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THE PERSPECTIVE OF PROTECTING THE MARINE ENVIRONMENT IN THE LIGHT OF PATCHWORK ENVIRONMENTAL LAW AND THE UPCOMING INTERNATIONAL LEGALLY BINDING INSTRUMENT UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION

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Abstract

In the implementation of international law, there is a possibility to find the problem of insufficient definition of the concept of environment, environmental protection and pollution, which may question the feasibility of treaty provisions.

It should be examined whether, in the light of the future international legally binding instrument under the United Nations Convention on the Law of the Sea for the Conservation and Sustainable Use of Marine Biological Diversity in Areas Outside National Jurisdiction, to be established in connection with UN General Assembly Resolution 72/249 of 24 December 2017 convening the Intergovernmental Conference under the auspices of the United Nations - "is it possible to efficiently perform actions leading to the protection and preservation of the marine environment without clarifying the concepts contained in UNCLOS?", and "whether it is possible to shape environmental standards for the ocean, if the document to be created does not will obtain the attribute of universality?".

It is worth noting that in the era of globalization processes and massive convergence of states, the development of international environmental law is at the forefront of the most important issues that the international community deals with and will have to deal with in the next decades.

Keywords: international, law, environmental, protection, legally, binding, instrument

1. Introduction

The history of the development of international law of the sea can be divided into three basic periods which, from the perspective of international environmental protection standards, have more and more detailed environmental obligations, thus becoming a signpost for states in their activities on the arena of international relations.

The first period of the creation of legal norms was the time until the Geneva codification of 1958 (Jessup, P., 1958), where, as a result of the First Conference on the Law of the Sea, which was held from February 24 to April 27 of 1958, four conventions occurred, which regulated aspects of the high seas, the continental shelf, the territorial sea and the adjacent zone, and fisheries. The adopted order then began to erode as a result of political changes and putting forward the developing countries on the agenda, which resulted in the need of further development of the norms of international sea law (Maduro, M.F., 1980).

The next period in the development of international law of the sea was the period until the adoption of the United Nations Convention on the Law of the Sea open for signature in Montego Bay on December 10 of 1982 (hereinafter also referred to as: "UNCLOS"), a normative act that is now considered one of the most extensive legal documents that have ever been constructed within the framework of the functioning of international relations (Łukaszuk L., 2014). UNCLOS is also considered to be much more extensive in terms of content concerning the protection of the marine environment than it was in the 1958 system (Boyle, A., 1985). Despite the introduction of a new convention regulating the situation of states in maritime zones, the old system of 1958 has not ceased to apply, and the development of international environmental protection standards has gained new importance since the First United Nations Conference on the Environment, held in Stockholm in 1972 and the Declaration on the Human Environment has been adopted at that conference(Report of the United Nations Conference on the Human Environment, 5-16 June 1972). Polish representatives of the doctrine of international public law and the protection of the marine environment emphasize that environmental standards are often an element of a "patchwork" normative system consisting of legal acts of various levels, both international agreements and various programs, activities and strategies developed by states and international organizations, acts of a global and regional nature, both binding and non-binding (soft law) (Pyć D., 2005, p. 112).

Therefore, the third period of development of international standards for the protection of the marine environment should be considered the time of preparation and work carried out under the Preparatory Committee established by United Nations General Assembly on the introduction of international legally binding instrument under the United Nations Convention on the Law of the Sea for the Conservation and Sustainable Use of Marine Biological Diversity in Areas Outside National Jurisdiction (hereinafter also referred to as "ILBI") as well as everything that will happen in connection with this new instrument.

This work, based on the shortcomings that can already be seen in the norms of international maritime law and international environmental law, aims to highlight a number of problems that should be resolved through the appropriate editing of the standards of the planned ILBI.

2. The marine environment and it's protection

Following the above-mentioned patchwork method of regulating the norms governing international environmental protection, the way of perceiving and defining the subject of protection is significant, what might be seen in moment of examining the treaty substrate. One of the most obvious attempt was made in the editorial draft of The Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, opened for signature on June 21 of 1993 in Lugano. (Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993) This convention has made a construction explicitly presenting what the environment "contains" but not what exactly it is - it's structure indicates "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors" , and in addition "property which forms part of the cultural heritage (...)" and "the characteristic aspects of the landscape". A trained eye of an entity applying international law will notice, however, that the definition contained in Art. 2 clause 10 was drawn up only for the purposes of the Convention, and not for the introduction of a generally applicable standard and the way of understanding the concept of the environment. In addition, it is worth noting that the states obliged to comply with the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, while joining the convention, expanded the meaning of the environment, recognizing that it includes goods being cultural heritage, such a procedure cannot be exercise in the light of some internal definitions of the environment, for example the Republic of Poland or the French Republic.

