances to be taken into account to achieve a fair delimitation result.[27] It should be noted that in international jurisprudence the disproportions do not always impact on the final decision.[28]

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[22] In the *Continental Shelf* case the ICJ stated that the geological and geomorphological arguments are not relevant in the case of delimitation between opposite coasts that lie less that 400 miles from each other (*Continental Shelf case (Libya v. Malta) (final Judgement)* [1985] ICJ Reports 1985, p. 35, para. 39).

[23] The ICJ on several occasions took into account the mineral resources when delimiting the continental shelf: *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada v U.S.A.)* [1984] ICJ Reports 1984, p. 101, para. 239; *North Sea Continental Shelf* cases, p. 21, para 17; *Case Concerning the Land and Maritime boundary between Cameron and Nigeria (final Judgement)* [1998] ICJ Reports 1998, pp. 138-140, paragraphs 282-283; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006 (Barbados v. Trinidad and Tobago)* [2006] RIAA, Vol. XXVII, p. 214, para. 241. It is possible to conclude that the fact of the presence of mineral resources within the disputed areas does not constitute a special/relevant circumstance until such time as the parties cannot agree on their mode of exploration.

[24] In several cases the ICJ expressed its opinion on the coastline configuration and its length and its impact on the final delimitation: *North Sea Continental Shelf* cases, pp. 50-51 paras. 89-91; *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, p. 93, para. 220; *Maritime Delimitation in the Black Sea (Ukraine v. Romania)* [2009] ICJ Reports 2009, pp. 129-130, paras. 213-214; *Case concerning Maritime delimitation between Greenland and Jan Mayen*, p. 34, para. 68; *Case concerning the Continental Shelf*, p. 56, para. 78.

[25] Art. 15 of the Convention on the Territorial Sea, April 9, 1958 516 UNTS 205. In the *Eritrea v. Yemen* arbitration, the arbitral court stated that the long period of use (*longa possessio*) is an important condition in the determination of historical rights (*Award of the arbitral tribunal in the first stage of the proceedings between Eritrea and Yemen* [1998] 114 ILR, p. 125, para. 450).

[26] The argument of security was not accepted since the delimitation took place far from the coastline of the states. *See e.g.*, *Case concerning the Continental Shelf*, p. 52, para. 73.

[27] *Award in the Canada-France Maritime Boundary Arbitration (Canada v. France)* [1992] 31 ILM 1148 (1992), p. 62, para. 56.

[28] This took place in the *Maritime delimitation in the Black Sea* case (*Maritime delimitation in the Black Sea case (Ukraine v. Romania)* [2009] p. 130, paras. 215-216). In the previous cases, such as the *Case concerning Maritime Delimitation between Greenland and Jan Mayen* and the *Case concerning the Continental Shelf*, the ICJ took into consideration

It should also be noted that in the practice of delimitation of the continental shelf between States with adjacent coasts, various forms of perpendiculars are used, corresponding to an equitable delimitation of the maritime area. The median line (as well as sectoral) forms a perpendicular line that in the vast majority cases links the points established by the parties, taking into account the special/relevant circumstances. Such delimitation should in any case correspond to a fair final delimitation. In the *Gulf of Maine* case, the ICJ ruled that "delimitation is to be affected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result."[29]

The delimitation of Arctic marine areas does not constitute an exception to the generally accepted principles of delimitation, even though it has its specific characteristics, in particular its location in relatively close proximity to the North Pole, the disputed status of the adjacent to Svalbard waters, the sparse population, and the length and configuration of the coastline. Delimitation with the help of sector division is a quite logical and historically developed form, though it is still not the only unique method of delimitation. A significant aspect of the sector concept is that it represents an important stage in the delimitation and, like the median line, can be used for the initial delimitation. Having regard to the delimitation of the Arctic it is worth focusing on the concept of bisector division, as described by the ICJ in the *Nicaragua v. Honduras* case.[30] In that case the ICJ admitted that the median line may not always be used for the initial delimitation.[31] It is possible

the disproportions between the length of coastlines in both instances (as 1 to 9 and 1 to 8 correspondingly). A similar qualification was made by the arbitral court in the Award in the *Canada-France Maritime Boundary Arbitration*. In this case the question was not the proportionality between the maritime area and the length of the coastline, but the just proportion. *See also*, *Guinea/Guinea Bisau Maritime Delimitation Arbitration (Guinea v. Guinea Bisau)* [1985] 25 ILM 251 (1986), pp. 183-184, paras. 94-95. It should be noted as well that the appropriate judicial institution may not consider the presence of small isles within maritime areas that are subject to delimitation or diminish their presence, and may not grant their own maritime areas out of territorial waters (*Maritime delimitation in the Black Sea case*, p. 122, para. 185).

[29] *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, pp. 57-58, para. 112.

[30] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, pp. 90-91, paragraphs 284-285. *See also*, *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, pp. 87-88, paras. 199-201, *Continental Shelf case (Tunisia v. Libya) (final judgement)* [1982], ICJ Reports 1982, pp. 71-72, para. 121.

[31] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, pp. 88-89, para. 280.

therefore to conclude that the sector delimitation and its derivatives constitute methods of initial delimitation equal in their status to that of the median line. At the same time it should be stressed that in each case the demarcation of marine areas should be analyzed separately, and the use of sectoral lines is rather a stage than the final result of delimitation.

