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## THE ROLE OF COOPERATION IN THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT AND ITS REALIZATION IN THE BALTIC SEA REGION

### Abstract

The environment in general and the marine environment in particular forms an ecosystem. Such ecosystem is characterized by high interconnectivity and interdependence of species inhabiting it. Often enough, marine ecosystems far exceed the limits of the State's sovereignty. Thus, their effective protection and preservation shall be carried out on a cooperative basis, engaging all States sharing common environment. The first international treaty to tackle the issue of marine environmental protection on a systemic basis is the United Nations Convention on the Law of the Sea (UNCLOS). It is also a treaty which directly established an obligation to cooperate in ensuring this protection. However, homogenous international regulation is not capable of addressing regional varying circumstances of marine environment. As the example of the South China Sea shows, lack of cooperation between coastal States can result in an irreversible damage to the environment. On the other hand, a remarkable model of effective realization of the obligation to cooperate has been established in the region of the Baltic Sea. What we can learn from these experiences is that fulfillment of the obligation to cooperate on a regional basis is a prerequisite for effective protection and preservation of the marine environment.

**Keywords:** sustainable development, marine environmental protection, cooperation, UNCLOS, cooperation, South China Sea, Baltic Sea region

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## INTRODUCTION

The environment is an essential element of common heritage of mankind. As becomes increasingly apparent nowadays, it is also an element that the very existence of mankind highly depends on. Environmental protection is one of the three pillars of sustainable development<sup>1</sup>, the concept defined by the World Commission on Environment and Development in its report *Our Common Future* already in 1987, and subsequently pursued and advanced by the international community as a whole, as well as by individual States.

For a long time, environmental protection was not a subject of serious, effective and integrated efforts of States in the adoption and implementation of their policies, presumably because of lack of tangible, short-term consequences. However, over 30 years later, we begin to observe that effective protection and preservation of the environment is a condition *sine qua non* for the achievement of sustainable development.

The environment in general, and the marine environment in particular, constitutes an ecosystem - or a series of interlocking ecosystems<sup>2</sup> - often exceeding territorial scope of States' sovereignty. All the more, the ecological unity of the Global Ocean and its influence on the quality and safety of life on Earth has been being emphasized by scholars examining this field<sup>3</sup>. Consequently, rules governing the protection and preservation of the marine environment cannot be designed in isolation from their context but shall reflect these ecological interconnections and take due account of regional varying characteristics.

For this reason, international environmental treaties often delegate the task of establishing region-specific rules, standards and recommended practices to States sharing common environment and oblige them to cooperate in this respect. Fulfillment of this obligation is rudimental. As we shall learn from the example of the South China Sea, in spite of existence of general environmental obligations, lack of international cooperation in adopting specific protective rules and measures risks leading to a normative gap, thus

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<sup>1</sup> Sustainable development has been defined in *Our Common Future* as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs". The very concept of sustainable development is based on three pillars - social equity, economic viability and environmental protection. For its achievement, in 2015 the United Nations have designed 17 Sustainable Development Goals, each with a set of targets and indicators, to be achieved until 2030. More on Sustainable Development Goals: <https://sustainabledevelopment.un.org> (access: 16.02.2020).

<sup>2</sup> P. Birnie, P. Boyle, A., *Conservation of Marine Living Resources and Biodiversity*, in: *International Law and the Environment*, Oxford University Press, Second Edition, 2002, p. 647.

<sup>3</sup> More on the ecological unity of the Global Ocean: D. Pyć, *Prawo Oceanu Światowego. Res usus publicum*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2011.

leaving the environment unprotected. Regional cooperation is therefore a prerequisite for the effective protection and preservation of the marine environment.

On the other hand, initiatives and actions undertaken in the region of the Baltic Sea - the adoption of the Convention on the Protection of the Marine Environment of the Baltic Sea Area already in 1974, its subsequent revision in 1992, as well as the continuous works of its governing body, the so-called Helsinki Commission, provide a remarkable example of effective realization of the duty to cooperate on a regional basis.

## 1. OBLIGATION TO COOPERATE IN INTERNATIONAL ENVIRONMENTAL LAW

Cooperation in protecting and preserving the marine environment is not only a mere act of good faith of States but forms an obligation under international environmental law, expressed in a growing number of international instruments<sup>4</sup>. A multilateral environmental agreement ('MEA') that tackles the issue of marine environmental protection on the most systemic basis is the United Nations Convention on the Law of the Sea ('UNCLOS') concluded in 1982<sup>5</sup>. The importance of this Convention shall not be underestimated for a number of reasons. As a consequence of its broad scope of regulation as well as almost universal adherence, UNCLOS is commonly considered to be the 'constitution for the oceans'<sup>6</sup>. Remarkably, the whole Part XII of this Convention has been dedicated to the protection and preservation of the marine environment. In this respect it is often called an 'umbrella treaty' because of its capacity to embody more specific environmental provisions of

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<sup>4</sup> The need of international cooperation in environmental protection and preservation has already been incorporated in the principles of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972. Subsequently, the duty to cooperate has played an important role in the outcomes of the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, the so-called Rio Declaration and Agenda 21 - a long-term action plan aimed at facilitation of implementation of the principles set out in Rio Declaration.