In the views of representatives of the science of international law, one can find theses that lead to the identification of the environment with all the physical elements of the globe, as well as the space beyond. Such solutions may be adopted on the basis of Art. II of the Convention on the prohibition of military or any other hostile use of environmental modification techniques, which defined the concept of "environmental modification techniques" as "any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including it's biota, lithosphere, hydrosphere and atmosphere, or of outer space" (Sands, P., Peel, J., Fabra, A., & Mackenzie, R., 2018). Such a view is not legitimate and completely correct due to the impossibility of determining whether it defines the entire environment or just the natural environment. Another example of a treaty regulation from which one can try to interpret the concept of the environment

can be found in the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, concluded on February 25 of 1991(United Nations, Treaty Series, vol. 1989, p. 309). That normative act which constructed for the purposes of the convention in it's article 1 legal definitions of "environmental impact assessment" and "impact", explained that the concept of environment includes „human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors" and further „effects on cultural heritage or socio-economic conditions resulting from alterations to those factors".

In the present situation, in order to explain whether there is an international norm explaining the concept of the environment, there should be processed a wide range analysis on the national legislation of all countries in the world, to determine whether there are statutory norms regulating this matter, and then comparison if there is a possibility that the definitions of the environment in national legislation coincide; finally on this basis there should be the determination of existence of an international custom. It would seem that the Polish Environmental Protection Law Act of April 27 of 2001, contains a complete definition of the environment, which is understood as: "all natural elements, including those transformed as a result of human activity, in particular the surface of the earth, minerals, air, landscape, climate and other elements of biological diversity, as well as the interactions between these elements"(Polish Journal of Laws, Dz. U. 2020 poz. 1219 ze zm.). So far, the generally applicable legal definition of the marine environment is the definition interpreted from the definition of "pollution of the marine environment" contained in the provisions of UNCLOS, which does not explain what the environment is, but only extends the area of the environment by the so-called estuaries.

Another issue of particular importance for further consideration is of key importance, especially in the analysis of future ILBI provisions. Undertaking efforts to obtain a complete and non-defective answer or the way of perceiving the concept of "environmental protection" is extremely difficult due to the exceptionally specialized way of presenting this issue. There is also no doubt that the conventions concerning various spheres of international protection do not directly define this issue. It seems that it is the Convention on Biological Diversity, opened for signature on June 5 of 1992 in Rio de Janeiro (hereinafter also referred to as the "Convention on Biodiversity")(United Nations, Treaty Series, vol. 1760, p. 79), that should be assigned the most significant importance, which indicates two types of environmental protection in the meaning of passive protection, *id est*: "ex-situ conservation" and "in-situ conservation". The first definition concerns the protection of components of biodiversity outside their natural habitats, and the second "means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings, and in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties".

The most important and underlying legal framework for the protection of the marine environment and it's resources can be found in the provisions of UNCLOS, and to be more precise in it's Part XII entitled "Protection and Conservation of the Marine Environment". If we were to analyze the rules of legal logic, the use of the conjunction word "and" in article 192 of UNCLOS between protection and preservation of the environment may suggest that states have two separate obligations - the first to protect the environment and the second to preserve the environment. The provisions of UNCLOS formulated in this way have to be read in the light of the provisions of the Convention on Biodiversity, the definition of which assumes that preservation equated to conservation also provides for the protection of ecosystems and the maintenance of species populations, which in turn makes it impossible to read the provisions of UNCLOS as two separate obligations. This approach was confirmed by the Arbitration Tribunal in the South China Sea Arbitration case, commenting on the interpretation of UNCLOS article 192, arguing that it should be read "in the light of other applicable provisions of international law" (Arbitration in the South China Sea (*Philippines v. China*), 2016).

3. Genesis of International Legally Binding Instrument Under The United Nations Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction

The genesis for the International Legally Binding Instrument Under The United Nations Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction should be sought as early as in 2012 as part of the operation of mosaic environmental law in the sense of "soft law ", specifically in the 66/288 UN General Assembly resolution of 27 June entitled:" The future we want ", adopted after the UN Conference on Sustainable Development, held in Rio de Janeiro(United Nations General Assembly Resolution, A/RES/66/288, 11 September 2012). In this resolution, you can find an excerpt from the 2012 commitment of states to positive environmental action, which is the basis for further action, that was formulated in paragraph 158:

„We therefore commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development".