2. DEVELOPMENT OF THE MARITIME DELIMITATION PROCESS IN THE BARENTS SEA. THE NORWEGIAN-RUSSIAN MARITIME BOUNDARY DISPUTE

The Barents Sea forms part of the Arctic Sea and covers about 1.4 million km^2. Altogether the disputed area measured approximately 175.000 km^2. The post-World Word II concept of continental shelf as a legal institution and the concept of a 200 nautical mile EEZ provoked the need to delimit maritime areas between the Soviet Union (and its successor, the Russian Federation) and Norway. It should be noted that before the concept of EEZs emerged during the 1970s the Norwegian-Russian maritime boundary dispute was limited to the delimitation of both states' continental shelves.

The history of the maritime delimitation process and boundary disputes in the Barents Sea is quite long. In 1957, Norway and the Soviet Union agreed on their first maritime boundary and concluded an agreement – known as the "Varangerfjord Agreement" – which delimited most of the Varangerfjord area and established the maritime boundary between the territorial seas of mainland Norway and the Soviet Union.[32] The Varangerfjord agreement contains two straight line segments. The first segment delimits the territorial sea between the two states, and the other segment runs from the end point of the territorial sea boundary to the middle point of the Varangerfjord closing line. Following the regulation provided for in the 1958 UN Convention on the Continental Shelf, both states claimed exclusive rights to their continental shelves. Norway put in a formal claim to its continental shelf in 1963, issuing its Royal Decree of 31 May 1963.[33]

[32] Agreement concerning the Sea Frontier between Norway and the USSR in the Varanger Fjord of February 15, 1957, 312 UNTS 4523. Descriptive Protocol relating to the Sea Frontier between Norway and the USSR in the Varanger Fjord of February 15, 1957, 312 UNTS 4523.

[33] "The sea-bed and the subsoil in the submarine areas outside the coast of the Kingdom of Norway are under Norwegian sovereignty as regards exploitation and exploration of natural resources, as far as the depth of the superjacent waters admits of exploitation of natural resources, within as well as outside the maritime boundaries otherwise applicable,

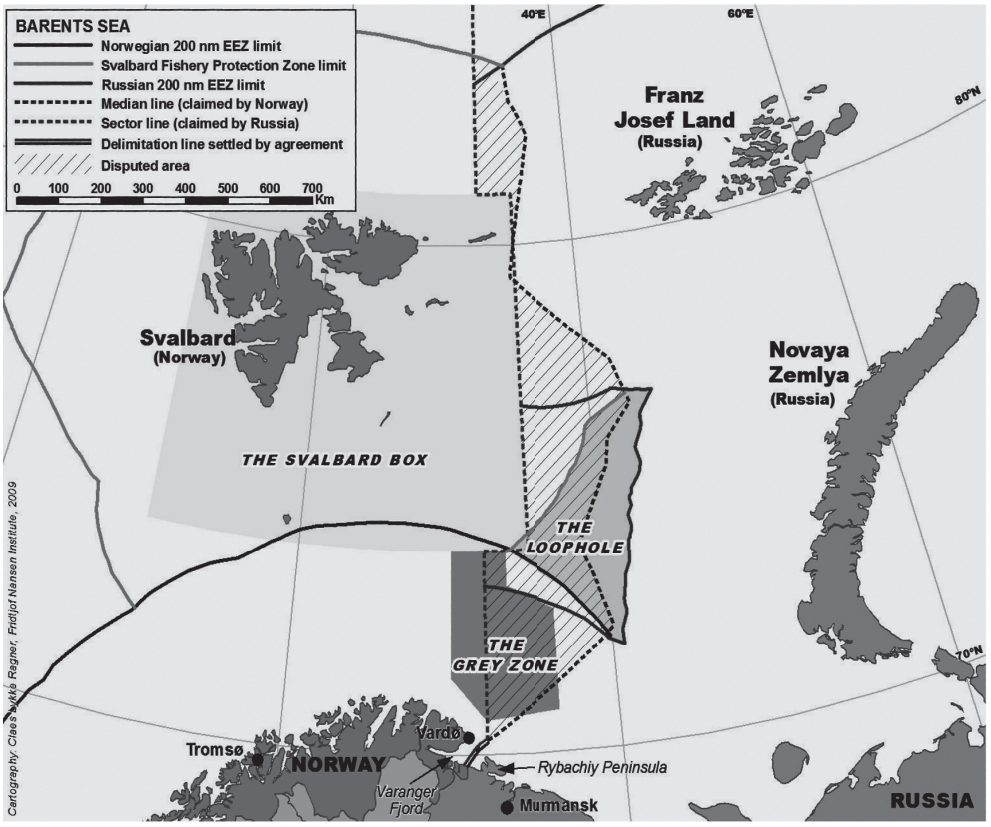

Figure 1. Map of the legal positions of Norway and the Russian Federation in the Barents Sea

Source: P. J. Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute*, Lysaker: 2010, p. 71.

Five years later the Soviet Union also made a formal claim to its continental shelf, issuing the Decree of the Presidium of the Supreme Soviet of the USSR of February 6, 1968. Large parts of the Barents Sea's seabed were seen as constituting continental shelf pursuant to the 1958 Convention, and therefore the need arose for a bilateral maritime delimitation agreement resolving boundary disputes between the two states. Both states entered into informal talks in 1970.[34] The formal

but not beyond the median line in relation to other states", Royal Decree of May 31, 1963 Relating to the Sovereignty of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast.