<sup>5</sup> M.M. Kenig-Witkowska, *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe*, Wydawnictwo LEX, Warszawa 2011, p. 190. It should be noted, however, that the need for states to cooperate on both global (Article VII(3)) and regional (Article VIII) basis in order to ensure effective protection of the marine environment has already been recognized in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 ('London Convention') and its subsequent Protocol.

<sup>6</sup> Y. Tanaka, *The International Law of the Sea*, Second Edition, Cambridge University Press, 2015, p. 30.

other international agreements<sup>7</sup>. Overall, UNCLOS is believed to impact upon the entire international marine environmental law<sup>8</sup>.

In Article 192, UNCLOS, as the first MEA, established a general obligation to protect and preserve the marine environment as a norm *ius cogens*. This obligation is further specified throughout the whole Part XII of the Convention, obliging State Parties *inter alia* to take all necessary measures to prevent, reduce and control pollution of the marine environment from any source (Article 194), to monitor risks or effects of pollution (Article 204) and to carry out an environmental impact assessment (Article 206).<sup>9</sup> Notably, a prominent rule stemming from this Convention is the obligation of international cooperation in environmental protection<sup>10</sup>. The basis of this obligation is contained in Article 197, imposing a duty to cooperate on a 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, taking into account characteristic regional features.

Section 2 of Part XII of UNCLOS is entirely devoted to global and regional cooperation, determining several forms of it. One of them is reflected in the obligation to immediately notify other States that are likely to be affected as well as international organizations about an imminent or actual damage of the marine environment by pollution (Article 198). In such case, States and international organizations shall cooperate, to the greatest extent possible, in order to eliminate the effects of pollution and to prevent or minimize the damage (Article 199). Another form of cooperation, stemming from Article 200, is the encouragement of exchange of information about pollution as well as promotion of joint scientific studies and research<sup>11</sup>. In the same breath,

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<sup>7</sup> Remarkably, apart from the general Article 311, regarding the relation of UNCLOS to other conventions and international agreements, Part XII of the Convention, devoted entirely to the protection and preservation of the marine environment contains its own 'inclusive' provision. According to Article 237, the provisions of Part XII of UNCLOS are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously, relating to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in UNCLOS. In the author's view, inclusiveness of UNCLOS is one of its strongest assets in terms of environmental protection.

<sup>8</sup> D. Pyć, *Prawo Oceanu Światowego. Res usus publicum...*, p. 21.

<sup>9</sup> Moreover, UNCLOS contains provisions regarding prevention, reduction and control of the main forms of pollution: land-based sources, seabed activities, activities in the Area, dumping, as well as pollution from vessels and atmosphere. Each of these forms is afforded with different level of protection, mostly due to the existence of *lex specialis*.

<sup>10</sup> D. Pyć, *Prawo Oceanu Światowego. Res usus publicum...*, p. 51.

<sup>11</sup> Ciechanowicz McLean J., *Międzynarodowe Prawo Ochrony Środowiska*, Wydanie II, Wydawnictwo Prawnicze LexisNexis, Warszawa 2001, p. 109.

in light of information acquired on basis of Article 200, States shall cooperate in establishing scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution (Article 201). A specific regulation has been envisaged in Article 123 for States bordering enclosed or semi-enclosed areas. Such areas are particularly vulnerable to pollution and other environmental stressors mostly because of limited water exchangeability and consequent barrier to the exchange of oxygen, the possible result of which is increasing eutrophication<sup>12</sup>. Therefore, States bordering enclosed or semi-enclosed areas, in performing their rights and duties under UNCLOS, shall coordinate in managing the living resources of the sea, in implementing their rights and duties with respect to environmental protection and preservation as well as in performing scientific research and programmes.

International cooperation in protecting and preserving the marine environment is deeply ingrained also in other provisions of UNCLOS. In principle, developing States are to be granted with scientific, educational and technical assistance from States with broader capacities. They have also been afforded with preferential treatment in allocating funds, technical assistance and specialized services by international organizations<sup>13</sup>. Another implicit form of international cooperation is the obligation to communicate the results of an undertaken monitoring and environmental impact assessment to competent international organizations<sup>14</sup>. The obligation to cooperate is also enshrined in the provisions concerning specific sources of pollution.

Overall, it may be concluded that UNCLOS provides with a comprehensive and systemic regulation on the protection and preservation of the marine environment and that the obligation to cooperate is its fundamental component. The International Tribunal for the Law of the Sea ('ITLOS') resolving the *MOX Plant case* has highlighted the importance of international cooperation, stating that:

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<sup>12</sup> A concise analysis of characteristics of the Baltic Sea as a semi-enclosed area: Berent M., Bomanowski B., *Protection of the Baltic Sea by HELCOM*, in: D. Pyć, j. Puzkarski (eds.), *Global Ocean Governance. From Vision to Action*, Wydawnictwo Ars Boni Et Aequi, Poznań 2014, pp. 219-222.

<sup>13</sup> Articles 202 and 203 of UNCLOS.

<sup>14</sup> Interestingly, the obligation to communicate the results of environmental impact assessment (EIA) has been considered by the Arbitral Tribunal resolving the dispute over the South China Sea between the Republic of the Philippines and the People's Republic of China to be of an absolute character, in contrast to the very content of such EIA, which is subject to relative State's discretion. Final Award of 12 July 2016, para. 948.

*the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention [UNCLOS] and general international law*<sup>15</sup>.

