

## **Arctic Square of Opportunities**

### **North Pole and “Shelf” of Svalbard Can not Be Norwegian**

*Alexander Oreshenkov*

The Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, which Russia and Norway signed on September 15, 2010, is regarded by the officialdom as a great diplomatic success. It is believed that the sides removed all the obstacles to the exploration of hydrocarbon wealth of the Arctic oceanic shelf as they attained a compromise solution. However, the treaty disregards a whole range of vital legal aspects, which may be detrimental to the operation of Russian state companies in the region, including possible weighty losses due to discrepancies in tax treatment.

The Russian-Norwegian treaty came as the most recent international legislative step on the part of Moscow in the long chain of moves to cede the geographic spaces – or claims to them – to which Russia had priority rights compared with its neighbors (as is widely known, these are the U.S. and Norway).

The total area of the land surface ceded by Russia in North America – mostly to the U.S. – has been estimated in Sergei Pykhtin’s article “How Russian America Was Sold” (Russ. Ed). According to his data, Russia lost a total 3.2 million square kilometers without getting a single dollar for it. In the utmost North of Europe, Russia transferred to Norway the so-called “common region” between the Kola Peninsula and the Scandinavian Peninsula and Spitsbergen (Svalbard), with the total area standing at 65,000 sq. km. This does not take account of Finnmark, which Muscovy (Moscow principality to Russian Tsardom) loosed under the Teusina Peace Treaty of 1595. And no one has measured yet the area of the continental shelf adjacent to these land surface spaces, although they run into millions of square kilometers.

Russia’s continental shelf is equal to 6.2 million sq. km, of which 4 million sq. km are potentially rich in oil and gas. Foreign geologists from the UN Commission on the Limits of the Continental Shelf will consider after our country’s repeated submission whether another 1.2 million sq. km or part thereof will belong to Russia. However, the sphere of Russia’s jurisdiction over the continental shelf in the limits of its polar sector could be expanded by about 1.5 million sq. km even without any submission if it makes the use of the norms of international law and national legislation more expediently. (For more detail on the history of establishing the borders in the Arctic region, see the article “Arctic Diplomacy: History Lessons for Settling Disputes on Litigious Territories” by the same author, published in Russia in Global Affairs, No.4, 2009 – Ed.)

Leading international analysts consider the West Arctic oil and gas shelf province, which the Russian-Norwegian delimitation line runs through, as a region where the resources may substitute for the falling production of oil in the North Sea and the Gulf of Mexico. The crude from the Persian Gulf can be totally

disregarded in this situation. The discovery of the province was announced at an international congress in London in 1983, but only now is Russia getting down to its development in practical terms. One of the largest deposits making up the province is the Shtokmanovsky; its resources are comparable to those of entire Norway.

Norway and Russia have sovereign rights to the continental shelf spaces of the Barents Sea, which include: the Russian shelf, the Norwegian shelf, the shelf areas around Svalbard, and the shelf areas of the litigious zone. Following forty years of talks, the Russian-Norwegian treaty concerning maritime delimitation in the Barents Sea divided the litigious zone into approximately two equal parts.

According to the Russian data, the zone of litigations has an area of 180,000 sq. km. Norway estimates it at 175,000 sq. km, including 20,000 sq. km in the Arctic Ocean. The Fedynsky High located in the southern part of the Barents Sea is believed to contain the most promising resources. Unofficial forecasts suggest its reserves exceed the Shtokmanovsky by a factor of three. It was precisely this part of the shelf that the Russian-Norwegian talks were deadlocked over.

The Barents Sea has one more problem that was somehow overlooked in the treaty concerning maritime delimitation and hence remains outstanding. It concerns the regime of sea and shelf areas adjacent to Svalbard. In this connection we must recall the history of the establishment of dividing lines in the Arctic Ocean.

The conventions of 1825 and 1867 between Russia, on the one part, and Great Britain and the U.S., on the other, established the lines of demarcation between their land possessions in the Arctic Ocean. The Spitsbergen (Svalbard) treaty, signed in the course of the Versailles Peace Conference in 1920, provides for the recognition of Norway's sovereignty over the land surface of the archipelago subject to the stipulations that this country creates a unified legal regime for the nationals of all the signatory countries on the shore and in the adjoining sea areas likewise. They can carry on different types of economic activities there subject to the observance of local laws and regulations.