[34] K. Kubiak, *Interesy i spory państw w Arktyce* (States' interests and disputes in the Arctic), Wydawnictwo Naukowe Dolnośląskiej Szkoły Wyższej, Wrocław: 2009, pp. 84-85.

negotiations concerning the delimitation of maritime borders between Norway and the Soviet Union commenced in 1974. The applicable law at that time was Article 6 of the 1958 Convention on the Continental Shelf, and both states agreed to conduct the negotiation process on the basis of its provisions related to median line delimitation.[35] At the core of the issue were competing claims from both parties to a disputed area of about 175,000 km^2, of which 155,000 km^2 was located within the Barents Sea and 20,000 km^2 just north of it (in the Arctic Ocean).[36] Significantly, the southern part of the disputed area has one of the world's best fisheries. There are also very large quantities of oil and gas in this region.[37]

As mentioned above, initially the negotiations were concerned only with the delimitation of the continental shelf. In 1977 Norway and the Soviet Union made their respective claims with regard to the maritime areas in the Barents Sea, i.e., they established their respective claims to EEZs. The establishment of 200 nm EEZs complicated the negotiation process. Since that time, the negotiations concerned both the delimitation of the EEZs and the fishery zones. In addition, the overlapping EEZ claims were not resolved. From the start of the negotiations, both parties held different opinions with regard to the demarcation line. By reason of the widely varying stances of the two parties, the negotiations became more complicated, which resulted in turning them into a very long and difficult process. Norway based its claims on the median line principle and its position was that the equidistance line should form the appropriate maritime boundary in accordance with international law. The Soviet Union (and its successor the Russian Federation), on the other hand, advocated for the sector line solution[38]. Throughout the negotiation process the Russians argued that the sector line along the longitude 32° 4' 35' E forms an appropriate delimitation line in accordance with international law. In the opinion of the Russians, there were so-called "special circumstances,'' as per Article 6 of the 1958 Continental Shelf Convention, which

[35] Article 6 of the 1958 Continental Shelf Convention stipulates that the boundary is the median line unless another boundary is justified by so-called "special circumstances". Convention on the Continental Shelf (adopted April 29, 1958, entered into force June 10, 1964) 1958 499 UNTS 311.

[36] P. J. Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute,* Fridtjof Nansen Institute Report 1/2010, Lysaker: 2010, p. 68.

[37] L. Łukaszuk, *Współpraca i spory międzynarodowe na morzach, wybrane zagadnienia prawa, polityki morskiej i ochrony środowiska* (Cooperation and international disputes on seas. Selected issues in law, maritime politics and environmental protection), Difin, Warszawa: 2009, p. 108.

[38] G. Hønneland, *Kompromiss als Routine: Russisch-Norwegische Konfliktlösung in der Barentssee* (Compromise as Routine: Russian-Norwegian Conflict Resolution in the Barents Sea), 2-3 Osteuropa (2011), p. 260.

justified deviating from the median line. The Russians considered that the special circumstances should lead to a boundary following the sector line originated in the above-mentioned 1926 Soviet Decree, which laid claim to the sector principle and declared that all territory within two designated eastern and western meridians were part of the Soviet Union.[39] The Russians argued that the Decree itself constitutes the maritime boundary and used it in the delimitation dispute with Norway. This point of view seems to be entirely unjustified because there is no mention of sovereignty over maritime zones in the 1926 Soviet Decree, and in addition at the time the concept of maritime zones had not been established in international law. The 1926 Soviet Decree thus could not be considered as a justified and rightful claim to maritime zones in the Barents Sea, as they did not exist at the time when the decree was issued and adopted.[40] Furthermore, the wording of the 1926 Soviet Decree indicates that the decree proclaimed sovereignty only over islands situated east of line drawn from the westernmost point of Russia up to the North Pole and a similar line drawn from the easternmost point.[41] The Russians consistently referred to "special circumstances" of both a geographical nature (configuration of the coast, disproportionality between the comparative lengths of coastlines) and non-geographical nature (greater population in Russia, economic and security interests, unequal distribution of fishing resources, ice conditions, presence of islands and rocks, special environmental risks, geological conditions. and the existence of the Svalbard Treaty and its special status in international law). Norway on the other hand consistently contended and argued that there are no special circumstances in the disputed area. The Norwegians also objected to the Russian stance that special circumstances would justify any adjustment of the equidistance line and did not agree to the Russian assertion that the sector line should form the maritime boundary.

[39] The 1926 Soviet Decree stated: "[a]ll lands and islands, both discovered and which may be discovered in the future, which do not comprise at the time of publication of the present decree the territory of any foreign state recognized by the Government of the USSR, located in the northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole between the meridian 32°04'35" E. long. from Greenwich, running along the eastern side of Vaida Bay through the triangular marker on Cape Kekurskii, and the meridian 168°49' 30" W. long. from Greenwich, bisecting the strait separating the Ratmanov and Kruzenstern Islands, of the Diomede group in the Bering Sea, are proclaimed to be territory of the USSR", L. Timtchenko, *The Russian Arctic Sectoral Concept: Past and Present*, 50(1) Arctic (1997), p. 30.

[40] Aasen, *supra* note 36, p. 72.

