



The international obligations of the Russian Federation relating to offshore oil and gas exploration and production in the Arctic

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*Small Master's Thesis
Masters of Laws in Law of the Sea
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Fall 2012*

Acknowledgements

I will first and foremost thank my supervisor, Nigel Banks for the help and inspiration and for the time he dedicated. I would also like to thank my family and friends for support and encouragement.

Abbreviations

UNCLOS – United Nations Convention on the Law of Sea

MARPOL –International Convention for the Prevention of Pollution from Ships

OSPAR - Convention for the Protection of the Marine Environment of the North-EastAtlantic

ITLOS- International Tribunal for the Law of the Sea

SIA – Social Impact Assessment

EEZ – Exclusive Economic Zone

WTO – World Trade Organisation

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1 Introduction

Russia's oil industry started to develop in the 19th century with the first fields that were discovered in the Baku region. The offshore development began on the Caspian Sea in the 1920s. The Soviet Union was an important oil producer in 1980s but the production started to decline in 1990s as a consequence of the dissolution of Soviet Union. However, production has recovered since 1999, which according to many analysts is due to the privatization of the industry. At present, Russia is an important producer of both oil and gas. Russia has proven oil reserves of 60 billion barrels, most of which are located in Western Siberia between the Ural Mountains and the Central Siberian Plateau. Russian crude oil production reached 9.2 million barrels a day in 2006. Furthermore, Russia has the largest natural gas reserves in the world, with approximately 1,700 trillion cubic feet, and was the world's largest natural gas producer and exporter in 2005. Regardless of the magnitude of the resources, the production of natural gas in Russia has increased only little in recent years and the growth is projected to continue only slowly. The demand for Russian oil and gas is high in the world market, in particular in Europe but potential growth of production hinders due to the Federal pipeline monopoly of Transneft, which does not allow any private transport pipelines, and also does not build enough infrastructure to handle increased production.

The continental shelves of the Arctic seas are considered to have a great potential, with estimated natural gas resources of 70 trillion cubic meters in the subsoil of the Barents, Pechora and Kara Seas alone. According to the most recent estimates, up to 80% of Russia's potential oil and gas reserves are concentrated on the Arctic shelf. Russia has already filed its submission for an extended continental shelf to the Commission on the Limits of the Continental Shelf under UNCLOS¹.

Recently there has been a significant growth in translocation of petroleum operations from land to offshore which raised important questions relating to its impact on the marine environment and biological resources. This issue is reviewed from different points of view.

¹Koivurova T., Kamrul H. (2008) p. 8.

Some believe in the industry's environmental safety and others disagree and predict negative impacts. Considering the former position a greater level of environmental protection may be required. This level may be achieved through effective regulations both on international and regional levels supported by national laws.

The general growth can be also seen in the Russian Federation with its enormous oil and gas resources in the Arctic.

In 2010 the Russian Federation (Gasprom), the Kingdom of Norway (Statoil) and France (Total) signed Shtokman agreement that is aimed on the development of Shtokman gas condensate field which was discovered in 1988 by the research vessel Professor Shtokman. The field is located in the central part of the shelf zone in the Russian sector of the Barents Sea and 550 km from shore. Initial geological reserves are estimated at 37 million tonnes of gas condensate and 3.8 trillion cu.m. of gas².

One of the top priorities of the Shtokman project is to minimize or completely eliminate the negative factors associated with the project development³. This project will set up a benchmark for future Arctic shelf development and will contribute to long-term energy security on the local, European and international markets.⁴

Moreover in 2012 Exxon Mobil and the Russian State oil company Rosneft signed an agreement that will open for the first time American domestic oil and gas fields to Russian investment. The deal offers expanded access to Russia's offshore Arctic fields for Exxon Mobil, as it strains to find new reserves. The agreement will form joint ventures in the Kara Sea north of Siberia and the Black Sea, with exploration plans costing an estimated \$3.2 billion. The Kara Sea prospect alone is estimated to hold 36 billion barrels of recoverable reserves. This agreement is significant for the Russian Federation which will gain access to modern drilling techniques developed in the United States⁵

According to Valeri Yazev, Deputy Chairman of Russian State Duma "Russia has no choice but to develop the Arctic, because the Arctic constitutes 20% of its territory. It is the storehouse of our mineral resources, which in the 21st century will be the bedrock of our economy... By the year 2020 more than 20% of Russia's gas will be produced here...

² <http://www.shtokman.ru/en/project/gasfield/>

³ <http://www.shtokman.ru/en/project/about/>

⁴ <http://www.shtokman.ru/en/project/importance/>

⁵ <http://www.nytimes.com/2012/04/17/business/energy-environment/exxon-and-russian-oil-company-agree-to-joint-projects.html>

Development of the Arctic region is set to become our country's new top national priority [...]”⁶.

As a petroleum - producing country with enormous offshore developments the Russian Federation faces and will face a threat of increasing pollution of the marine environment resulting from the offshore activities both in its area in the Arctic and on territories of other States.

Therefore it is critical for Russia to participate in development of international and regional legal instruments, to have an effective domestic regime for the offshore industry and to ensure that it has fixed obligations on international level in order to avoid negative consequences.

1.1 Research question

On the above mentioned background I pose the following research question:

Are the international obligations of the Russian Federation relating to the offshore oil and gas exploration and production in the Arctic able to control this process and avoid negative consequences of these activities and is there a need to develop new treaties and join the existing once?

Based on the research question I formulated the following hypothesis:

The Russian Federation has many obligations in the Arctic region under the international law in respect of oil and gas activities, but signing the OSPAR Convention and the London Protocol of 1996 can make its legal status more determined and ensure the lack of negative impacts resulting from these activities.

1.2 Legal sources

The thesis will be mostly based on:

- the international and regional treaties(United Nations Convention on the Law of the Sea, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and 1996 Protocol Thereto, Convention for the Protection of the Marine Environment of the North-East Atlantic, International Convention for the Prevention of Pollution from Ships);
- bilateral agreements (The Barents agreement between the Kingdom of Norway and the Russian Federation, Russian-Norwegian joint agreement);

⁶ <http://www.shtokman.ru/en/project/importance/>

- principles of international law (the precautionary principle, sustainable development and the “polluter pays” principle;
- case law (Mox Plant case UK v. Ireland, Advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea «Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area»);
- “Arctic offshore oil and gas guidelines”.

1.3 Method

In this thesis I mainly employ a hypothetical deductive research strategy. In this hypothetical deductive method, a hypothesis is created on the background of theory. This thesis is mostly focused on the Russian Federation and its oil and gas projects and obligations under the international law so the case study method is applied.

As far as many legal instruments regulate the Arctic region and the oil and gas activities and many articles and books were written on this topic, the method of analyzing will be used in summarizing texts and underlining main bullet points and applying them to the research.

1.4 Topic limitations

Oil and activities include geophysical exploration, the exploration for and development of petroleum, natural gas or both, the production, gathering, processing, storage or disposal of petroleum, natural gas or both, the construction or operation of a pipeline. The thesis is limited to exploration and production of oil and gas. I also focus on oil blowouts and decommissioning of oil platforms.

For the purpose of the thesis the following definition of exploration is used “Exploration includes any drilling activity but not seismic investigations”⁷

1.5 Structure

In chapter 1 I define the Arctic and describe several factors, including climate change, indigenous peoples and presence of permafrost, which characterize the Arctic region a special area. Chapter II presents theoretical framework of thesis where I discuss the existing legal framework governing oil and gas activities in the Arctic and obligations of the Russian Federation under regional and international treaties and agreements. The role of the Arctic Council and “Arctic offshore oil and gas guidelines” is also touched upon in this chapter. In

⁷Helsinki Convention Annex VI art. 1(3)

chapter 3 I present analytical framework. I analyze OSPAR Convention and the London Protocol 1996 and underline problems resulting from the Russian Federation not being a party to these treaties and answer the research question.