The obligation to cooperate has subsequently been incorporated in many important MEAs, such as the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, United Nations Framework Convention on Climate Change and – often implemented with regards to the marine environment – the Convention on Biological Diversity<sup>16</sup>.

The duty to cooperate stemming from international instruments of both *soft law* and *hard law* nature is being implemented worldwide on different levels and through different forums. By way of example, specific rules regarding prevention, reduction and control of pollution from ships are established on the global level by the International Maritime Organization ('IMO'). At the same time, the organization responsible for the establishment of rules regarding pollution from land-based sources, as well as for regional cooperation, is the United Nations Environment Programme ('UNEP')<sup>17</sup>.

However, before turning to the implementation of the duty to cooperate in the Baltic Sea Region, it is necessary to articulate the role this obligation plays in the effective protection and preservation of the marine environment.

## 2. THE ROLE OF THE OBLIGATION TO COOPERATE

The foundation underlying the obligation to cooperate is the belief about the existence of interests and values that are common to the whole humanity and their recognition by the international community<sup>18</sup>. Definitely a value that cannot be strictly divided between States, nor assigned to a single generation living in a given time period, is the marine environment. To the contrary, the marine environment is an essentially indivisible value, entrusted from one

<sup>15</sup> ITLOS, *The MOX Plant case*, Provisional Measures, Order of 3 December 2001, para. 82.

<sup>16</sup> *Inter alia* art. 2 para. 2, art. 4, art. 5 of the Vienna Convention for the Protection of the Ozone Layer; Art. 9, art. 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer; Art. 3 para. 5, art. 4 para. 1 of the United Nations Framework Convention on Climate Change, Art. 5, art. 16, art. 17, art. 18 of the Convention on Biological Diversity.

<sup>17</sup> Already in 1974, UNEP has launched the *Regional Seas Programme* aimed at engaging neighbouring countries in comprehensive and specific actions to protect their common marine environment. For each of the Regional Seas Programmes, UNEP seek to adopt an Action Plan and a Regional Convention.

<sup>18</sup> D. Pyć, *Prawo zrównoważonego rozwoju*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2006, s. 97.

generation to another and at the same time conditioning the quality of life and well-being of people belonging to each of these generations. For these reasons, it is considered to be one of the key elements of the common heritage of mankind. The expression of the international community's recognition of the environment as a common value to the humanity can be traced in the broad incorporation of the duty to cooperate in many important international instruments, some of which are mentioned in the previous section.

Interestingly, although environmental protection is a key element of such global conventions as UNCLOS or the London Convention, the marine environment has not been defined in any of them, nor has it been afforded with a universal definition under general international law. Nevertheless, it seems that the common scholarly understanding of the marine environment is relatively unanimous and includes oceans and the atmosphere above them.<sup>19</sup> The ecological unity of seas, oceans and their surrounding environment has been emphasized in the Report of the World Summit on Sustainable Development:

*[o]ceans, seas, islands and coastal areas form an integrated and essential component of the Earth's ecosystem<sup>20</sup>.*

The marine ecosystem, in turn, has been described one year later in the Report of the UN Secretary-General as:

*the sum total of marine organisms living in a particular sea area, the interactions between those organisms and the physical environment in which they interact<sup>21</sup>.*

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<sup>19</sup> M.M. Kenig-Witkowska, *Międzynarodowe prawo środowiska...*, pp. 16-17. Notably, one of the few questions that remained the most problematic in this respect was whether to include internal waters in the understanding of the marine environment for the purposes of establishing coherent and comprehensive legal framework for the environmental protection. That was still the case of the Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1974 ('1974 Helsinki Convention'), in which the internal waters were not yet included. See: F.L. Morrison, R. Wolfrum (eds.), *International, Regional and National Environmental Law*, Kluwer Law International, the Netherlands 2000, p. 255; M. Berent., B. Bomanowski, *Protection of the Baltic Sea by HELCOM...*, p. 224.

<sup>20</sup> Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, A/CONF.199/20, para. 30.

<sup>21</sup> Moreover, a vulnerable marine ecosystem has been defined as one that is particularly susceptible to disruption, to damage or even to destruction due to its physical characteristics, the activities and interactions of the organisms therein and the impacts they suffer from human activities and the surrounding environment. Report of the UN Secretary-General, *Oceans and the law of the sea*, UN General Assembly, 58<sup>th</sup> Session, 3 March 2003, A/58/65, para. 172.

The above has been confirmed by scholars who point out that biologically oceans are an ecosystem, or a series of interlocking ecosystems, and therefore their protection and preservation undertaken by single States having jurisdiction over a certain area already proved to be insufficient<sup>22</sup>.

On these grounds, one may conclude that the effective protection and preservation of the marine environment can be achieved neither by means of a homogenous international regulation, nor through detached actions undertaken by individual States. Citing once again the Report of the World Summit on Sustainable Development:

*Ensuring the sustainable development of the oceans requires effective coordination and cooperation, including at the global and regional levels, between relevant bodies, and actions at all levels [...].*

Therefore, the issue of effective marine environmental protection and preservation is in fact both global and regional in nature and can only be achieved through effective interstate cooperation.