[41] A. T. Falkanger, *International Law in the Arctic: Sovereignty and Delimitation Issues from a Norwegian Perspective*, in J. P. Rui (ed.), *Rettshjelp fra kyst til vidde – Festskrift til Jusshjelpa i Nord-Norge 20 år*, Gyldendal Akademisk, Oslo: 2009, p. 131.

It is worth mentioning that there was no shelf-activity at the time, and therefore there was no urgent need at that time to settle this border dispute. However, in January 1978 the parties concluded a provisional and temporary arrangement regulating fishing activities in parts of the disputed area.[42] This interim arrangement – called the "Grey Zone Agreement" – covered an area within 200 nm from the mainland coast of both countries. The "grey zone" included 67,500 km^2, of which 41,500 km^2 was located in the disputed area.[43] Under the provisions of the Grey Zone Agreement each party was entitled to exercise jurisdiction solely over fishing vessels flying its own flag. It also contained regulations related to third-country fishing vessels. Both states agreed to draw a single maritime boundary for the continental shelf and the EEZ, but they could not reach a consensus on the boundary line. The Grey Zone Agreement was initially limited to one year, but since its adoption it has been regularly extended on a yearly basis. The agreement was a classic mechanism of control over the management and conservation of fish stocks in international or disputed waters.[44] The Grey Zone Agreement was a provisional solution regulating fishing activities, which was the most pressing issue at the time. Throughout the following years there were periodic suspensions and resumptions of the negotiation process. Many factors influenced each state's approaches to the boundary question. Both parties ratified UNCLOS (Norway in 1996 and Russia in 1997). This led to modifying the rules applicable to the delimitation of the continental shelf and the EEZ. Since then, the provisions of Articles 73 and 84 of UNCLOS were applicable to the dispute. At this stage of negotiations the parties agreed that their objective was to establish a single boundary for the EEZ and the continental shelf in the areas within 200 nm from their relevant coastlines.[45]

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[42] Avtale mellom Norge og Sovjetunionen om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet med tilhørende protokoll og erklæring (Agreement Between Norway and the Soviet Union on a Temporary and Practical Arrangement for the Fishery in an Adjacent Area of the Barents Sea), Oslo, January 11, 1978, entered into force April 27, 1978, *Overenskomster med fremmede stater* (1978), 436.

[43] The 67,500 square kilometres of "Grey Zone" comprised the Loop Hole (Norwegian: Smutthullet), a high seas triangle bound by Russian EEZ, the disputed waters between both states, the Svalbard fishery zone and Norwegian EEZ. 23,000 km^2 are in undisputed Norwegian waters and 3,000 km^2 are in undisputed Russian waters. M. Laruelle, *International Law and Geographical Representations: The Russia Stance on Territorial Conflicts in the Arctic*, in L. Salmela (ed.), *Nordic Cooperation and the far North*, National Defence University, Helsinki: 2011, p. 28.

[44] *Ibidem*.

[45] T. Henriksen, G. Ulfstein, *Maritime Delimitation in the Arctic: The Barents Sea Treaty*, 42(1) Ocean Development & International Law 1 (2011), p. 2.