Chapter I The Arctic: factors and issues that make the region special

The Arctic region cannot be simply defined. Relevant criteria for the delimitation of the region include geographic, climatic or biological factors, as well as political or demographical borders.⁸

The official definition on what is Arctic or where its boundaries lie does not exist. Instead, there are few ways of defining the Arctic.

The Arctic consists of ocean surrounded by continental land masses and islands. The central Arctic Ocean is ice-covered year-round, and snow and ice are present on land for most of the year.

The southern limit of the Arctic region is commonly placed at the Arctic Circle (latitude 66 degrees, 32 minutes North). The Arctic Circle is an imaginary line that marks the latitude above which the sun does not set on the day of the summer solstice (usually 21 June) and does not rise on the day of the winter solstice (usually 21 December)⁹.

According to Rosemary Rayfuse the Arctic is usually referred to as comprising all areas lying north of the Arctic Circle, or 66°33' north latitude. Ecologically speaking, a more accurate defining criterion for the Arctic region may be the northern limit of the tree line, the existence of which is based on temperature. Alternately, the Arctic is also sometimes defined as a northern region where the average July temperature is under 10°C. Both of these ecological descriptions encompass an area considerably larger than that enveloped by the Arctic Circle. For political purposes, too, the definition of the Arctic varies depending on the subject matter under discussion and on the interests of the discussants. Definitions include all areas north of 60° north, or all areas north of the Arctic Circle but with an exception to include all of Iceland, or simply all areas north of the Arctic Circle¹⁰.

The Arctic covers an area of approximately 13.4 x 10⁶ km² and large tracks of land are covered by glacial ice.

⁸Wegge (2010) p.165

⁹<http://portlets.arcticportal.org/definitions-of-the-arctic>

¹⁰Rayfuse, Rosemary (2007) p.197

A characteristic feature of the Arctic is the presence of permafrost. Groundwater is quite extensive as well. For example two thirds of the Yukon in the Canadian Arctic is underlain by aquifers. The largest groundwater aquifers occur in Iceland (AMAP 1998). Most of the large Arctic rivers begin their flow south of the Arctic such as the major rivers of Siberia (Ob, Yenisey and Lena) and the Mackenzie River in Canada. Freeze up in Arctic rivers begins in the fall as with some Arctic lakes, however. Arctic lakes are partly frozen for 9-12 months of the year (AMAP 1998).

Another factor that makes this region special is climate change. “The last fifty years have witnessed a significant increase in the earth’s temperature. While the average global temperature has increased by 0.6 since the industrial revolution, the annual temperature rise in the Arctic has been twice as fast. As a result Arctic ice has been reduced, the snow cover season is shorter, sea level is higher and land temperature has increased”¹¹. Climate change affects oil and gas development in the Arctic. It can either make drilling, exploration or production easier or make it impossible.

On the one hand, ice melting can lead to new possible shipping routes in summer, but on the other hand, fragile Arctic ice can move at a great speed and can interrupt drilling. Ice reduction is not the only result of the climate change in the Arctic region. According to researchers extreme weather conditions can increase as a result of global warming.

Another feature which makes Arctic special is the fact that the water is relatively shallow, compared to larger oceans. This factor represents significant risk to shipping as it may enlarge the already huge waves that may damage drilling and production facilities.

Longer summer seasons which can result from global warming may make offshore Arctic oil and gas development easier as the ice continues to melt. It can reduce some production costs, as oil companies may be able to replace ice based construction equipment with lower cost conventional construction equipment.

In Russia, Canada and Alaska, subsistence activities of the native populations are directly threatened by the oil and gas industry. Two kinds of effects exist: direct and indirect. The direct effects are connected to pollution of water and land and construction of infrastructure for oil and gas purposes which digress animals from their traditional migration routes and

¹¹Harsem Ø, Heen K. (2011) p.8038

make access for hunters complicated¹². “The indirect effects are related to emissions and pollution from the burning of fossils for energy production anywhere, with CO2 interfering with natural climate variations”¹³.

Arctic is a homeland for a diverse group of indigenous peoples ranging from the Inuit and Athabascans of the North American Arctic through the Saami of Fennoscandia and the Kola Peninsula and on to the small-numbered peoples of the Russian North and Arctic. They are the descendents of peoples who followed the retreating icecap in Europe, spread out over northern Siberia and the Russian Far East, and crossed the Bering Strait some 4,000 years ago or more. They have found ways to live comfortably in the Arctic and to respond in a flexible manner to the biophysical fluctuations in the region. Throughout much of the past, groups like the Inuit of the North American Arctic and the Nenets of Northwestern Siberia have led a relatively self-contained existence, a condition that accounts for their common practice of using terms that mean “the people” to refer to themselves and “the land” to characterize the areas in which they live¹⁴.

According to the Article 27 of the International Covenant on Civil and Political Rights “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”¹⁵.

In the north today indigenous people are not essential to the oil and gas industry. The world needs these resources, but it does not need native people to acquire them.

For example SIA (social impact assessment) is often used as a traditional way of decision-making and Indigenous Peoples are included as one of the stakeholders, but recent studies showed that SIA is problematic in relation to Indigenous Peoples. In many cases Indigenous Peoples are excluded from the SIA even though the relationship with the questioned area is proved. In this case basic rights of Indigenous Peoples are violated. Sometimes even

¹²Mikkelsen A., Langhelle O. (2008) p. 47

¹³Mikkelsen A., Langhelle O. (2008) p. 47

¹⁴Young, O.R. (2004) p.22

¹⁵ ICCPR art. 27

if Indigenous Peoples are included in the SIA the process of participation is complicated by lack of the financial resources and short time-frame.¹⁶

Arctic States and in particular the Russian Federation have to ensure that petroleum activities in the Arctic do not have a negative impact on the basic rights of Indigenous peoples.

¹⁶Fjellheim R., Henriksen J. (2006) p.11

Chapter II Governance of oil and gas exploration and production in the Arctic

2.1. Treaties

2.1.1 United Nations Convention on the Law of the Sea

Offshore exploration and production of oil and gas in the Arctic is regulated by many legal instruments. As an international legal document United Nations Convention on the Law of the Sea (UNCLOS) has the strongest impact on Arctic resource exploration in the “hard law” sphere. Almost all Arctic coastal states signed and ratified convention except the United States which signed but has not ratified it yet. The Russian Federation ratified UNCLOS on the 12th of March 1997 and this means that all articles of UNCLOS are binding on the Russian Federation.

UNCLOS has been stated as the Constitution of the Oceans and has a considerable impact on state practices in offshore oil and gas activities.

Convention deals with sovereignty of states over their resources which can be divided into 2 groups: natural resources within national jurisdiction (territorial sea, continental shelf and EEZ) and natural resources beyond national jurisdiction (Area).

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”¹⁷. This means that only coastal State has the right to exploit, explore and produce resources within 12 nautical miles breadth of territorial sea. Article 56 (a) provides that in the EEZ coastal State has “sovereign rights for the purpose of exploring and exploiting natural resources whether living or non-living [...]”¹⁸. This right is similar to the one the coastal State has in the territorial sea. One of the main articles regulating offshore activities in the EEZ is the Article 60 which confers the coastal States with the exclusive right in the EEZ to construct, authorise and regulate the construction, operation and use of installations and structures for the purpose of exploring and

¹⁷UNCLOS art. 2

¹⁸UNCLOS art. 56(a)

exploiting natural resources and other economic purposes.¹⁹ Paragraph 3 of Article 60 sets out the obligation to remove abandoned or disused installations in order to ensure the safety of navigation with due regard to fishing, the protection of the marine environment and the rights and interests of other States.²⁰ While taking these actions generally accepted international standards established by the competent international organizations shall be also taken into account. For example 1989 Guidelines and Standards for the removal of Offshore Installations and Structures on the Continental Shelf and in the exclusive Economic Zone adopted by the IMO which establishes general requirements, standards and guidelines for the removal of offshore installations.²¹

The last maritime zone which lies within national jurisdiction and where coastal state has sovereignty over natural resources in continental shelf. Rights of the coastal State over the continental shelf is regulated by the Article 77 of UNCLOS according to which the coastal State exercises exclusive sovereign rights for the purpose of exploring and exploiting its natural resources²². Almost all oil and gas activities in the Arctic are held on the continental shelf of the Russian Federation and in this matter Article 76 of UNCLOS has an importance.