This is the reason why multilateral environmental agreements often delegate to States the task of designing specific rules and measures capable of addressing regional varying circumstances. Such concept of regionalization has been recognized in the provisions of UNCLOS through the call for the establishment of *rules, standards and recommended practices and procedures for the protection and preservation of the marine environment, taking into account characteristic regional features*<sup>23</sup>. A remarkable emphasis on regionalization and related cooperation has been expressed in Article VIII of the London Convention. This Article provides also with an interesting attempt of determining, or at least approximating, how the term 'regional' shall be understood. Accordingly, *States with common interests to protect in the marine environment in a given geographical area shall endeavour, taking into account characteristic regional features, to enter into regional agreements consistent with the London Convention. Moreover, States shall endeavour to act consistently with the objectives and provisions of such regional agreements*<sup>24</sup>. Furthermore, States

<sup>22</sup> P. Birnie, A. Boyle, *Conservation of Marine Living Resources and Biodiversity...*, p. 647.

<sup>23</sup> F.L. Morrison, R. Wolfrum (eds.), *International, Regional and National Environmental Law...*, p. 254.

<sup>24</sup> This provision reflects the two-component structure of the obligation to protect and preserve the marine environment, elaborated by the international doctrine and jurisprudence in the last decades. In the view expressed by the International Court of Justice ('ICJ') in its final decision of the *Pulp Mills* case, the obligation to preserve aquatic environment and to prevent pollution is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control.



shall seek to cooperate with the parties to regional agreements in order to develop harmonized procedures with regards to different conventions concerned. In this respect, special attention shall be given to cooperation in the field of monitoring and scientific research.

Decentralization of competences to adopt region-specific rules and measures indeed has the potential to increase flexibility and adaptability of the Convention, as well as to mitigate discrepancies stemming from the zonal approach to environmental protection. On the other hand, however, a possible shortcoming of such decentralization is the risk of leaving normative gaps, especially where such delegation of regulatory powers is not safeguarded by a certain 'plan B' in the form of enforcement mechanisms or default rules. It is also worth noting that, unlike the London Convention, UNCLOS does not even seek to specify what the term 'regional' actually means<sup>25</sup>.

An example of realization of the aforementioned risk can clearly be seen in the region of Southeast Asia, and particularly in the South China Sea. The South China Sea is a water basin of approximately 3,5 million square kilometers, forming part of the Pacific Ocean in its western side. It is surrounded by eight coastal states<sup>26</sup>. As commonly evidenced, the South China Sea is one of the most biodiverse ecosystems on Earth, hosting around 600 species of coral reefs, more than 3000 known species of fish and 1500 species of sponge, most of which are endemic to the region<sup>27</sup>. The South China Sea in general, and one of its main archipelagos – the Spratly Islands – in particular, have long been subject to constant political tensions. Apart from their rich biodiversity<sup>28</sup>, the Spratly

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Accordingly, in order to fulfill their obligation, States shall ensure the effective enforcement of previously adopted legal instruments. It needs to be noted, however, that this is an obligation of conduct (to do the utmost) and not an obligation of result.

<sup>25</sup> By way of example, Article 207 para. 4 regarding land-based sources of pollution establishes that States shall adopt relevant laws and regulations taking into account internationally agreed rules, standards and recommended practices and procedures and shall endeavour to harmonize their policies in this connection at the appropriate regional level. Lack of such attempt to define what is meant by 'regional', especially in light of strong dependence on regional cooperation and the adoption of region-specific rules and measures, casts a potential shadow on the enforcement of environmental provisions of UNCLOS.

<sup>26</sup> The People's Republic of China, the Republic of China (Taiwan), the Republic of the Philippines, Malaysia, Brunei, Indonesia, Singapore and Vietnam.

<sup>27</sup> Expert Report: *Assessment of the potential environmental consequences of construction activities on seven reefs in the Spratly Islands in the South China Sea*, Expert Report of Dr rer. nat. Sebastian C. A. Ferse, Professor Peter Mumby, PhD and Dr. Selina Ward, PhD, 26 April 2016, p. 13.

<sup>28</sup> The outstanding feature of the Spratly Islands in terms of biodiversity is that not only is it an abundant ecosystem itself but also has the capabilities of transferring biodiversity across the other parts of the South China Sea. In addition to producing important larvae which ultimately repopulate this area, the Spratlys also function as biological 'roadside cafes' for migratory fish which subsequently repopulate other marine communities.

Islands constitute an important communication route through the South China Sea and are considered to have the potential for oil exploration.

On 22 January 2013, the Philippines commenced arbitration proceedings against China under the auspices of the Permanent Court of Arbitration, submitting *inter alia* that China has breached its obligation to protect and preserve the marine environment under UNCLOS. Throughout the proceedings it has been proven that after taking military control over the Spratly Islands<sup>29</sup>, China has built around 13 million square meters of artificial islands in less than three years, permanently destroying up to 60% of the shallow reef habitat therein<sup>30</sup>. Moreover, the available evidence demonstrated that China deliberately tolerated and protected harvesting of endangered species by Chinese fishermen, including predominantly corals and sea turtles. In its Final Award of 12 July 2016, the Tribunal found China to be in breach of its environmental obligations under UNCLOS.