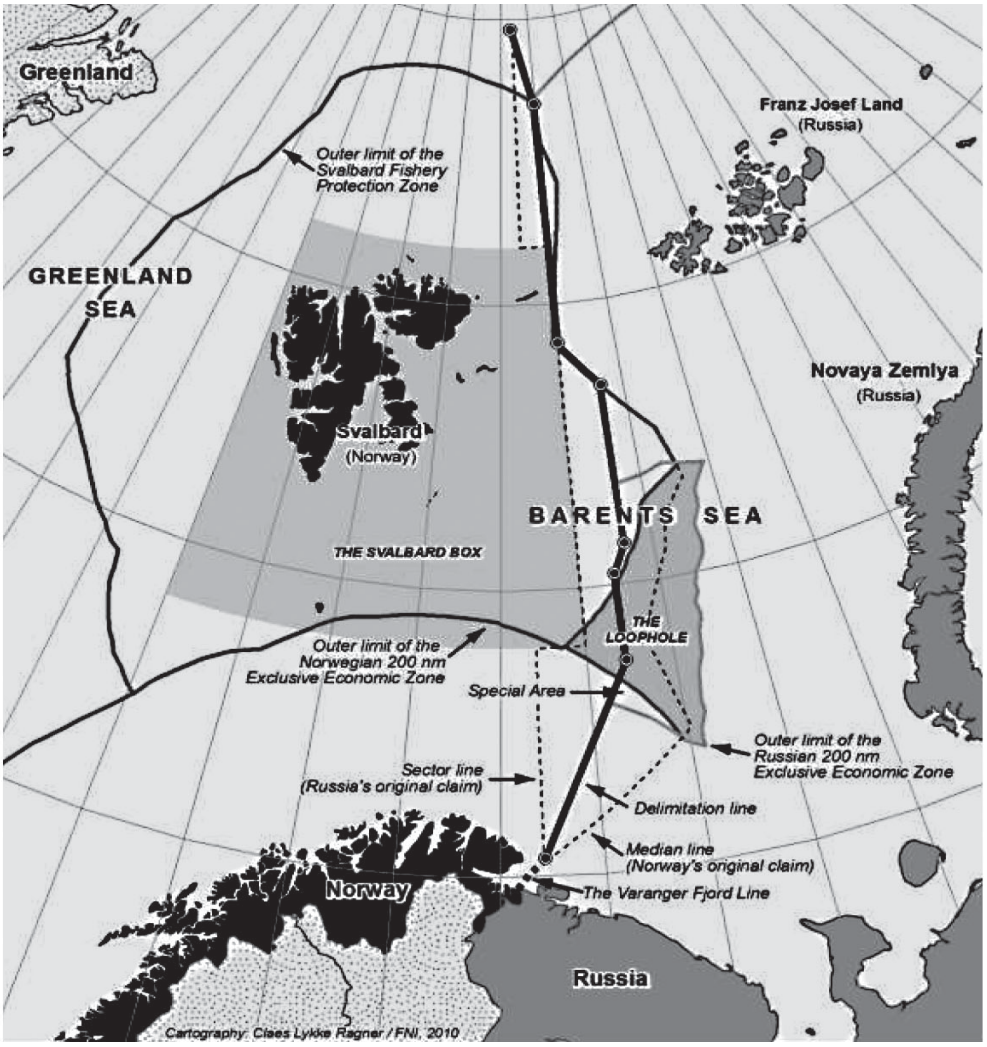

Figure 2. The delimitation line agreed in the Norwegian-Russian 2010 Agreement

Source: Ø. Jensen, *Current Legal Developments, The Barents Sea: Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 26(1) International Journal of Marine and Coastal Law (2011), p. 153.

Throughout the 1990s and the first decade of the 2000s there were recurring tensions between the two states, particularly in the fisheries sector.[46] The unresolved maritime boundary dispute prompted numerous controversies and

[46] A. Moe, D. Fjærtoft, I. Øverland, *Space and Timing: Why was the Barents Sea Delimitation Dispute Resolved in 2010?*, 34(3) Polar Geography 145 (2011), p. 149.

flashpoints over the inspection and boarding of Russian fishing vessels by the Norwegian Navy. In 1988 the Soviet Union proposed a joint development zone for hydrocarbons, but this was rejected by Norway. In addition the negotiations were put on hold for a while due to the dissolution of the Soviet Union. In 2007 both parties agreed to update and supplement the Varangerfjord Agreement of 1957, which was seen as at least some progress. The Varangerfjord Agreement was revised mainly due to Norway's expansion of its territorial sea from four to 12 nm and the establishment of a 24 nm contiguous zone in 2004.[47] The parties agreed to extend the maritime boundary to a point approximately 30 kilometers from the terminus of the Varangerfjord. The median line and sector line cross at this point, and the southern part of the disputed area was established. The boundary agreed on in 2007 was consistent with a simplified median line.[48] Finally a decisive breakthrough in the negotiations was reached in 2010. After almost four decades of on-again, off-again negotiations, the parties concluded a definitive agreement in April 2010 during President Medvedev's visit to Norway. On April 27, 2010, the Norwegian and Russian Foreign Ministers signed a joint statement in Oslo, announcing that, following extensive negotiations that had covered all related issues, the two countries' negotiating delegations had reached a preliminary agreement on delimitation. The Foreign Ministers of both states announced in the 2010 Joint Statement that the negotiation process was completed and a tentative delimitation agreement had been achieved. On September 15, 2010 in Murmansk (Russia), they signed a formal treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. The new 2010 Delimitation Treaty defines a single maritime boundary that divides an overall disputed area of about 175,000 km^2.

3. THE 2010 BARENTS SEA DELIMITATION TREATY

The 2010 Agreement defines the maritime delimitation line by eight points (see the attached map in Figure 2). The delimitation line, which splits the disputed area nearly in half, is multi-functional. The single delimitation line applies both to the water areas (i.e. both states EEZs) and continental shelf in areas within and beyond 200 nm of their coast. According to the 2010 Joint Statement, the agreed delimitation line is in accordance with "international law in order to achieve an

[47] Aasen, *supra* note 36, p. 69.
[48] Henriksen et al, *supra* note 45, p. 4.

equitable solution". The delimitation line is a modified version of both states' former claims. The agreed-upon demarcation line lies, apart from certain deviations, practically half way between Norway's original median line claim and Russia's sector claim.[49] Both parties to the Barents Sea boundary dispute have made concessions in relation to their original positions in order to achieve the delimitation agreement. Thus the agreement may be rightly seen as a compromise solution. The final scope of the agreed delimitation line seems to have been influenced only partially and indirectly by the concept of special or relevant circumstances. According to the 2010 Joint Statement of both states' Foreign Ministers, the only factor which was taken into account was "the effect of major disparities in respective costal lengths."[50] However there are no references in the 2010 Delimitation Agreement either to the median line or to the sector principle. This does not mean that the delimitation process in the Barents Sea did not follow the existing state practice concerning maritime delimitation developed in recent years. Nonetheless there are some factors of a political nature that may have been taken into account during the delimitation process. The parties refer in the 2010 Joint Statement to "the course of long standing negotiations between the parties in order to reach agreement". This suggests that the political will to reach an appropriate agreement satisfying to both parties may have played a significant role in the Norwegian - Russian delimitation process.[51] It seems that the final scope of delimitation line agreed upon in the 2010 Delimitation Treaty was based on a baseline measured from the Svalbard coast. While the issue of the terminology used in the 2010 delimitation agreement is rather of an academic nature, it is nevertheless still important. The Russians use the term "modified sector line" to describe the agreed boundary line, while the Norwegians prefer the term "modified median line".[52] Both terms indirectly refer to Russia's and Norway's original claims made during negotiations. A special feature of the 2010 Delimitation Agreement is the establishment of a "Special Area" (Norwegian: "det særskilte området", Russian: "Специальный район"). Under Article 3 of the Treaty, Russia is entitled to sovereign rights and jurisdiction

[49] Ø. Jensen, *Current Legal Developments, The Barents Sea: Treaty between Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 26 (1) International Journal of Marine and Coastal Law 151 (2011), p. 153.