The full legislative base of the Norwegian "shelf" legislation is given in the submission of this country to the UN Commission on the Limits of the Continental Shelf and represents the petroleum legislation of Norway. The first piece of legislation referred to in it, is a Royal Resolution of 1963; it sets the Norwegian jurisdiction over all seabed and its subsoil, which is subject to the sovereign rights of Oslo, and suggests that Svalbard has not its own shelf and the adjacent seabed and its subsoil is a natural extension of the underwater part of mainland Norway.

This approach can be explained by the fact that Svalbard had no territorial waters borders at the time while the baselines and the territorial sea limits are used to define the limits of the continental shelf and the exclusive economic zone (EEZ). Norway set the limits of "the territorial sea" around the archipelago as late as in 1970, without providing the reasons for why it applied the term "territorial sea" in this case. The Svalbard Treaty contains the term "territorial waters". In the meantime, under the effective international law foreign citizens have differing

amounts of rights in the territorial waters of Svalbard and in the territorial sea adjacent to littoral states.

Highly reputed Russian experts on international law Alexander Vylegzhanin and Vyacheslav Zilanov in their book “Spitsbergen: legal regime of adjacent marine areas” (Russ. Ed) offered scientific grounding for the Soviet Union’s position as specified in the Soviet Foreign Ministry’s note of June 14, 1988. The position suggests that the treaty is limited from spatial point of view by the so-called Svalbard Square (10°/35° East by 74°/81° North).

The authors draw a well-substantiated conclusion that Norwegian lawmakers do not have the legislative grounds for invoking “territorial sea” as a classical institution of contemporary international treaty sea law for marking off the exclusive economic zone around the archipelago or on its shelf, since the norms of this law does not envision such a possibility. And given the absence of any other benchmarks for setting the relevant limits under the customary international law and treaty maritime law, the role of such benchmarks can be attributed to the geographic coordinates specified in Article 1 of the 1920 Paris Treaty and known as the Svalbard Square.

The regime for the sea spaces adjacent to Svalbard spelt out under Article 3 of the 1920 Paris Treaty embraces waters, fjords and territorial waters of the archipelago and – for the most part – falls in line with the set of notions underlying the contemporary international maritime treaty law in what concerns the exclusive economic zones. The EEZ concept was drafted in the format of the UN Third Conference on the Law of the Sea and included in the Convention on the Law of the Sea of 1982. It defined the EEZ as an area beyond and adjacent to the territorial sea. It is composed of the waters superjacent to the seabed, the seabed itself and its subsoil.

The Convention on the Law of the Sea of 1982 defines the composition of maritime spaces in legal and geographic terms, such as the territorial sea, the exclusive economic zone, the continental shelf and waters, seabed and its subsoil. According to Article 3 of the Svalbard Treaty, foreign nationals have the right to carry on all maritime, industrial, mining and commercial operations on a footing of absolute equality with Norwegian nationals in the waters adjacent to Svalbard. On its part, Norway is expected to maintain the local regime in these spaces based on the norms of the Svalbard Treaty.

However, the Norwegians claim that the Paris Treaty of 1920 does not apply beyond the limits of the Svalbard territorial sea. At the same time, they needed the limits of the “territorial sea” for establishing the limits of the Svalbard shelf areas and the economic zone (fishery protection zone). The Norwegians draw the limits of the zone which includes waters adjacent to the archipelago and the seabed lying under them in 1977. In doing so, however, they disregarded the provisions of the Svalbard Treaty stipulating that the same regime applies to this zone, too. Norway’s move aroused sharp protests from a number of signatory countries. Meanwhile, the presence of the fishery (economic) zone made it possible for Norway not to establish an exclusive economic zone around Svalbard.

Norway has a law on economic zone, but there is no law on the continental shelf. Instead introduced Oslo in 1985 a petroleum law, and released its new edition in 1996. According to this document was established a unified petroleum regime in all the spaces under the jurisdiction of Norway (mainly in respect to the seabed and the subsoil thereof), including the land territory of mainland Norway, but excluding Svalbard, its internal waters and “territorial sea”.