Part 8 puts an obligation on the coastal State to submit information on the limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf²³. Russian Federation submitted such application in 2001 and it was the first submission received by the commission since it was first elected in 1997. Submission has been circulated to all Members of the United Nations including States-Parties to the Convention in order to make public the proposed outer limits of the continental shelf pursuant to the submission. All other four Arctic coastal States commented on Russian submission. In 2002 a subcommission has been established which prepared recommendations for the Russian Federation. Submission was sent back for lack of evidence and Russia said it will resubmit the claim after collecting more scientific data²⁴.

¹⁹UNLOSC art. 60 (1)

²⁰UNCLOS art. 60 (3)

²¹ IMO Guideliens

²²UNCLOS art. 77

²³UNCLOS art. 76(8)

²⁴Jares, Vladimir (2009) p.1283

In all three maritime zones within national jurisdiction: territorial sea, EEZ and continental shelf the coastal State (Russian Federation in our case) has sovereign rights for the purpose of exploration and production of oil and gas.

Part XI of UNCLOS consists of clauses regulating the legal status of the Area and its resources. It provides that no State has sovereign rights over the Area or its resources and all the natural resources situated in the Area is a common heritage of mankind.

Arctic is facing new opportunities connected with expansion of economic activities and exploration of Arctic resources leading to expanded oil and gas development. However, these activities can also trigger pollution from the offshore extraction of oil and gas, oil spills and other harmful effects, so in order to avoid these consequences UNCLOS does not only deal only with sovereign rights of the coastal State over natural resources but it also deals with obligations which arise from different activities including oil and gas exploration and production.

For instance, Part XII Protection and preservation of the marine environment underlines the sovereign right of States to exploit their natural resources and this right works in cooperation with duty to protect and preserve the marine environment. “Oil and gas exploration increases the risk of oil pollution (and other kinds of pollution) in the Arctic”²⁵. Level and type of human activity being conducted in the region is a primary factor determining the risk of oil pollution in the Arctic. One of a source of major oil spills is oil well blowouts from offshore oil extraction operations. In recent history the largest unintentional oil spill was in 2010 in the Gulf of Mexico (Deepwater Horizon). Even if activities in Russian Arctic waters present less risk of an oil well blowout some oil spills and accidents can probably occur from equipment failure or human error. Even a minor spill can cause significant harm to individual organisms and entire populations depending on the timing and location. Regarding aquatic spills, marine mammals, birds, bottom-dwelling and intertidal species, and organisms in early developmental stages are especially vulnerable. However, the effects of oil spills can vary greatly. Oil spills can cause negative impacts from only a few days to several years, or even decades in some cases²⁶. In order to prevent this kind of pollution UNCLOS provides in the Article 194 a list of measures States including Russian Federation shall take in order to prevent, reduce and control

²⁵O’Rourke R., (2012) p. 24.

²⁶O’Rourke R., (2012) p. 26.

pollution of the marine environment. In particular part 3(c) of the Article 194 is applicable to pollution from installations and devices used in exploration of the natural resources of the seabed and subsoil. UNCLOS does not specify which particular measures States shall take it just provides the following “[...] measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices”²⁷. Moreover in taking such measures States shall not interfere with other States activities in conformity with UNCLOS.

Furthermore under Articles 197 and 198 the Russian Federation shall co-operate on global and regional basis “in formulating and elaborating international rules, standards and recommended practices and procedures [...] for the protection and preservation of the marine environment”²⁸ and when it becomes aware of damage to the marine environment it shall notify other States which likely can be affected by such damage²⁹.

Part XII includes 3 important obligations of the Russian Federation: obligation to keep under surveillance the effects of any activities which it permits or in which it engages provided by the Article 204³⁰, obligation to assess the potential effects of activities which may cause substantial pollution of or significant and harmful changes to the marine environment under the Article 206³¹ and the Article 208 gives coastal States rights and obligations to prevent, reduce and control pollution of the marine environment from seabed activities under their jurisdiction and from installations and structures under their jurisdiction³². This obligation will apply to seabed activities in internal waters, territorial sea, EEZ and on continental shelf. Usually pipelines are connected to offshore installations and structures and such pipelines carry gas, oil and other noxious substances and the Article 208 does not make clear whether these pipelines would be considered part of the installation or structure. Also it can be argued that this article can put the obligation on States to adopt rules and regulations on pollution from pipelines.

²⁷UNCLOS art. 194 (3)(c)

²⁸UNCLOS art. 197

²⁹UNCLOS art. 198

³⁰UNCLOS art. 204

³¹UNCLOS art. 206

³²UNCLOS art. 208

The last Article of the UNCLOS which deals with consequences of violation of obligations of Russian Federation relating to exploration and production of oil and gas and protection and preservation of the marine environment is Article 235(1) (2) Responsibility and liability. This Article provides that “1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law” and “3.[...] States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability of the assessment of and compensation for damage[...]”³³.

The analyze of the UNCLOS made above shows that the UN Convention on Law of the Sea does not regulate all obligations of the Russian Federation relating to oil and gas exploration and production. It only focuses on sovereign rights of States on the purpose of exploring natural resources in different maritime zones and Part XII underlines obligations of States concerning protection and preservation of the marine environment and prevention, reduction and control of pollution of the marine environment which can result from exploration and production activities.

This Convention alone does not address special problems and threats facing the Arctic while growing oil and gas activities. It also fails to provide special rules for environmental protection of ice-covered waters in the Arctic which clearly require different and stricter rules and obligations of States due to their vulnerability.

2.1.2. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 and 1996 Protocol Thereto

“The "London Convention" for short, is one of the first global conventions to protect the marine environment from human activities and has been in force since 1975. Its objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter. Currently, 87 states are Parties to this Convention. The Russian Federation has signed and ratified the London Convention in 1975 but it is not a party to the London Protocol which entered into force on 24

³³UNCLOS art. 235(1)(2)

March 2006 and which eventually replaced the London Convention between States which are Parties to both Convention and Protocol and prohibited all dumping except for the “reverse list” with the possibly acceptable wastes³⁴.

During the exploration and production stages the most adverse environmental impacts usually occur. Different offshore activities such as pipe-laying, dredging, platform emplacement and construction of support facilities cause physical disturbance and as a consequence produce various emissions and discharges of pollutants into the sea. Moreover decommissioned platforms may also cause environmental hazards. Decommissioned platform can always move from its original position at some future time. The only possible way of removal of fixed offshore platforms is using explosive materials and the explosions created have negative impacts on the marine environment³⁵.

The London Convention covers dumping from offshore platforms including any deliberate disposal of offshore platforms but it does not deal with disposal during normal operations of platforms.

Under the London Convention the Russian Federation has the following obligations relating to oil and gas exploration and production:

- to promote the effective control of all sources of pollution (including offshore platforms) of the marine environment and take all steps to prevent the pollution of the sea by dumping of waste;³⁶
- to take effective measures individually and collectively to prevent marine pollution caused by dumping;³⁷
- to apply the measures required to implement the London Convention to all fixed and floating platforms under the jurisdiction of the Russian Federation believed to be engaged in dumping;³⁸
- to promote within the competent agencies and international bodies measures to protect the marine environment against pollution caused by hydrocarbons, including oil and their wastes and wastes or other matter directly arising from, or related to the

³⁴ <http://www.imo.org/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx>

³⁵ Kashybski M. (2006) p.2

³⁶ The London Convention art. 1

³⁷ The London Convention art. 2

³⁸ The London Convention art. 7

exploration, exploitation and associated off-shore processing of sea-bed mineral resources and wastes generated in the course of operation of platforms;³⁹

Under this Convention dumping can be conducted where it is necessary to minimize the likelihood of damage to human or marine life.