The lesson we learn from the case of the South China Sea is that in lack of specific legal rules or effective enforcement mechanisms, the fulfillment of the obligation to cooperate largely depends on the willingness and good-faith of States. In this region, political conflicts and the attitude of the dominant power precluded reaching any agreement between coastal States with respect to environmental protection<sup>31</sup>. The attempts to cooperate in tackling this issue on the regional level have also been hindered. Although China shares a common marine environment with most of the members of the Association of Southeast Asian Nations ('ASEAN'), it is not part of this organization and thus not a party to its conventions<sup>32</sup>. From a global perspective, UNEP covered the area of the South China Sea in an Action Plan for East Asian Seas and established a Coordinating Body on the Seas of East Asia ('COBSEA') aimed at guiding its participating countries in the development and protection of the marine environment. Nevertheless, there is no Regional Convention including this area that would design region-specific measures and impose binding obligations on the States concerned.

In case of the South China Sea, lack of necessary cooperation of all its coastal States, prescribed in Articles 197 and 207 para. 4 of UNCLOS, resulted in

<sup>29</sup> Which in fact belong to the exclusive economic zone of the Philippines.

<sup>30</sup> Expert Report: *Assessment of the potential environmental consequences...*, p. 3.

<sup>31</sup> On numerous occasions China asserted that it has indisputable sovereignty over the South China Sea islands and the adjacent waters and therefore the activities undertaken in this area are subject to China's discretion.

<sup>32</sup> ASEAN is an organization with a primary focus on cooperation in the region in economic, social, cultural, technical, educational and other fields. It gathers Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar and Vietnam. A regional treaty that tackles the issue of environmental protection and preservation is the Agreement on the Conservation of Nature and Natural Resources of 1985.

a normative gap with respect to environmental protection and preservation, the consequences of which were particularly severe and for the most part irreversible<sup>33</sup>. Despite the existence of the general obligation to protect and preserve the marine environment stemming from Article 192 of UNCLOS, lack of region-specific regulations contributed to the fact that the marine environment of the South China Sea has not been afforded with necessary protection and preservation.

The arguments laid down above highlight the prominent role the obligation to cooperate plays in the protection and preservation of the marine environment. Considering the fact that seas and oceans constitute integrated and interconnected ecosystems, measures aimed at protection and preservation of their environment cannot be designed by single States in isolation from the broader context they exist in. On the other hand, in light of considerable differences that the marine environment of certain geographical areas demonstrates, it is nearly impossible to create a complete, comprehensive, effective and responsive protection framework by means of a homogenous international regulation. Rather, specification of necessary rules and measures shall be done at the 'middle ground', namely the regional level, taking into account regional varying characteristics. In this respect, we could learn two important things from the case of the South China Sea. First, the general framework for the protection and preservation of the marine environment offered by general international environmental law, although of vital importance, cannot in all instances safeguard the marine environment in an effective way. Second, we could observe that the nature and current structure of the obligation to cooperate under international environmental law is to a considerable extent discretionary. Thus, its fulfillment ultimately depends on the willingness and good faith of States in question. Lack of fulfillment of the obligation to cooperate, resulting in lack of adoption of region-specific protective rules and measures, can in turn amount to an irreversible environmental damage, influencing not only the environment itself, but also well-being of the communities depending on it. Sound cooperation of States is therefore a prerequisite for the effective protection and preservation of the marine environment.

### 3. COOPERATION IN THE BALTIC SEA REGION

Contrary to the situation in the region of Southeast Asia, the Baltic Sea region has been the frontrunner of regional cooperation with respect to

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<sup>33</sup> Expert Report: *Assessment of the potential environmental consequences...*, p. 59.

environmental protection<sup>34</sup>. It should be noted as a preliminary remark that in the wake of development of international environmental law, already at its very beginning, coastal States of the Baltic Sea acknowledged the need to specify legally binding obligations with respect to the protection of their common marine environment. This in itself constitutes a valuable expression of regional cooperation. Furthermore, the 1974 Helsinki Convention was the first regional treaty to cover control of marine pollution from all sources. This convention is also considered to have had a considerable influence on the formulation of environmental provisions related to pollution of UNCLOS and subsequently of the UNEP's Regional Conventions<sup>35</sup>.

The urgent need of close regional cooperation aimed at the protection and enhancement of the marine environment of the Baltic Sea has already been recognized throughout the whole preamble of 1974 Helsinki Convention. Moreover, this Convention explicitly imposed an obligation to cooperate on its contracting States with regard to prevention and elimination of pollution from land-based sources (Article 6), dumping (Article 9), pollution by oil and other harmful substances<sup>36</sup> (Article 11), as well as scientific research, technological spill-over and exchange of information (Article 16). Bearing in mind that effective enforcement and implementation of the Convention is as important as its adoption, the 1974 Helsinki Convention established the Baltic Marine Environment Protection Commission as its governing body, attributed with such competences as monitoring of implementation of the Convention, reviewing its content, designing recommendations, enhancing cooperation and coordination of measures undertaken for the purposes of marine environmental protection in the region<sup>37</sup>.

Despite the milestone that the 1974 Helsinki Convention represented in the field of protection of the marine environment, growing pressure on strengthening environmental protection resulted in the commencement of works over the new legal regime. As a result, on 9<sup>th</sup> of April 1992, coastal States of the Baltic Sea adopted a new Convention on the Protection of the Marine Environment of the Baltic Sea Area ('1992 Helsinki Convention'). Once

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<sup>34</sup> Z. Bukowski, *Prawo międzynarodowe a ochrona środowiska*, Wydawnictwo „Dom Organizatora”, Toruń 2005, p. 137.