In this regard, both within the “Norwegian shelf spaces” measured from the baselines of the archipelago and the limits of its “territorial sea” and the onshore continental Norway applies the same rules. That is, the basis of the regime of “shelf spaces” of Svalbard is Norwegian sovereignty over the continental part of this country, and this is a direct violation of paragraph 1 of Article 77 of the UN Convention on the Law of the Sea in 1982, according to which: “The coastal State exercises over the continental shelf sovereign rights ...”. Other countries-participants of the treaty on Svalbard do not share the position of Norway to the regime, in the language of the treaty, of waters surrounding this archipelago.

The difference in the approaches of Norway and other signatories to the Paris Treaty to the issue of the Svalbard continental shelf and the regime applicable to it arises from the fact that the maritime areas adjacent to it may have taxation levels as low as those existing on the archipelago. As for mainland Norway, the taxes come to 78 percent of the revenues that businesses get from the shelf deposits. Yet the 1920 Paris Treaty says that the export duty “shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished”. Unofficial forecasts by Russian geologists suggest that the shelf deposits in question may contain up to 1 percent of the global reserves of hydrocarbons.

Thus, Norway altered the spatial terms of the Svalbard Treaty in a unilateral manner by applying the norms of national legislation that was drafted counter to or without account of provisions of this treaty. In addition, it took some foreign policy steps to prop up its position. In 2006, Norway signed an agreement with Denmark on the delimitation of sea areas between Svalbard and Greenland, which ignores the Svalbard Treaty provisions regarding the spaces where it has legal effect. In 2009 geology experts of the UN Commission on the Limits of the Continental Shelf handed to the Norwegians a recommendation on how to establish limits of the continental shelf measured from the archipelago. Yet geologists do not have the power to advise on the imposition of shelf limits in the areas which have a special international legal position defined by the Svalbard Treaty of 1920 – not by the 1982 UN Convention on the Law of the Sea.

As for Russia, the clue to the problem is found in the line connecting points 2 to 8, which are indicated in Clause 1 of Article 1 of the Russian-Norwegian treaty on delimitation and which stand out of “the Svalbard Square”. The reference to these points shows that Russia – and also Denmark –followed the Norwegian stand. The latter, as we said above, is based on violation of the Svalbard treaty provisions and on establishing a legal position for areas adjacent to Svalbard that has no parallels in international law.

However, if one proceeds from the principle of *pacta sunt servanda* – “treaties must be respected” – the spaces specified in Article 1 of the Svalbard Treaty and the regime for the spaces adjacent to the archipelago may not be changed by the Norwegians either unilaterally or through bilateral agreements with neighboring countries, or using recommendations by the UN Commission on the Limits of the Continental Shelf. These actions, agreements or decisions on the spaces adjacent to the archipelago can be taken by any contracting party of the Svalbard Treaty to The Hague International Court of Justice.

The absence of provisions in the Russian-Norwegian delimitation treaty for the legal realities of the Svalbard treaty and Norway’s national legislation will slash the revenues of Russian state oil and gas companies (Rosneft, Gazprom, Zarubezhneft) which have a legally confirmed access to the continental shelf, should oil and gas deposits be found at the interface of the Russian shelf in the Barents Sea and “the shelf spaces” around Svalbard.

As specified by the 1920 Paris Treaty, the Russian companies should enjoy the same right of access to such deposits as the Norwegian companies. They are also expected to pay the taxes for Svalbard’s needs in the amount of less than 1 percent of the cost of hydrocarbons produced. The text of the Russian-Norwegian treaty does not suggest, for instance, that if the delimitation line runs across a deposit discovered by Russian companies in the Russian sector of the Barents Sea and extends into the zone covered by the Svalbard Treaty, these companies will have the right to operate on the basis of local legislation there, paying part of taxes to the Russian government and another – much smaller – part for Svalbard’s needs.