The logical consequence of the above resolution was adopted without a vote 69/292 General Assembly Resolution of the Sixty-ninth Session of 19 June 2015

on the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea for the Conservation and Sustainable Use of Marine Biodiversity in areas Beyond National Jurisdiction(United Nations General Assembly Resolution, A/RES/69/292, 6 July 2015), which, in reference to paragraph 162(United Nations General Assembly Resolution, A/RES/66/288, 11 September 2012, paragraph 162)[1] of the resolution of 27 June 2012, decided on the development of the ILBI and the establishment of the Preparatory Committee, responsible for making every crucial effort to reach an international consensus on matters of substance.

Ultimately, a decision was made to hold an intergovernmental conference, the organizational meeting of which took place between April 16 and 18 of 2018.(United Nations General Assembly Resolution, A/RES/72/249, 19January 2018, paragraph 4) The meetings of the above conference were divided and planned into four rounds, starting from 2018 and ending in the first half of 2020, however, due to the spread of the COVID-19 pandemic, the fourth session did not take place and was postponed to the period from August 16 to 27 of 2021(United Nations General Assembly Resolution, A/RES/75/239, 5 January 2021, paragraph 258) It is worth noting that the subject matter of the conference oscillates in the adopted subject initially recommended in 2011 by the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction(United Nations General Assembly Resolution, A/66/119, 30 June 2011), adopted in the package by the UN General Assembly December 24, of 2011 by resolution 66/231(United Nations General Assembly Resolution, A/RES/66/231, 5 April 2012) and resolution 72/249. The subject of negotiations should include:

1. conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, as a combined body of water,
2. marine genetic resources,
3. sharing of benefits,
4. measures such as area-based management tools,
5. marine protected areas
6. environmental impact assessments
7. capacity-building
8. transfer of marine technology(United Nations General Assembly Resolution, A/RES/72/249, 19 January 2018, paragraph 2)

[1] „(...) *We note the ongoing work under the auspices of the General Assembly of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. Building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, we commit to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the Convention on the Law of the Sea*".

In response to the question about the effectiveness of the introduced regulations, it should be emphasized, that it was indicated in the Preparatory Committee report of July 31 of 2017(United Nations General Assembly Resolution, A/AC.287/2017/PC.4/2, 31 July 2017, p. 17) in section B that:

„*With regard to environmental impact assessments, further discussions are required on the degree to which the process should be conducted by States or be "internationalized", as well as on whether the instrument should address strategic environmental impact assessments*".

It seems that the environmental impact assessment of maritime activities also in the area beyond the jurisdiction of any country due to the idea of human heritage, which is the so-called "AREA", is one of the key elements, and as for the issue of introducing legal mechanisms, there should be no doubt whether such provisions will be implemented by states. The indication in section B of the above report of the necessity to conduct further discussions in order to reach an agreement both on the environmental impact assessment and in the attached matters of global and regional cooperation of specialized organizations suggests that the risk of achieving the universality of ILBI is significantly reduced, and it is worth noting that only the universality of international environmental protection standards and the fact that treaty standards acquire a *quasi-ius Cogens* character may guarantee changes at the global level. The literature of the subject emphasizes the lack of consensus as to the form of institutional solutions, points to regional, global and hybrid solutions and an ambiguous understanding of these phrases (Clark, N. A., 2020), but it should be noted that the existence of an international global organization that would deal with supervision of compliance with environmental protection standards in areas outside state jurisdiction could be the desired effect of the ILBI.

4. Environmental protection in light of a ILBI draft

It is not possible to describe the applicable standards due to the delay in the work of the conference to determine the detailed provisions of the ILBI, however, based on the ILBI drafts of May 17 of 2019(United Nations General Assembly, A/CONF.232/2019/6, 17 May 2019), and November 27 of 2019(United Nations General Assembly, A/CONF.232/2020/3, 18 November 2019) presented in the UN online resource, such an attempt can be made. First of all, it is necessary to present what the ILBI really is and in which areas it is actually to apply. Under UNCLOS we divide sea into zones: (1) where the state exercises it's jurisdiction and fulfil own competences, (2) into zones where coastal states have certain economic rights (3) and that do not come under state jurisdiction. In that last zone, countries have a number of freedoms, for example those resulting from Art. 87 UNCLOS of the freedom of the high seas for example such as freedom of navigation, freedom to lay submarine cables and pipelines, and the freedom to build artificial islands and other installations. Pursuant