<sup>35</sup> P. Birnie, A. Boyle, *The Law of the Sea and the protection of the Marine Environment*, in: *International Law and the Environment*, Oxford University Press, Second Edition, 2002, p. 357. Remarkably, the definition of pollution established in Article 2 para. 1 of the 1974 Helsinki Convention has subsequently been adopted in Article 1 para. 1 point 4 of UNCLOS in nearly unchanged wording.

<sup>36</sup> The introduction of the obligation to cooperate in combatting marine pollution by spillage of oil and other harmful substances has been given particular importance, the expression of which was the dedication of the whole Annex VI to this matter.

<sup>37</sup> Article 12 and next of the 1974 Helsinki Convention.

again, the revised framework for this region provided a role model to be followed<sup>38</sup>. As emphasized by scholars, the 1992 Helsinki Convention represented a philosophy of marine environmental protection which stressed the comprehensive nature of the efforts over the whole area of the Baltic Sea catchment<sup>39</sup>. That was also one of the reasons to include internal waters within the jurisdiction of the Convention. Remarkably, it encompassed some fundamental principles of the general international environmental law, articulated in the same year during the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, in the so-called Rio Declaration. One of the most important of them was the precautionary principle<sup>40</sup>, expressly defined in Article 3(2) of the 1992 Helsinki Convention as an obligation:

*to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may [...] harm living resources and marine ecosystems [...] when there is no conclusive evidence of a causal relationship between inputs and their alleged effects<sup>41</sup>. In terms of cooperation, the 1992 Helsinki Convention already in its preamble recognized that the protection and enhancement of the marine environment of the Baltic Sea Area are tasks that cannot effectively be accomplished by national efforts alone but by close regional co-operation and other appropriate international measures.*

In the same breath, cooperation has been implemented in the Convention as one of its underlying principles. According to Article 3(1) outlaying fundamental principles and obligations, States shall take, individually or jointly, all legislative, administrative or other measures preventing and eliminating pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance<sup>42</sup>. Subsequently, cooperation has been implemented as an integral element of many provisions related to

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<sup>38</sup> F.L. Morrison, R. Wolfrum (eds.), *International, Regional and National Environmental Law...*, p. 254.

<sup>39</sup> J. Ciechanowicz-McLean, M. Nyka, *Baltic Sea Environmental Protection in Polish Law*, in: D. Pyć, J. Puzkarski (eds.), *Global Ocean Governance. From Vision to Action*, Wydawnictwo Ars Boni et Aequi, Poznań 2014, p. 193.

<sup>40</sup> According to Principle 15 of the Rio Declaration, 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 degradation.

<sup>41</sup> Moreover, the 1992 Helsinki Convention introduced the polluter-pays principle (Article 3 (4)) and an explicit obligation to carry out an environmental impact assessment (Article 7).

<sup>42</sup> Remarkably, such formulation of this obligation conveys the principle of prevention established in international environmental law and its two-component structure described in the

prevention of pollution from different sources<sup>43</sup>. Moreover, the Convention further emphasized indispensable nature of cooperation by extending the scope of the provision related thereto in combatting marine pollution. According to Article 14, States shall individually and jointly take all appropriate measures to maintain adequate ability and to respond to pollution incidents in order to eliminate or minimize the consequences to the marine environment of the Baltic Sea. As we can observe, this regulation no longer differentiates the sources of pollution, as it was done in the corresponding Article 11 of the 1974 Helsinki Convention which obliged States to cooperate in eliminating or minimizing pollution by oil or other harmful substances. Moreover, one of the distinct advancements of the 1992 Helsinki Convention was the acknowledgement of the importance of the conservation of living resources and biological diversity as well as of the protection of marine ecosystems and ecological processes in the Baltic Sea. This has been expressed in Article 15, imposing on States an obligation to cooperate in the aforementioned areas *inter alia* through adoption of appropriate guidelines and criteria.

Notwithstanding the adoption of the Convention and wide implementation of the duty to cooperate therein<sup>44</sup>, the noteworthy expression of the acknowledgement of the role the regional cooperation plays in the effective environmental protection is to be found in the continuous works of the Helsinki Commission ('HELCOM'). HELCOM has been established as early as in 1974 as the governing body of the Helsinki Convention. Despite the revision of the Convention, it maintained its competences under the new legal framework<sup>45</sup>. The Helsinki Commission serves as an environmental policy maker for the Baltic Sea region by developing common environmental objectives and actions. Moreover, one of the most important duties of HELCOM is the development of recommendations to be implemented by the coastal States of the Baltic Sea through their national legislation<sup>46</sup>. Moreover, HELCOM keeps under

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previous section of this Article. States are therefore obliged not only to take appropriate legislative measures, but also to ensure its enforcement through administrative, executive measures.

<sup>43</sup> Article 6(2) and (4) with regard to pollution from land-based sources, Article 10(3) with regard to the prohibition of incineration in the Baltic Sea Area, Article 11(6) with respect to pollution from dumping.

<sup>44</sup> M. Berent, B. Bomanowski, *Protection of the Baltic Sea by HELCOM...*, p. 248.

<sup>45</sup> According to Article 19(2) of the 1992 Helsinki Convention, the Helsinki Commission established pursuant to the provisions of the 1974 Helsinki Convention shall remain 'the Commission' under the new legal framework.