The London Protocol is more restrictive than Convention. Article 3 obliges the Contracting Parties to apply one of the main principles of environmental law- the precautionary approach to environmental protection from dumping of waste. The precautionary approach requires that even if there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm and even when there is no conclusive evidence establishing a link between inputs and their effects appropriate preventive measures are taken⁴⁰.

Article 4 (1) introduced the so-called “reverse list” under Annex I that consists of dumping which is allowed and other kinds of dumping which are not, in this list are prohibited⁴¹. Furthermore definition of dumping is wider in the Protocol than in Convention. It covers “[...] 3. any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircraft, platforms or other man-made structures at sea; and 4. any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal”⁴².

The Convention Protocol effectively limits the materials that can be disposed at sea and more effective in protection of the marine environment. Unfortunately only 42 States are Parties to the Protocol and 2 Arctic States: the Russian Federation and the United States have not signed it yet. The Protocol will provide effective regime of the protection of the marine environment from dumping when all 87 States-Parties to the London Convention will sign and ratify the Protocol.

2.1.3. International Convention for the Prevention of Pollution from Ships amended by Protocol of 1978 (MARPOL 73/38)

³⁹The London Convention art. 12

⁴⁰The London Protocol art. 3

⁴¹The London Protocol art. 4(1)

⁴²The London Protocol art. 1

MARPOL has been signed and ratified by the Russian Federation and entered into force on the 3d of February 1984. Regulation 29 provides special requirements for fixed or floating platforms. MARPOL requires offshore installations engaged in exploration to be equipped with the same pollution control devices as required for ships of 400 gross tonnage and above⁴³. It also prohibits any discharge into the sea of oil or oily mixtures which exceed 15 parts per million⁴⁴. Platforms are also required to keep a record of all operations involving oil or oily mixture discharges⁴⁵.

MARPOL does not only apply to the oil platforms engaged in exploration and adjacent to the coast over which the Party to the Convention exercises sovereign rights but it also puts obligations on States-Parties to MARPOL in particular⁴⁶.

Under the Regulation 15 (D) the Russian Federation in case of visible traces of oil on the surface or below the surface of the water observed in the immediate vicinity of a oil platform should promptly investigate the issue of whether there has been a violation of the provisions of the Regulation 15⁴⁷. Moreover the Russian Federation has to ensure that all oil fixed and floating oil platforms adjacent to its coast operate and discharge oil in compliance with regulations of MARPOL and it should prohibit all violations and establish sanctions under its law. According to the Article 6 of MARPOL the Russian Federation has to cooperate with other Parties in the detection of violations and the enforcement of provisions of this Convention⁴⁸.

Even though MARPOL generally applies to fixed and floating oil platforms it does not deal with many operational aspects of offshore oil and gas exploration and production which can cause harm to the marine environment⁴⁹.

2.1.4. The Arctic Council

The Arctic Council has been formally established by the Ottawa Declaration of 1996 as a high level intergovernmental forum to provide means for coordination, cooperation and interaction

⁴³MARPOL reg.29

⁴⁴MARPOL reg.15

⁴⁵MARPOL reg.39

⁴⁶MARPOL art.2(4)

⁴⁷MARPOL reg.15

⁴⁸MARPOL art.6

⁴⁹Kashybski M. (2006) p.4

among the Arctic States and involvement of Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues like sustainable development and environmental protection in the Arctic. The Arctic Council also conducted studies on oil and gas. The Arctic Council includes 8 member-Arctic States (Norway, Denmark, Canada, Iceland, the United States, Sweden, Finland and the Russian Federation). The Council also has permanent and ad-hoc observer countries and “permanent participants”. The Arctic Council consists of 6 working groups:

- Arctic Monitoring and Assessment Programme (AMAP);
- Conservation of Arctic Flora and Fauna;
- Emergency Prevention, Preparedness and Response (EPPR);
- Protection of the Arctic Marine Environment (PAME);
- Sustainable Development Working Group (SDWG);
- Arctic Contaminants Action Program (ACAP)⁵⁰.

In 2009 the Protection of Arctic Marine Environment working group issued “Arctic offshore oil and gas guidelines” (Arctic guidelines). All stages of offshore oil and gas activity were included in the guidelines except transportation. The guidelines are supposed to be used by Arctic nations for offshore oil and gas activities during planning, exploration, development, production and decommissioning.

Arctic guidelines combined a number of legal instruments related to offshore oil and gas activities: UNCLOS, MARPOL (73/78), the London Convention, OSPAR. Additional information has been provided by the Arctic Council since 2002.

The main goal of the Arctic guidelines is environmental protection during offshore oil and gas activities in the Arctic area. For this purpose Arctic States and the Russian Federation in our case should plan and conduct offshore oil and gas activities so as to avoid effects on air and water quality, on different environments including the marine environment, on species or population of species, on areas of biological, cultural, historic, scientific, aesthetic or wilderness significance, on livelihoods, societies, cultures and traditional lifestyles for northern and indigenous peoples and effects to subsistence hunting, fishing and gathering.⁵¹ Arctic guidelines reflect not only environmental obligations of the Russian Federation relating

⁵⁰ <http://www.arctic-council.org/index.php/en/about-us/working-groups>

⁵¹ Arctic Guidelines (2009) p.4

to oil and gas activities but it also provides obligations relating to conservation of flora and fauna, different human activities and cultural values.

According to Arctic Guidelines the Russian Federation has the following obligations in the Arctic Area:

1. Appropriately manage oil and gas activities in culturally and ecologically sensitive areas;⁵²p.12
2. Integrate traditional and local knowledge into the decision-making process (the Russian Federation has been using ethnological expert studies in which scientific and local knowledge are combined);
3. Use Environmental impact assessment procedures in order to determine the potential impacts of oil and gas exploration and production on the environment and human communities (the Russian Federation can use a variety of methods. For example, ecosystem-based approach, Strategic Environmental Assessment, integrated oceans and coastal management, regional assessments for oil and gas activities and etc.);⁵³
4. Carry out environmental monitoring to ensure that the bases for the decision-making are sufficient to maintain acceptable environment conditions as a result of petroleum activities (it should measure chemical, biological and physical conditions that may impact or be impacted by the activities being conducted);⁵⁴
5. Include waste management in the overall planning from the beginning combined with pollution prevention measures ;⁵⁵
6. Strictly regulate the use and discharge of chemicals from the oil and gas industry in order to avoid or reduce possible negative effects on the marine environment;⁵⁶
7. To ensure that operators have oil pollution emergency plans and that these plans are carried on board installations;⁵⁷
8. Develop decommissioning plans in consultation with the competent authorities and stakeholders, including fishing groups, indigenous peoples and other interested parties and incorporate plans at the design phase and review again when the platform is no

⁵²Arctic Guidelines (2009) p. 12

⁵³Arctic Guidelines (2009) p.13

⁵⁴Arctic Guidelines (2009) p.21

⁵⁵Arctic Guidelines (2009) p.31

⁵⁶Arctic Guidelines (2009) p.34

⁵⁷Arctic Guidelines (2009) p.43

longer needed for its purpose;⁵⁸

Even though all of abovementioned obligations regulate the whole range of oil and gas activities from exploration to decommissioning and only exclude the transportation phase, the question of effectiveness of the Arctic guidelines is still essential.