[50] The text of the joint statement is available at the webpage of the Norwegian Foreign Ministry: http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/100427-FellesuutalelseEngelsk.pdf.

[51] Taking a longer view there are some other factors that may have served as drivers for finalizing the negotiations process and finally concluding of the 2010 Delimitation Treaty. National economic interests and strategic and security considerations are good examples, Moe et al, *supra* note 46, p. 146.

[52] Henriksen et al, *supra* note 45, p. 7.

in this special area, which is an undisputed part of Norway's EEZ. This "special area" is located east of the delimitation line, within 200 nm of Norway's EEZ and beyond 200 nm of Russia's EEZ.[53] According to the construction agreed upon, Norway's sovereign rights to an area to which normally it would be entitled to under international law have been transferred to Russia. Since the special area fell on the Russian side of the maritime boundary, Norway is excluded from exercising jurisdiction in this area.[54] This special regulation made it possible for Russia to enjoy sovereign rights beyond its 200 nm EEZ. However, this exceptional agreement does not adjudicate the question of legal title to this area. It has also been stated that the regulation provided for in Article 3 does not imply any formal extension of Russian maritime areas.

It is unclear which arguments were taken into consideration during the negotiations concerning the establishment of the special area. Most likely, the parties' aim in establishing the special area was based on their will to settle on a harmonized maritime boundary. Another possible explanation is Russia's desire to exercise the same sovereign rights in the special area as in its continental shelf within 200 nm, without bearing any additional costs. The "special area" does not appear however as a wholly innovative construction under international law of the sea. Another example of this construction is provided in the 1990 agreement on the maritime boundary concluded between the USA and Russia. Both parties transferred to each other their sovereign rights and jurisdiction in the special area. It has also been stated that an exercise of sovereign rights and jurisdiction deriving from such an agreement does not constitute an extension of the exclusive economic zones or continental shelves of the state exercising the sovereign jurisdiction. This legal construction makes it possible for one state to have the right of usage over zones

[53] Article 3 of the 2010 Barents Sea Delimitation Treaty states:

"1. In the area east of the maritime delimitation line that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of mainland Norway is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the Russian Federation is measured (hereinafter 'the Special Area'), the Russian Federation shall, from the day of the entry into force of the present Treaty, be entitled to exercise such sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction that Norway would otherwise be entitled to exercise under international law.

2. To the extent that the Russian Federation exercises the sovereign rights or jurisdiction in the Special Area as provided for in this Article, such exercise of sovereign rights or jurisdiction derives from the agreement of the Parties and does not constitute an extension of its exclusive economic zone. To this end, the Russian Federation shall take the necessary steps to ensure that any exercise on its part of such sovereign rights or jurisdiction in the Special Area shall be so characterized in its relevant laws, regulations and charts."

[54] Jensen, *supra* note 49, p. 154.

located beyond 200 nm and within the scope of an EEZ or continental shelf-zone within 200 nm of another state, without the CLCS's approval and the payment of those fees or contributions which are foreseen under the provisions of UNCLOS.

4. THE SVALBARD ARCHIPELAGO AND THE SVALBARD MARITIME ZONES CONTROVERSY – A STILL UNRESOLVED QUESTION

The 2010 Norwegian-Russian agreement leaves unresolved the question of maritime zones around Svalbard. The archipelago of Svalbard is situated midway between Norway and the North Pole (between 74° and 81° north latitude in the Arctic Ocean). The Svalbard islands – also known as Spitsbergen – were *terra nullius* until the conclusion of the Svalbard Treaty in 1920. The archipelago covers 61,000 km^2 in the Barents Sea. In 1924 the Soviet Union accepted Norway's sovereignty over Svalbard in exchange for the establishment of diplomatic relations with Oslo. In 1935 the Soviet Union ratified the 1920 Svalbard Treaty, which recognized Norway's full and absolute sovereignty over the Svalbard archipelago. The international controversy and disputes around Svalbard are threefold, and are linked to the question of the status of the maritime areas around Svalbard (Svalbard's Fisheries Protection Zone and the continental shelf around Svalbard), and the interpretation and the jurisdictional framework of the 1920 Svalbard Treaty. However, the main international controversy and the most fundamental dispute over Svalbard today concerns whether the provisions of the Svalbard Treaty apply to the continental shelf and waters beyond the territorial waters of Svalbard (12 nautical miles).