Annex II to the Russian-Norwegian delimitation treaty mentions only the norms of the two countries’ national legislations. The essence of Norwegian legislation effective beyond the territorial sea of the archipelago has been discussed above. Since these realities are not featured in the bilateral delimitation treaty, the Russian oil and gas producers will have to share an appropriate part of each such deposit located in the Svalbard Square with the Norwegians under provisions of the treaty, to say nothing of the transfer of part of the incontestably Russian continental shelf to Norway.

If a deposit beginning within the limits of the archipelago’s territory extends beyond its territorial waters, the Russian companies working on Svalbard will be expected (in violation of the Svalbard Treaty) to observe the norms of Norway’s continental mainland petroleum legislation in the sea areas adjacent to the archipelago. This means that 78 percent of their earnings from the hydrocarbons produced outside Norway’s territorial waters will go away in tax payments to the Norwegian treasury.

Article 6 of the Russian-Norwegian delimitation treaty contains the following provision: “The present Treaty shall not prejudice rights and obligations under other international treaties to which both the Kingdom of Norway and the Russian Federation are Parties, and which are in force at the date of the entry into force of the present Treaty”. Yet this provision does ensure the protection of the Russian oil and gas producers’ interests, since the Soviet Union did not react to the Norwegian petroleum law back in 1985. For this reason, the emergence of a

litigious issue and/or its submission to the International Court will automatically bring into effect the *estoppel* principle rather than the provision of the bilateral treaty cited above. This principle suggests that a signatory party's (to the Spitsbergen treaty) silent consent to a certain state of things leads to the loss of the right to refer in the future to grounds proving the treaty's invalidity. The same concerns Article 3 of the Danish-Norwegian agreement on the delimitation of the sea spaces between Greenland and Svalbard.

Soviet-American and Russian-Norwegian agreements regarding the Arctic Ocean envision delimitation of maritime spaces, while similar Canadian, Danish and Norwegian agreements on maritime Arctic speak of the delimitation of areas in accord with concrete legal notions. The Soviet-American agreement of 1990 suggests that it deals with the delimitation of jurisdictions concerning exclusive economic zones, as well as waters, the seabed and the subsoil. One of the objectives the Soviet side pursued by signing this agreement was to influence the course of talks with Norway on the delimitation of maritime areas. The results of that attempt are well-known now.

As Alexander Vylegzhanin writes in his article "Twenty Years of Provisional Application of the Soviet-American Agreement on the Line of Delimitation of Maritime Spaces," application of the median line principle could have provided the Soviet Union with an additional area of 25,000 sq. km in the Bering Sea compared to what it had by applying the line established in 1867. According to the 1867 Convention, part of that line might have run through the Arctic Ocean as far as the North Pole. In the meantime, the message of President George H.W. Bush made to the U.S. Congress on the occasion of the ratification of the above-mentioned Soviet-American agreement and the map supplementing Russia's submission to the UN Continental Shelf Commission indicate that the delimitation is restricted by the 200-mile exclusive economic zone. Russia might also benefit if the median line principle were applied to the delimitation of the Arctic continental shelf between Russia and the U.S.

Of all the terms specified in the 1982 UN Convention on the Law of the Sea to define maritime areas, the recently signed Russian-Norwegian maritime delimitation treaty mentions the Russian EEZ and the two countries' continental shelf. Since the Norwegian legislative base defining the regime of the country's "continental shelf" and the limits of Svalbard's "shelf areas" is not free from imperfections, this treaty should have taken into account the specific features of the spatial provisions of the Svalbard Treaty. Also, it makes sense to use the entire scope of legal notions that the contemporary international law of the sea applies nowadays in considering delimitation issues.

The special international legal position of the Svalbard Square, which de facto is a historical enclave, does not allow Norway to make claims for extending the "Norwegian continental shelf" as far as the North Pole on the basis of agreements with neighboring countries using Article 83 of the UN Convention on the Law of the Sea, which covers the issues of delimitation of continental shelf between states with opposite or adjacent coasts. This, in turn, presupposes a possible delimitation of deep-lying shelf spaces of the Arctic Ocean between

Russia and Denmark (or self-governed Greenland) on the basis of the very same Article 83 of the 1982 UN Convention on the Law of the Sea.

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**Alexander Oreshnekov** is an expert in international legislative problems of the Arctic. He has a Doctorate in Law.