Koivurova and Molenaar stated in 2009 in a report prepared for the WWF International Arctic Programme that Ottawa Declaration is a “soft-law” legal instrument and as well as the Arctic Council it does not impose legally binding obligations on its participants and the Russian Federation in particular. Moreover it is also difficult to evaluate the effectiveness of work of the Arctic Council because it does not systematically evaluate whether its guidelines are being applied by Arctic States. They suggest establishment of a new regime governing the Arctic⁵⁹.

Some scholars have different from Koivurova and Molenaar opinion. For instance, Stokke argues that creating of a new regime with new institutions is not necessary and the Arctic Council has already strengthened environmental governance in the Arctic by preparing guidelines and by supporting the capacity of Arctic States to implement existing commitments. And the only way of making the existing regime more effective is a productive interplay between norm-building and existing institutions.⁶⁰

2.2. Principles of international law

Obligations of the Russian Federation arise not only from membership in organizations and conventions, but also from the principles of international law.

2.2.1. The precautionary principle.

For the first time this principle has been introduced in the 1992 Rio Declaration on Environment and Development in the following terms: “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental

⁵⁸Arctic Guidelines (2009) p.49

⁵⁹Koivurova T., Molenaar E. (2009) p.13

⁶⁰Stokke, Olav (2007) p. 408.

degradation”⁶¹.

It means that the Russian Federation when determining what the risk of harm from oil and gas exploration and production can be has to take into account uncertainties regarding, for example, the impact of proposed activities, the capacity of the environment to assimilate pollution or any other relevant factors. Principle 15 of the Rio Declaration emphasizes that the precautionary approach shall be “widely applied by states according to their capabilities”⁶². Capabilities are not defined in the Declaration, so the Russian Federation as well as other States has taken into account the cost-effectiveness of proposed measures, the nature and degree of the environmental risk and its economic and social priorities when deciding what preventive measures to adopt.

P. Birnie, A. Boyle and C. Redgwell argue that the legal status of the precautionary principle is an open question. On the one hand, it has been formulated on the Rio Declaration in obligatory terms and it has been adopted or applied by many international organizations and treaty bodies as a matter of policy and in treaties like Agenda 21, the London Convention and the OSPAR Convention which are discussed in the next chapter. On the other hand, the precautionary principle is not universally applied and states have been selective in adopting it in different treaties. Moreover the WTO Appellate Body concluded that the applicable agreement incorporated precautionary elements, it still found the legal status of the precautionary principle uncertain in the Beef Hormones Case.

Some scholars argue that the precautionary principle is a rule of customary international law. Nevertheless, the uncertainties in the implications, application and meaning of the precautionary approach suggest that the proposition that it is a rule of customary international law or it is not is too simplistic.⁶³

The 1996 Protocol to the London Convention is one of several legal instruments aimed on the prevention of pollution and protection of the marine environment to which the precautionary principle has been applied. The Protocol requires Parties to apply “a precautionary approach to environmental protection from dumping [...] whereby appropriate preventive measures are taken when there is reason to believe that wastes [...] are likely to cause harm even when there

⁶¹The Rio Declaration principle 15

⁶²The Rio Declaration principle 15

⁶³Birnie P., Redgwell C.(2009) p. 160

is no conclusive evidence to prove a casual relation between inputs and their effects”⁶⁴.As it was mentioned above, the Russian Federation has not signed the Protocol, but the general prohibition on dumping at the heart of 1996 Protocol appears to be respected by States whether or not they are not parties to one or both instruments.⁶⁵

In case if the precautionary principle is considered as a rule of customary international law and if the Russian Federation is not a Party to legal instruments which requires Parties to apply the precautionary principle, the Russian Federation will still be obliged to apply it to oil and gas activities in the Arctic region.

Moreover the Arctic offshore oil and gas guidelines provides that Arctic offshore oil and gas activities should be based on the principle of precautionary approach⁶⁶.

2.2.2. Sustainable development.

The Rio Declaration does not explicitly refer to a “right to sustainable development”. Principle 3 of the Declaration endorses the “right to development” and emphasizes that it “should be fulfilled so as to meet equitably the development and environmental needs of present and future generations”⁶⁷. Sustainable development contains procedural and substantive elements. Procedural elements deal with environmental impact assessment and public participation in decision-making and can be found in Principles 10 and 17. Substantive elements are set in Principles 3-8 of the Rio Declaration and these are the following: the right to development, the sustainable utilization of natural resources, the equitable allocation of resources both within the present generation and between present and future generations and the integration of environmental protection and economic development⁶⁸.

“Sustainable development has become the core idiom framing international and national debates about environment and development”⁶⁹. The focus on sustainable development is visible in the cooperation of Arctic States in the Arctic Council. The Arctic Council even established a Working Group on Sustainable development in 2000. In 2004 in the “Programme

⁶⁴The London Protocol art.3(1)

⁶⁵Rothwell D., Stephens T. (2010) p. 375

⁶⁶Arctic Guidelines (2009) p.60

⁶⁷The Rio Declaration principle 3

⁶⁸Birnie P., Redgwell C.(2009) p. 116

⁶⁹Mikkelsen A., Langhelle O. (2008) p. 15.

of the Russian Federation Chairmanship of the Arctic Council” the Arctic Council is seen as a mechanism for the implementation of sustainable development in the Arctic. According to Arctic offshore oil and gas guidelines oil and gas activities in the Arctic should be also based on the principle of sustainable development. “In permitting offshore oil and gas activities Arctic governments should be mindful of their commitment to sustainable development, including, *inter alia*:

- protection of biological diversity;
- the duty not to transfer, directly or indirectly, damage or hazards from one area of the marine environment to another or transform one type of pollution into another;
- promotion of the use of best available technology/techniques and best environmental practices;
- the duty to cooperate on a regional basis for protection and preservation of the marine environment, taking into account characteristic regional features and global climate change effects;
- development which meets the needs of the present without compromising the ability to meet the needs of the future and etc.”

Even though the principle of sustainable development is widely implemented in legally binding and not legally binding instruments the question “how a sustainable development path can be secured and implemented in the Arctic?” still exists.

2.2.3. Polluter pays principle

Is reflected in the Principle 16 of the Rio Declaration. “National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment”⁷⁰. The wording of this principle lacks the character of rule of law and it is not intended to be legally binding. The “polluter-pays” principle was applied only to few treaties created after the Rio Declaration and which deal with marine pollution and energy and transboundary industrial accidents (1996 Protocol to the London Dumping Convention, 1990

⁷⁰The Rio Declaration principle 16

Convention on Oil Pollution Preparedness, Response and Cooperation etc.)

In order to be effective this principle has to be implemented in national legislation. States have a variety of methods of implementation: liability laws, charges and taxation. According to Russian environmental legislation in particular Federal Law 2002 No 7-FZ “On Environmental Protection” the polluter must pay to the budget of the Russian Federation proportionally to the amount of emissions. The size of the environmental tax depends on the harm from the specific polluting substance. Producers have to make efforts to reduce pollution in order to avoid the environmental tax for emissions exceeding the permitted. Many factors determine the environmental tax in different circumstances. “Sometimes it is determined by the cost of equipment to trap the specific polluting substance calculated per unit of emissions. In other cases it may be the per unit (of emission) cost of the difference in the so-called hedonic price (for housing and accommodations) and so on”⁷¹.

Although the “polluter-pays principle” is not legally binding on the international level, the Russian Federation recognized the validity of this principle by implementing it in its national legislation.

2.3. Bilateral and multilateral agreements between the Russian Federation and other Arctic States.

In addition to principles of the international law and treaties obligations of the Russian Federation relating to oil and gas activities drive from bilateral and multilateral agreements.

There is an established network of agreements both bilateral and multilateral between two or more of the Arctic States that cover offshore activities, management of resources and environmental issues in the Arctic region.

Several offshore activities and environmental agreements between the Russian Federation and the Kingdom of Norway will be analyzed in this paragraph.