With regard to the question of the Norwegian-Russian dispute over Svalbard, both parties still disagree on whether Norway is entitled to establish new maritime zones around the archipelago and to exercise coastal state jurisdiction in these areas. There is also a disagreement between both parties about the scope of application of the Svalbard Treaty, and whether the other signatory parties are entitled to enjoy rights under it in maritime areas beyond the territorial waters of the archipelago. While the 2010 delimitation agreement does not refer to the Svalbard archipelago, it establishes a delimitation line between the Svalbard Fisheries Protection Zone and the Russian EEZ. It also delimits the continental shelf in the mid- and northern Barents Sea.[55] At the same time, Article 6 of the 2010 Barents Sea Delimitation Treaty provides that it does not prejudice any rights and obligations under other international treaties to which both the Kingdom of Norway

[55] Henriksen, et al., *supra* note 45, p. 9.

and the Russian Federation are parties. Therefore the question of the Svalbard Treaty's area of application and the legal status of Svalbard's maritime zones – the continental shelf and the Fishery Protection Zone (hereinafter "FPZ") – still provoke controversy.

The preliminary question is whether Svalbard generates its own continental shelf. Norway's traditional stance on this question has been that the continental shelf around Svalbard is a natural prolongation of mainland Norway,[56] and that Svalbard does not generate its own continental shelf.[57] Nevertheless, Norway's position seems to have been changed taking into account the recent delimitation practices it has been involved in. First of all one should mention the maritime boundary agreement of February 20, 2006 between Denmark and Norway. The procedure of this delimitation seems to be based on the method of equidistance line between the nearest base points, based on the coastlines of Svalbard and Greenland. The 2010 delimitation procedure in the Barents Sea seems also to be based on the base line measured from the coast of Svalbard. This indicates that both parties to the 2010 Norwegian-Russian agreement implicitly recognized Svalbard's ability to generate its own continental shelf,[58] which means that the

[56] This is a rather problematic question. From a geological and geomorphological standpoint, the Archipelago of Svalbard sits on a continental shelf. The natural prolongation of mainland Norway's continental shelf is rather not possible because south of Bear Island the Barents Through cuts the Norwegian mainland shelf in two, U. Jenisch, *Arktis und Seerecht*, 2-3 Osteuropa (2011), p. 67.

[57] Naturally there was no mention of the continental shelf and another maritime areas in the Svalbard Treaty, the simple reason being that the concept of maritime zones such as continental shelf, EEZ, FPZ (known in modern international law of the sea) was unknown to the signatory parties of the Svalbard Treaty. As we know, the concept of maritime zones was developed and legally formalized after World War II. *See also*, M. Ruud, G. Ulfstein, *Innføring i folkerett*, Universitetsforlaget, Oslo: 2006, pp. 159-161.

[58] If Svalbard does not have its own continental shelf it would be rather impossible to determine basepoints based on the coastlines of Svalbard. One of the best known Norwegian experts in international law, Geir Ulfstein, argues that the part of Norway's claims presented in its submission to the Commission on the Limits of the Continental Shelf relates to an area which is located beyond 200 miles (measured from Svalbard) north of Svalbard. If Svalbard does not generate its own continental shelf the area claimed by Norway would have to be delimited from the Norwegian mainland, not from Svalbard. In addition, if Svalbard can generate a 200-mile FPZ (as Norway has claimed since 1977), all the more it has ability to generate its own continental shelf (separate from mainland's continental shelf), the reason being that a state may have a continental shelf without an EEZ, but it cannot have an EEZ without a continental shelf (as was stated by the ICJ in the *Libya/Malta* case, 1985 ICJ Rep. 18 at 33, para. 34). In the opinion of the authors of this article it is hard to disagree with Ulfstein's argumentation. For a detailed discussion of this topic, *see generally*, G. Ulfstein,

continental shelf around Svalbard is a Svalbard shelf, not a mainland shelf.[59] In the event Svalbard has its own continental shelf, then obviously the Norwegian mainland shelf and Svalbard shelf have to be delimited. This problem does not seem incapable of resolution and could be solved by administrative means, applying the rules of international law by analogy. Several states have delimited continental shelves between some of their coastal provinces. As examples one could mention the Canadian provinces of Newfoundland and Nova Scotia, or the United Kingdom, which has determined maritime boundaries between Anguilla and the British Virgin Islands and between Guernsey and Jersey.[60] The scope of the delimitation line agreed upon in the 2010 Treaty supports the assertion that Svalbard does indeed generate its own shelf. The agreed delimitation line is considerably closer to the equidistance line measured between Svalbard and the Russian provinces Novaya Zemlya and Franz Josef Land than to the equidistance line between the Norwegian mainland (measured from province Finnmark) and Russian coastal provinces. The main controversy over the Svalbard continental shelf may thus be seen as a legal conflict arising from differences in interpretation of the Svalbard Treaty.[61]

Another issue that has been a source of international controversy is the 200 mile FPZ around Svalbard. The concept of fisheries zones established beyond the territorial sea became part of international law on the basis of state practice in the 1960s and 1970s.[62] The Svalbard fisheries protection zone was established in 1977 by the May 23 Royal Decree. The FPZ around Svalbard is subject to a unique form of limited jurisdiction aimed at ensuring the effective conservation of fish stocks on a nondiscriminatory basis among states whose vessels have a history of fishing in the area. This zone could be characterized as either a fisheries zone or a limited type of economic zone.[63] Since the very beginning Russia and some other states have been contesting the Norwegian claims to maritime zones around Svalbard. Russia has questioned the legal basis for Norway's claimed jurisdiction over

R. Churchill, *The Disputed Maritime Zones Around Svalbard*, in M. H. Nordquist, J. N. Moore, T. H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea*, Martinus Nijhoff Publishers, Leiden: 2010, pp. 588-592.