<sup>46</sup> Recommendations issued by HELCOM play an important role in the implementation of 1992 Helsinki Convention. They are an expression of *soft law* regulations in international environmental law, usually more specific and rather technical, supplementing the content of *hard law* framework. See: J. Ciechanowicz McLean, *Międzynarodowe Prawo Ochrony Środowiska...*, p. 127.

permanent surveillance the implementation of the Convention and the measures designed by the Commission<sup>47</sup>. For these purposes, the Commission currently works through five permanent groups<sup>48</sup> and three time-limited groups<sup>49</sup>. Moreover, every few years the Commission hosts a Ministerial Meeting bringing together ministers of the coastal States responsible for the environment as well as the EU Commissioner for the Environment. Such a Ministerial Meeting held in 2007 in Cracow, Poland, resulted in the adoption of the Baltic Sea Action Plan – Reaching Good Environmental Status for the Baltic Sea ('BSAP'). It sets out the objectives to be reached by its coastal States by 2021 grouped in four important segments – eutrophication of the Baltic Sea, hazardous substances, biodiversity and nature conservation, as well as the maritime activities segment<sup>50</sup>.

Remarkably, the key concept underpinning the Baltic Sea Action Plan and leading the works of the Commission is the ecosystem approach. It has been defined in the preamble of the BSAP as an approach

*based on an integrated management of all human activities impacting on the marine environment [which], based on best available scientific knowledge about the ecosystem and its dynamics, identifies and leads to actions improving the health of the marine ecosystem, supporting at the same time sustainable use of ecosystem goods and services.*

The goal of the ecosystem approach can thus be described as to reconcile and balance the benefits the humanity can derive from the sea, mostly in the economic sense, with the pressures exerted on the marine environment in the process of achieving these benefits. A feature characterizing the ecosystem approach and emphasized by scholars working in this field is thus its multidimensionality. This multidimensionality, while allowing to tackle the

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<sup>47</sup> In addition, HELCOM serves as an information diffuser with respect to the state of and tendencies observed in the marine environment, as well as the efficiency of protective measures undertaken in the Baltic Sea. In case of any major maritime incidents, HELCOM shall serve as a coordinating body ensuring an integrated response thereto.

<sup>48</sup> Group on the Implementation of the Ecosystem Approach (GEAR), The Maritime Working Group (WG MARITIME), Working Group on reduction of Pressures from the Baltic sea Catchment area (Pressure group, form. LAND), the Response Working Group (RESPONSE), Working group on the State of the Environment and Nature Conservation (State and Conservation Working Group, form. HABITAT and MONAS).

<sup>49</sup> Group on sustainable agricultural practices (the Agri group), Group on Ecosystem-based sustainable fisheries (the Fish group), Joint HELCOM-VASAB Maritime Spatial Planning Working Group (HELCOM-VASAB MSP WG).

<sup>50</sup> HELCOM Ministerial Meeting, *HELCOM Baltic Sea Action Plan*, Kraków, Poland, 15 November 2007.

issue in the most comprehensive way, in turn poses considerable obstacles in implementing the ecosystem approach in practice. Therefore, as put by Prof. Pyć, the adoption of the ecosystem approach does not mean a withdrawal from the sectoral approach. Rather, the establishment of sectors falling under the jurisdiction of States and these excluded therefrom constitutes a useful and clarifying point of departure<sup>51</sup>.

One of the most current cooperative initiatives undertaken by HELCOM, having the ecosystem approach at its very roots<sup>52</sup>, is the development of common principles of the ecosystem-based management and maritime spatial planning (MSP), advanced by the Joint HELCOM-VASAB Maritime Spatial Planning Working Group. As described by HELCOM-VASAB MSP WG, maritime spatial planning is:

*an instrument for analyzing, coordinating and allocating the spatial and temporal distribution of human activities in marine areas to achieve a balance between economic, environmental, social and any other interests in line with internationally and nationally agreed objectives<sup>53</sup>.*

Such formulation of MSP is very broad and, as signaled earlier with respect to the ecosystem approach, can pose significant problems in its practical implementation. What needs to be grasped from this concept in the view of the author of this article is that the use of the sea by humans, from which social and economic benefits derive, have to be planned and constrained in a way to secure adaptability and recovery of the marine environment and its resources. As phrased by HELCOM itself, the goal is to achieve *environmentally-friendly management of human sea-based activities*<sup>54</sup>.

In order to increase cooperation and ensure coordination of the national MSPs across the region of the Baltic Sea, HELCOM-VASAB MSP WG has created the Regional Baltic Maritime Spatial Planning Roadmap<sup>55</sup>. More

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<sup>51</sup> D. Pyć, *Prawo Oceanu Światowego. Res usus publicum...*, pp. 100-102.

<sup>52</sup> According to Prof. Pyć and other scholars working in this field, marine spatial planning shall be designed applying three fundamental approaches: holistic, ecosystem and precautionary. See: D. Pyć, *The Polish Legal Regime on Marine Spatial Planning*, in: *Prawo Morskie*, Vol. XXXIII, Gdańsk 2017, p. 107.; D. Pyć, *Prawo Oceanu Światowego. Res usus publicum...*, pp. 97-105.

<sup>53</sup> Baltic Sea Broad Scale Maritime Spatial Planning (MSP) Principles, HELCOM HOD 34-2010 and 54th Meeting of VASAB CSPD/BSR: <https://helcom.fi/wp-content/uploads/2019/10/HELCOM-VASAB-MSP-Principles.pdf>.