In 2007 Norway and the Russian Federation signed joint agreement aimed at harmonizing health, safety and environmental standards for petroleum activity in the Barents Sea and which proposed Russian-Norwegian Barents 2020 industry project. The aim of the project is to ensure that all the oil and gas activities both on Russian and Norwegian sides should be carried

⁷¹Glazyrina I., Vinnichenkoo S. (2006) p.325

out with an acceptable safety level (safety of life and environment). Also the aim of the project is an establishment of a dialogue between experts of two countries who may recommend safe and harmonized industry standards for use in the Barents Sea. The project includes all stages of offshore petroleum activity: exploration, drilling, production and transportation.

“The objectives of this Barents 2020 project can be summarized as follows:

Through identification of areas for harmonization of HSE standards for use in Norwegian and Russian parts of the Barents Sea, the project aimed to contribute to

- an acceptable and uniform safety level in the oil and gas activity in the Barents Sea
- a predictable HSE framework for oil and gas companies and contractors independent of nationality
- an improved basis for cooperation for all involved parties in the future”⁷².

In 2009 the report No 1626 “Assessment of international standards for safe exploration, production and transportation of oil and gas in the Barents Sea” was prepared and it proposed the following:

- Development of harmonized Norwegian- Russian standards on risk management of major hazards (fires, explosions) at offshore oil and gas platforms in the Barents Sea:

- Review of effective design decisions and the best practice cases (Norway – offshore platforms, Russia – Arctic conditions).
- Development and approval of standard provisions, which contain specific requirements and recommendations for offshore platforms of the Barents Sea and which take into account specific features of national legislative, regulatory and methodical bases of both countries.
- The result of the work can have the form of guideline for the application of the recommended standards.

The recommendations covered many areas of oil and gas activities in the Arctic. Emissions and discharges to air and water, platform technology, risk management of major hazards, safety, health and environment, Arctic technology, evacuation and rescue of people and completion are among them.

The report proposed a risk-based management and 130 international standards.

As long as the industrial project has recommendatory character we can not conclude that it

⁷²http://www.dnv.com/binaries/barents_2020_report_%20phase_3_tcm4-519577.pdf Harmonization of Health, Safety, and Environmental Protection Standarts for The Barents Sea. Final report.

puts any obligations on the Russian Federation, but we can assume that the Russian Federation as well as Norway has also initiated this agreement and it will treat these recommendations as obligations and will fulfill them on different stages of oil and gas activity in the Barents Sea in order to provide safety and environmental protection.

In 2010 one more agreement was signed between these States “ Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean”.

According to the Article 2 of the Treaty “If the existence of a hydrocarbon deposit on the continental shelf of one of the Parties is established and the other Party is of the opinion that the said deposit extends to its continental shelf, the latter Party may notify the former Party and shall submit the data on which it bases its opinion. If such an opinion is submitted, the Parties shall initiate discussions on the extent of the hydrocarbon deposit and the possibility for exploitation of the deposit as a unit... If the hydrocarbon deposit extends to the continental shelf of each of the Parties and the deposit on the continental shelf of one Party can be exploited wholly or in part from the continental shelf of the other Party, or the exploitation of the hydrocarbon deposit on the continental shelf of one Party would affect the possibility of exploitation of the hydrocarbon deposit on the continental shelf of the other Party, agreement on the exploitation of the hydrocarbon deposit as a unit, including its apportionment between the Parties, shall be reached at the request of one of the Parties”.(ART2ofBarentsagreement). Such request is called the Utilisation Agreement and is regulated by Annex II. The Annex provides obligations of Parties relating to Transboundary Hydrocarbon Deposits. Under the Article 1 of the Annex II the Russian Federation has an obligation to inspect hydrocarbon installations located on its continental shelf and ensure that the relevant information is given to another Party to enable it to protect its fundamental interest including health, safety, environment and hydrocarbon production. More it has to consult the Kingdom of Norway with respect to its health, safety and environmental measures that are required by the domestic law. Moreover together with the Kingdom of Norway the Russian Federation has an obligation to establish a Joint Commission for consultations on issues relating to any planned or existing unitised hydrocarbon deposits.

The provisions of the Treaty show that both Parties are concerned with environmental protection of their territories and the Arctic region in general. The main priorities of the unit

hydrocarbon exploitation activity are protection of health, environment and safety. This agreement has been negotiated for 40 years and finally in 2010 both Parties agreed on every provision and committed themselves, so presumptive the Russian Federation will comply with these obligations.

In addition to the discussed above agreements the Russian Federation signed an agreement on international funding for co-financing nature conservation projects operating under the Arctic Council. The aim of the funds is to support the Arctic Council member States helping to protect the Arctic environment. Russia was the first Arctic Council member state to accept the new instrument⁷³.

Even though bilateral and multilateral agreements are less binding of the Russian Federation than for example, “hard-law” treaties, it is still expected to fulfill the obligations. Irina Nossova underlines that Russian behavior with respect to preserving a reputation of compliance has never been perfect, Russia is aware that in a game with other economically strong partners, any violation of its obligations or promises might result in reputation sanctions which do not require states to choose to impose costly sanctions in an effort to generate future compliance, but they reflect the updating of beliefs by self-interested states. Reputation sanctions may result in co-operation without Russia: scientific research without Russian scientists, claims of an extended continental shelf, etc.⁷⁴

Russia has to decide if non-compliance with one obligation worth a lost reputation.

2.4. Case law

In addition to treaties and agreements, decisions of courts and tribunals are also considered as a source of law.

Advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea from the 1st of February 2011 «Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area» will be discussed in this paragraph.

The advisory opinion was requested by the Council of the International Seabed Authority in accordance with the Article 191 of the UNCLOS and was based on two applications received

⁷³<http://arctic.ru/news/2011/10/russia-signs-international-arctic-projects-agreement>

⁷⁴ Nossova I. (2011) p. 119

in 2008 from Nauru Ocean resources Inc. and Tonga Offshore mining Ltd. for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States. The following questions were asked in the request:

“1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?”⁷⁵

The Seabed Chamber based its advisory opinion on the provisions of the UNCLOS and Nodules and Sulphides Regulations.

Answering the first question it underlined the following responsibilities and obligations of States Parties to the Convention:

- obligation to ensure the effective protection for the marine environment from harmful effects which may arise from drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities⁷⁶;

- responsibility “to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with Part XI of UNCLOS”⁷⁷;

⁷⁵ Advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea from the 1st of February 2011 «Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area» p. 6.

⁷⁶Ibid p. 28

⁷⁷Ibid p.32.

- obligation to take all measures necessary in order to assist the Authority in to ensuring the compliance of sponsored persons and entities with the relevant provisions of UNCLOS and rules, regulations and procedures of the Authority⁷⁸;
- obligation to adopt laws and regulations and take administrative measures within its legal system in order to ensure the responsibility of sponsored contractor to carry out activities in conformity with UNCLOS and the contract⁷⁹.

The violation of the former obligation can cause liability of States. But not every violation can result into liability. As it is stated in the advisory opinion “such liability is limited to the State’s failure to meet its obligation to “ensure” compliance by the sponsored contractor”. For example, if the Russian Federation adopts the Federal Law ensuring the responsibility of the sponsored persons and entities to comply with the provisions of the UNCLOS and the contract, but the former violate this obligation, the Russian Federation will not be liable because it “[...] exercises best possible efforts, to do the utmost, to obtain this result”⁸⁰.

Besides the obligations to ensure sponsoring States have direct obligations. The most important are: “the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments”⁸¹.

The answer on the second question related to the extent of liability was based on the Article 139 of UNCLOS and the Chamber underlined the following “[...] it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations”⁸².

According to the Article 139 (2) of UNCLOS States liability arises not only from the failure to fulfill it is obligations, but also from caused damage and the link between damage and violation of obligations⁸³. Such link must be proven.