to Art. 1 of the Geneva Convention on the High Seas, adopted in 1958, the area of the high seas should be considered those parts of the sea bodies extending beyond the territorial sea, whereby according to Art. 86 UNCLOS, the provisions relating to the high seas apply to waters extending beyond the territorial sea to the exclusion of the waters of the EEZ. The above is not unrelated to the proposal indicated in the ILBI draft, which is Art. 1 clause 4 that describes the area beyond the national jurisdiction of the coastal state as the high seas area and the so-called "AREA". It should be noted that in the exclusive economic zone, the coastal state does not exercise jurisdiction, in sense which, it does not have sovereign rights and cannot make claims in the area of the exclusive economic zone from the very essence of the state. The state, on the other hand, exercises it's rights under the international agreement in the form of UNCLOS, and in connection with the content of art. 56 clause 1 point b) has jurisdiction over matters related to the protection and preservation of the marine environment in the area of the exclusive economic zone, therefore the drafting of the ILBI draft seems legitimate, as the new convention is to regulate the standards related to the conservation and sustainable use of marine biodiversity. However, attention should be paid to possible misconception of sea areas outside the jurisdiction by some coastal states as areas outside the territorial sea, because the primary jurisdiction of a state resulting from it's essence and limited only to it's territory is important.

Important from the perspective of activities conducted under state jurisdiction or by entities controlled by states is Art. 32 of the presented draft of ILBI convention, due to the extended normative scope in relation to the environmental impact assessment described in art. 206 UNCLOS. Pursuant to the provisions of this article, a State conducting maritime activities that may introduce significant changes to the marine environment is required to prepare a report on the assessment of the potential effects of such activities and submit it subsequently to the relevant international organizations. The new planned ILBI regulations introduce certain conditions that could prove the transparency of the environmental impact assessment process and submitted reports. Article 32 of the ILBI draft presents two options, the first of which is the possibility of submitting the environmental impact assessment to a third country designated by a State carrying out maritime activities outside it's jurisdiction. This form, assuming that the third country has no interest in the unreliable carrying out of the impact assessment, will guarantee an objective approach to the task and it's reliable execution. The second option presented by the ILBI project was to be assessed by an independent expert appointed by the group of experts forming the Scientific and Technical Body / Network, however, as can be seen in the revised ILBI draft, this idea has been suspended and the group of experts would have at most to select the third country to carry out the impact assessment on the environment.

The normative resource of UNCLOS gives grounds for thinking that the freedoms of the high seas are exercised in the area of the high seas without major restrictions, of course, if we do not take into account the content of Art. 112 UNCLOS.

Establishing the ILBI would not only limit the freedom to exercise the freedom of the high seas due to the need to carry out an environmental impact assessment in situations other than the threat of transboundary pollution, but would also call into question the existence of the freedom of the high seas as a separate structure of international sea law. Considerations in this matter are not the subject of this article, however, it is worth emphasizing that such a problem may also appear in the process of interpreting international law.

5. Summary

In conclusion, it should be emphasized that the proposed normative act of the International Legally Binding Instrument Under The United Nations Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction, does not yet contain provisions that would explain how to define basic issues of the marine environment and protection of this environment. Within the *de lege ferenda* postulates, it should be postulated that these two definitions should find their place due to the editorial duality of the drafting contained in UNCLOS. In the current state of work, it is clear that there are some inaccuracies in the way of understanding certain institutional solutions and there is a risk of a conflict of norms regarding the functioning of the freedom of the high seas. It would seem that the work on ILBI is currently one of the most important regulatory projects under the existing international law of the sea and the law of the protection of the marine environment, however, the lack of consensus shown in the Preparatory Committee report suggests that there may be a risk that the newly emerging Convention may not be universally applicable, therefore, it's objectives may not be sufficiently achieved, especially among developing countries. It would seem that some restrictions on the environmental impact assessment may result in a lack of acceptance among states without coasts due to the potential restriction of the functioning of the freedom of the high seas. In the light of the new challenges facing the international community in relation to sea basins, it should be emphasized that only the universal nature of environmental standards and granting them the status of *quasi-ius Cogens* standards can lead to real effects and improvement of the degree of biodiversity conservation and sustainable use of marine resources. To emphasize the time in which the article was prepared, it is worth noting that its edition ended at the beginning of July 2021.

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