<sup>54</sup> Ecosystem-based management and maritime spatial planning are furthered at HELCOM-VASAB meeting in St Petersburg: <https://helcom.fi/ecosystem-based-management-and-maritime-spatial-planning-are-furthered-at-helcom-vasab-meeting-in-st-petersburg/>.

<sup>55</sup> The Regional Baltic Maritime Spatial Planning Roadmap (2013-2020): <https://helcom.fi/media/documents/Regional-Baltic-MSP-Roadmap-2013-2020.pdf>.



recently, on 28-29<sup>th</sup> of October 2019, the 19<sup>th</sup> meeting of the Joint HELCOM-VASAB MSP WG has taken place in St Petersburg. A central topic of this meeting was the ecosystem-based management and the advancement of MSP. Participants of this meeting have introduced new ideas and concepts to be integrated into the implementation of MSP in the incoming years<sup>56</sup>. The HELCOM-VASAB MSP WG Work Plan for 2020-2021 awaits approval.

Taking into consideration the above, regional cooperation undertaken in the Baltic Sea region shall be evaluated positively. Despite possible difficulties in reconciling interests and capacities of different coastal States as well as noticeable shortcomings of such broad concepts as sustainable development or the ecosystem approach, regional cooperation in protecting the marine environment of the Baltic Sea within the framework of HELCOM has been functioning relatively well<sup>57</sup>. As summarized by the Joint Group dedicated to MSP, all Baltic States are currently developing maritime spatial plans or looking into the matter, with the majority already having adopted their plans and some even embarking on their revision. Cooperation is naturally ingrained in all of the initiatives and efforts undertaken in the Baltic Sea region with regard to environmental protection.

## CONCLUSIONS

The obligation to cooperate in protecting and preserving the marine environment has so far been broadly incorporated in many important international legal instruments, including multilateral environmental agreements. However, in order to truly understand the role cooperation plays both in the establishment and the subsequent implementation of protective measures, one must analyze the specificity of the environment it is designed for as well as possible consequences of lack of its fulfillment.

Taking into consideration the ecological unity of the Global Ocean on one hand and the fact that bulk of marine ecosystems far exceeds the limits of territorial and jurisdictional sovereignty of States on the other, it becomes evident that effective measures aimed at protection and preservation of these ecosystems can be designed neither by means of a homogenous international

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<sup>56</sup> The concept of green infrastructure (GI) has been introduced during the meeting by the Pan Baltic Scope. Green infrastructure is a network of natural or semi-natural ecosystems that, by providing natural resources, helps to address environmental and climate challenges. It is believed that by mapping such ecosystems, it is possible to effectively link biodiversity and spatial planning.

<sup>57</sup> F.L. Morrison, R. Wolfrum (eds.), *International, Regional and National Environmental Law...*, p. 254.

regulation nor through detached initiatives undertaken by single States. Therefore, the actions shall be taken at the 'middle ground' and regional cooperation of States sharing common marine environment appears rudimental.

Lack of cooperation of coastal States of the South China Sea in the past years resulted in severe irreversible damage to its environment and to marine species inhabiting it. To the contrary, despite relatively unfavourable conditions of the Baltic Sea as a semi-closed water body, the initiatives undertaken in cooperation of all its coastal States manage relatively well to respond to numerous challenges posed thereto by human sea-based activities. Taking into consideration experiences of different maritime regions, especially the ones analyzed in this article, one must conclude that regional cooperation is a prerequisite for the effective protection and preservation of the marine environment.

## ROLA WSPÓŁPRACY W ZAKRESIE OCHRONY I ZACHOWANIA ŚRODOWISKA MORSKIEGO ORAZ JEJ REALIZACJA W REGIONIE MORZA BAŁTYCKIEGO

**Słowa kluczowe:** zrównoważony rozwój, ochrona środowiska morskiego, współpraca, UNCLOS, Morze Południowochińskie, region Morza Bałtyckiego

### Abstrakt

Każde środowisko, w tym w szczególności środowisko morskie, stanowi ekosystem nacechowany znacznymi wzajemnymi zależnościami gatunków go zamieszkujących. W większości przypadków, morskie ekosystemy wykraczają poza granice suwerenności Państw. Ich ochrona oraz zachowanie powinny więc być przedsięwzięte na zasadzie współpracy wszystkich Państw dzielących wspólne im środowisko. Pierwszą międzynarodową konwencją regulującą kwestię ochrony środowiska morskiego w sposób systemowy jest Konwencja NZ o prawie morza (UNCLOS). Jest to również konwencja, która w sposób bezpośredni nakłada na państwa obowiązek współpracy w tym zakresie. Jednakże, jednolita regulacja szczebla międzynarodowego nie jest w stanie uwzględnić różnic pomiędzy środowiskami morskimi różnych regionów świata. Jak pokazuje przykład Morza Południowochińskiego, brak współpracy Państw przybrzeżnych może prowadzić do nieodwracalnych w skutkach szkód w środowisku morskim. Z drugiej strony, przykładem modelowej realizacji obowiązku współpracy są działania podejmowane w regionie Morza Bałtyckiego. Opisane doświadczenia prowadzą do wniosku, iż realizacja obowiązku współpracy na poziomie regionalnym jest warunkiem *sine qua non* skutecznej ochrony i zachowania środowiska morskiego.