⁷⁸Ibid p.32

⁷⁹Ibid p.32

⁸⁰Ibid p.34

⁸¹Ibid p.38

⁸² Ibid p.52

⁸³UNCLOS art. 139 (2)

The advisory opinion plays a great role in underlining obligations of sponsoring States and extents of liability in respect to activities in the Area. All of these obligations are applicable to the Russian Federation which is also the Party to UNCLOS and which is engaged in the sponsoring of persons and entitites engaged in the seabed activities in the Area.

Chapter III Analytical part: OSPAR Convention

There are only two treaties among all the instruments regulating activities and providing environmental protection in the Arctic to which the Russian Federation did not become a Party. They are the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the Protocol to the London Dumping Convention.

OSPAR Convention.

In accordance with Article 192 of UNCLOS States have a duty to protect and preserve the marine environment⁸⁴. And in order to reach this goal Article 197 provides a possibility for States to co-operate on global and regional basis directly or through international organizations when formulating international rules and standards for the protection and preservation of the marine environment.⁸⁵ In the North-East Atlantic there is an active regional cooperation under OSPAR Convention which was open for signature at the Ministerial Meeting of the Oslo and Paris Commissions in Paris on 22 September 1992.

It has been signed and ratified by all of the Contracting Parties to the original Oslo or Paris Conventions (Belgium, the European Community, Denmark, Germany, Finland, France, Iceland, Ireland, Norway, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland) and by Luxembourg and Switzerland⁸⁶.

The OSPAR Convention entered into force on 25 March 1998. It replaced the Oslo and Paris Conventions. The main objectives of the Convention are safeguarding human health, conserving marine ecosystems and restoring marine areas which have been affected in the North-East Atlantic by prevention and elimination of pollution.⁸⁷

The area regulated by OSPAR is divided into 5 regions. Region 1 which covers Russian and Norwegian part of the Barents Sea is applicable to the thesis.

OSPAR is one of few “hard-law” instruments which adopted the precautionary principle and the polluter pays principle as general obligations of Parties⁸⁸.

⁸⁴UNCLOS art. 192

⁸⁵UNCLOS art. 197

⁸⁶ http://www.ospar.org/content/content.asp?menu=0148120000000_000000_000000

⁸⁷OSPAR art. 1(a)

⁸⁸OSPAR art. 2(2)(a)(b)

Article 5 provides a duty to take all possible steps to prevent and eliminate pollution both individually and jointly⁸⁹. Moreover pollution from offshore sources is regulated by Annex III which prohibits any dumping of wastes from offshore installations⁹⁰ except discharges or emissions from offshore sources⁹¹ and carbon dioxide streams from carbon dioxide capture processes for storage⁹².

In addition to prohibition of wastes, Annex III and OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations prohibit dumping of disused offshore installations and pipelines, but gives the Contracting States the right to grant permits for dumping or leaving disused offshore installations and pipelines wholly or partly in place in the maritime area⁹³ when there are significant reasons why one of alternative disposals mentioned in the paragraph 3 of the Decision is preferable to reuse, recycling or final disposal on land⁹⁴. Decisions to issue such permits shall be taken through the medium of OSPAR Commission and by informing other Contracting Parties of reasons for issuing permits. Contracting Parties shall keep records of dumped offshore installations and pipelines and disused offshore installations left in place with dates, places and methods of dumping⁹⁵.

Article 2(1) of Annex III obliges the Contracting Parties to require the use of both the best available techniques including clear technology where appropriate and the best environmental practice when adopting measures and programmes for the purpose of prevention and elimination of pollution from offshore sources.⁹⁶

Under the Article 6 the Contracting Parties have a right to dumping in case of force majeure when the safety of human life or of an offshore installation is threatened.

Parties shall co-operate with each other, inform the Party concerned about the contraventions of the provisions of the Annex III and instruct inspection vessels, aircrafts and other related services to report authorities any incidents contrary to the provisions of this Annex.

According to the Article 4 of Annex III the Contracting Parties shall authorise and regulate the use, discharge or emission from offshore sources or substances which may affect the maritime

⁸⁹OSPAR art. 5

⁹⁰OSPAR Annex III art. 3 (1)

⁹¹OSPAR Annex III art. 3(2).

⁹²OSPAR Annex III art. 3(3)

⁹³OSPAR Annex III art. 5(1).

⁹⁴OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations (3).

⁹⁵Ospar Annex III art.5 (4)

⁹⁶Ospar Annex III art. 2(1)

area. The competent authorities shall provide with monitoring and inspection systems in order to assess compliance with authorization or regulation.⁹⁷This article was one of the basis of the OSPAR Guidelines for Completing the Harmonised Offshore Chemical Notification Format and OSPAR Recommendation 2010/3 on a Harmonised Offshore Chemical Notification Format

OSPAR Convention established the OSPAR Commission made up of 15 representatives of Contracting States. Commission may adopt rules and regulations by unanimous vote of the Parties⁹⁸.

The Convention also made new provisions for a non-compliance process, for protection of marine ecosystems and biodiversity and for limited public access to information⁹⁹. The former became an object of dispute between UK and Ireland in the Mox Plant case. The first round in the Mox Plant case was the OSPAR Arbitration from 2003 between Ireland and the United Kingdom concerning their dispute over the potential radioactive pollution of the Irish Sea from a mixed oxide (“MOX”) fuel plant at the Sellafield nuclear facility in the United Kingdom. Ireland requested access to material deleted from the published versions of reports prepared as part of the approval process for the MOX plant. The United Kingdom declined to provide the information arguing that the information was properly withheld on commercial confidentiality grounds¹⁰⁰. The second round of this case was the ITLOS. The scope of this case is broader than just the Article 9 of OSPAR. It is also concerned with interpretation and application of Part XII of UNLOSC, including its provisions on prevention of pollution, co-operation and consultation, environmental impact assessment and also liability for possible damage¹⁰¹. Both the ITLOS and the arbitrators did not take an integrated view of the LOSC and OSPAR Convention and preferred to see them as parallel but separate regimes. By keeping these treaties separate they deprived themselves of jurisdiction to apply OSPAR in the LOSC dispute¹⁰².

⁹⁷Ospar Annex III art. 4 (1) (2)

⁹⁸Ospar Art. 13 (1)

⁹⁹Birnie, Boyle (2009) p.459

¹⁰⁰Permanent Court of Arbitration Award Series (2009) p.1

¹⁰¹Boyle A. (2007) p. 372

¹⁰²Boyle A (2007) p. 381

Although international organisations have developed environmental measures relevant to the off-shore industry, OSPAR is the key organisation addressing environmental aspects of off-shore oil and gas activities in the North-East Atlantic.

OSPAR has adopted a wide range measures to reduce pollution from all different stages of offshore activities including the reduction of oil in produced water, discharge of organic-phase drilling fluids, the banning of dumping or leaving in place disused offshore installations, subject to derogation in certain specified cases. Almost all offshore operators have now followed OSPAR's promotion of environmental management systems for offshore installations to support the objectives of the Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020 which is aimed on implementation of the ecosystem based approach, joint assessment and monitoring, prevention of further loss of the marine biodiversity in the North-East Atlantic, combating of eutrophication in the OSPAR marine area, prevention of pollution and prevention and elimination of pollution with regard to offshore oil and gas activities.

OSPAR has also established a harmonised mandatory control system aimed on promotions of the use of less hazardous substances or non-hazardous substances.

The established cooperation between the offshore industry and OSPAR addressed a range of issues, including discharges of produced water and the use and discharge of chemicals. The environmental management systems introduced by operators were also supported by this cooperation.