[59] G. Ulfstein, *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*, Scandinavian University Press, Oslo: 1995, p. 422.

[60] D. H. Anderson, *The Status Under International Law of Maritime Areas Around Svalbard*, Ocean 40 Development and International Law 373 (2009), p. 378.

[61] T. Pedersen, *The Svalbard Treaty Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 Ocean Development and International Law 339 (2006), p. 353.

[62] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne, zagadnienie systemowe* (Public international law, systemic issues), C.H. Beck, Warszawa: 2004, p. 157.

[63] Anderson, *supra* note 60, p. 378.

geographical areas not specified by the Svalbard Treaty.[64] Russia and Norway have also taken opposite positions concerning the jurisdictional reach of the Svalbard Treaty. Norway argues that the Treaty has to be interpreted according to its wording and cannot apply to areas located beyond the 12 nm territorial sea. Russia on the other hand claims that Norwegian sovereignty over Svalbard is limited to the provisions of the Paris Treaty, and that Svalbard maritime zones should be subject to the administration and jurisdiction of the signatory parties to the Svalbard Treaty. Finally, Norway and Russia still disagree on whether the equal treatment rights guaranteed by the provisions of the 1920 Svalbard Treaty apply to the waters and maritime zones around Svalbard.

At the present time the above issues regarding Svalbard are not pressing questions, but the increasing interest in exploring and exploiting natural and petroleum resources, as well hydrocarbon-related activities outside Svalbard, may well create the need to resolve the legal questions relating to this archipelago in the near future.[65] Undoubtedly the increasing focus of the international community on this region is motivated by economic factors. The 2010 Norwegian – Russian delimitation agreement did not resolve a set of complicated questions relating to international law concerning the Archipelago of Svalbard,[66] the main and fundamental reason being that Russia still does not recognize Norway's claims and jurisdiction in maritime areas around Svalbard.[67] In all likelihood, the final settlement of the maritime dispute in the Barents Sea will, on one hand, consolidate the FPZ established by Norway around Svalbard, and on the other it will strengthen Norway's claims to the Svalbard continental shelf.

[64] Pedersen, *supra* note 61, p. 354.

[65] T. Neumann, *Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean*, 14(34) American Society of International Law Insight 1 (2010).

[66] *See also e.g.*, J. Symonides, *Delimitacja obszarów morskich na Morzu Barentsa i Oceanie Arktycznym między Rosją a Norwegią* (Delimitation of maritime areas on the Barents Sea and Arctic Ocean between Russia and Norway), in U. Jackowiak, I. Nakielska, P. Lewandowski (eds.), *Współczesne problemy prawa. Księga pamiątkowa dedykowana Profesorowi Jerzemu Młynarczykowi*, Wyższa Szkoła Administracji i Biznesu im. Eugeniusza Kwiatkowskiego, Gdynia: 2011, pp. 76-79.

[67] For a detailed discussion of this topic, *see generally*, A. N. Vylegzhanin, V. K. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas* (edited and translated by W. E. Butler), Eleven International Publishing, Utrecht: 2007, pp. 27-75.

CONCLUSION

The question of the equitable delimitation of the continental shelf and exclusive zones has been and still is one of the most complicated and controversial subjects in contemporary international law. Norway and Russia could have resolved their maritime boundaries only by agreement or by consent to international adjudication. After almost 40 years of negotiations the two states reached agreement on the bilateral maritime delimitation of the continental shelf and the exclusive economic zones in the Barents Sea. The agreement reached is a compromise solution, reflecting elements of the former claims and positions of both parties. Russia's original position was based on the concept of the sector line derived from the 1926 Soviet Decree. Due to the Svalbard Treaty, the shape of the sector line claimed by Russia indicated a deviation toward the east as it passes the archipelago. Additionally, the Russians subsequently referred to "special circumstances" as per Article 6 of the 1958 Continental Shelf Convention. The Norwegians, on the other hand, consistently objected to the Russian stance and based their claims on the median line/equidistance line. It is difficult to resist the conclusion that the final scope of the agreed delimitation line appears to have been influenced by a perpendicular line solution, the reason being that the boundary line seems to be drawn approximately halfway between Norway's original median line claim and Russia's former sector line claim.

The date of signing the 2010 Agreement is not coincidental. It is self-evident that both parties' growing economic interest in this region drove them to conclude an agreement. The new possibilities and prospects – transarctic shipping and transportation, access to natural resources, exploitation and exploration activities in the Barents Sea area – played a significant role in the settlement of this boundary dispute. An agreed-upon maritime boundary makes it possible for both states to enact domestic legislation enabling gas-related and oil-related activities in the previously disputed area, as well in the entire region of the Barents Sea.

The final settlement of the maritime border between Norway and Russia may only partially implicate state practice concerning maritime delimitation, the reason being that the 2010 Barents Sea Delimitation Treaty does not provide any information about which special or relevant circumstances were predominant or were used to determine the delimitation line. However, the treaty could be relevant for other unresolved boundary disputes in the Arctic region and become part of a comprehensive legal framework creating an Arctic legal regime. Last but not least, the case of the Barents Sea Delimitation Treaty affirms the significant role of bilateral negotiations in boundary disputes.