Since entry into force OSPAR Convention and the OSPAR Commission achieved the following results:

15% reduction in oil discharges in produced water in the North-East Atlantic, injection of produced water has proved technically challenging for some installations, mainly due to reservoir properties, possibilities to substitute certain chemicals by less hazardous chemicals proved technically challenging, impacts of offshore oil and gas activities have reduced around some installation, but concerns over negative impacts of the offshore industry on the marine environment continue, especially those relating to oil and chemicals discharged with produced water and atmospheric emissions¹⁰³.

¹⁰³ http://qsr2010.ospar.org/en/ch07_05.html

Basing on the discussed above I can conclude that the work of OSPAR as a regional organization is effective in respect of reducing the level of pollution and protection of the marine environment of the North-East Atlantic comparing to Oslo and Paris Conventions which according to the Preamble of the OSPAR did not properly control some of the sources of pollution¹⁰⁴.

Birnie, Boyle and Redgwell argue that OSPAR together with the 1996 Protocol to the London Convention changed the regulatory approach from “permitted unless prohibited” to “prohibited unless permitted”¹⁰⁵. This shift has a significant importance for the prevention and elimination of pollution.

The Russian Federation by not being a Party to OSPAR refrains from obligations resulting from the membership to this Convention. But we cannot say that OSPAR is not applicable to the Russian Federation at all. Some provisions of OSPAR are considered as international customary law, so they apply to the Russian Federation even without signing and ratifying the treaty. For instance, the precautionary principle the legal status of which I discussed in the second chapter and where I concluded that its status in international law is undetermined and according to one scholars it can be considered as a part of customary international law and others do not support this point of view. The precautionary principle has been widely applied by different international organizations to international treaties and by States to their practice, so I assume that the precautionary principle is a part of customary international law. In this case the Article 2 (2)(a) is legally binding on the Russian Federation and the States has a duty to take preventive measures when there are reasons to believe that the newly introduced to the marine environment substances or energy can cause damage to living resources, marine ecosystems and human health even if the link between the inputs and the effects is not evident¹⁰⁶. Effective application of this principle by the Russian Federation in the North-East Atlantic (region I) can result in reducing the level of marine pollution by offshore installations and strengthening protection and preservation of the marine environment. By effective application I mean obtaining from activities and substances even if the risk of harm from them is of very low probability.

¹⁰⁴OSPAR Preamble

¹⁰⁵Birnie P., Redgwell C. (2009) p. 459

¹⁰⁶OSPAR art. 2(2)(a)

The polluter pays principle stated in the Article 2 (2) (b) of OSPAR as the following “the polluter pays principle, by virtue of which costs of pollution prevention, control and reduction measures are to be borne by the polluter”¹⁰⁷ is also legally binding on the Russian Federation. This generally accepted principle of international environmental law was implemented in the Russian national legislation and as a part of customary international law can be applied in cases of pollution of the marine environment of the North-East Atlantic resulting from the offshore activities of the Russian Federation.

In addition to the precautionary principle some other provisions of OSPAR are also part of the customary international law. According to the Preamble the Convention includes provisions of the Part XII of UNCLOS which are reflected in the customary international law¹⁰⁸. For example, the Article 2(1)(a) of OSPAR recalls the Article 194 (1) and provides a duty to take measures to prevent pollution of the marine environment¹⁰⁹. As a part of customary law and UNCLOS this obligation is also applicable to the Russian Federation. Furthermore, under the Article 2 (1) (b) which recalls the Article 197 of UNCLOS the Russian Federation has a duty to adopt measures and programmes for the protection and preservation of the marine environment¹¹⁰ of the North-East Atlantic jointly or individually.

Not every provision of OSPAR became a part of the customary international law and only few of them are binding on the Russian Federation despite the fact that it is not a Party to the OSPAR. Annex III which regulates pollution from offshore activities and prohibits any dumping from offshore installations is not a customary law, so this prohibition applies only to the Contracting Parties. Another international treaty that includes the same provision is the 1996 Protocol to the London Convention and to which the Russian Federation is not a Party.

If according to the rules of international law provisions of the treaty are legally binding only on the Contracting Parties, the Russian Federation still has a possibility to dump wastes and other matters from offshore installations in compliance with the London Dumping Convention and by refraining from the membership to OSPAR and the 1996 Protocol.

In spite of many efforts by the signatory parties, the Russian government has not signed the OSPAR Convention and the 1996 Protocol.

¹⁰⁷OSPAR art. 2(2) (b)

¹⁰⁸OSPAR Preamble

¹⁰⁹OSPAR art. 2(1)(a)

¹¹⁰OSPAR art. 2(1)(b)

I can only assume the reasons why the Russian Federation does not join these treaties. First of all, both OSPAR and the 1996 Protocol apply stricter measures and regulations towards the prevention of pollution and the protection of the environment than the London Convention and the State wants to preserve its freedom of actions in the Arctic region.

Secondly, the Russian Federation like any other State is not ready for commitments under the “hard-law” instrument. It would probably join OSPAR with the “soft-law” status that would mean the non-legally binding character of its decisions and give the Russian Federation freedom of choice.

Now the Russian Federation has observer status in OSPAR and probably recent offshore oil and gas agreements and development of Stockman project will lead the Russian Federation to the membership in OSPAR.

Conclusion

I have started this thesis by emphasizing the importance of the Arctic region, growth in the translocation of petroleum operations from land to offshore and its impact on the marine environment and biological resources.

The research question of the thesis has been stated as following:

“Are the international obligations of the Russian Federation relating to the offshore oil and gas exploration and production in the Arctic able to control this process and avoid negative consequences of these activities and is there a need to develop new treaties and join the existing ones?”

To answer the research question I have posed the hypothesis which will be answered in the conclusion together with the research question.

“The Russian Federation has many obligations in the Arctic region under the international law in respect of oil and gas activities, but signing the OSPAR Convention and the London Protocol of 1996 can make its legal status more determined and ensure the lack of negative impacts resulting from these activities”.

According to my findings the obligation of the Russian Federation relating to the offshore oil and gas exploration and production are mostly connected with protection and preservation of the marine environment. The sources of obligations are international treaties, bilateral and multilateral agreements, general principles of environmental law, customary international law and the case law. The main obligations that result from these sources are the following: obligation to apply precautionary and pollutant pays principles, duty to protect and preserve the marine environment, obligation to keep under surveillance the effects of any activities which the Russian Federation permits or in which it engages, obligation to assess the potential effects of activities which may cause substantial pollution of or significant and harmful changes to the marine environment, obligation to co-operate on global and regional basis in formulating and elaborating international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment, to take effective measures individually and collectively to prevent marine pollution caused by dumping and etc, The Russian Federation is a Party to almost all important and effective treaties providing a legal framework for the Arctic regime. Obligations provided in these treaties control pollution, protect and preserve the marine environment, protect marine biodiversity, rights of indigenous

peoples, provide co-operation between States, regulate decommissioning of oil platforms and blowouts.

If I compare the Arctic regime to the one existing in the Antarctic I can say that it has numerous holes, but still I can assume that the existing legal framework in the Arctic regulates all aspects of offshore oil and gas activities and many global agreements and the Arctic Council still address different issues. Of course but and I are well regulated and the except OSPAR Convention and 1996 Protocol to the London Dumping Convention that prohibit dumping of wastes.

The obligations of the Russian Federation resulting from different sources of law and relating to oil and gas activities in the Arctic are able to control exploration and production and prevent the Russian Federation from having a negative impact on the marine environment, biological diversity and the rights of indigenous peoples, but joining the OSPAR Convention and the 1996 Protocol will assign its commitment in the Arctic region especially in the light of new and important oil and gas projects in the Arctic.

I agree with the opinion of many scholars who support the establishment of new Arctic Treaty which will consist of existing rights and obligations of Arctic States, will have a “hard-law” character and will be legally-binding on all Arctic States. Such agreement will be more effective in regulating activities in the Arctic and the fact that one or two Arctic States are not Parties to important treaties will not be a problem anymore.

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