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## UNRESOLVED ISSUES AND EMERGING CHALLENGES IN THE LAW OF THE SEA

### Abstract

The study addresses the challenges facing the law of the sea. Although UNCLOS is rightly described as a constitution of the law of the sea, it does not and cannot give answers to all problems and doubts that arise in practice and that are related to global warming, protection of biodiversity, legal status of genetic resources, controversy concerning shipping, delimitation of areas or the protection of underwater cultural heritage. Hence the question arises, what the ways and means of further development of the law of the sea are. Undoubtedly, one of the possibilities is to develop implementation agreements, of which the third devoted to the protection and sustainable use of marine biodiversity outside national jurisdiction is the subject of an international conference convened by the General Assembly, whose resolutions in the area of the law of the sea play an important role. Undoubtedly, also the importance of the organization of the United Nations system, such as the IMO, FAO, UNESCO, UNEP is significant. There is also the possibility of accepting agreements addressing the issues left by UNCLOS without solution or definition. Not without significance is the soft law and the practice of states as well as the position of the organs appointed by UNCLOS.

**Keywords:** Third Conference, UNCLOS, General Assembly, IMO, territorial sea, exclusive economic zone, continental shelf, marine biological diversity, marine genetic resources, freedom of navigation, underwater cultural heritage, equity.

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## INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS), one of the most comprehensive and complex international treaties that had ever been negotiated, entered into force on 16 November 1994, twelve months after submission of the 60<sup>th</sup> ratification document<sup>1</sup>. The aim of the UNCLOS, according to its preamble is to: “settle [...] all issues relating to the law of the sea” and to establish “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”.

The Convention was negotiated and adopted, at the Third Conference on the Law of the Sea, convened by the United Nations. On 17 December 1970, the UN General Assembly adopted a resolution on starting, in 1973, a conference to draft a comprehensive convention regulating the legal status of the World Ocean. Following the protracted and tough negotiations, an agreement was reached on 30 April 1982, and on 10 December 1982 the text of the convention was opened for signature at Montego Bay in Jamaica and at the UN headquarters in New York<sup>2</sup>. By 2018, 167 States, all of them the United Nations member states, have become the parties to the UNCLOS, as well as two self-governing territories (the Cook Islands and Niue) and one international organization (the European Union), making a total of 168 parties.

The Convention is frequently recognised and qualified as a “constitution for the oceans”. This designation has some important consequences. It underlines a fundamental character of that international treaty for the law of the sea and formulates a presumption that any activity at the seas and the oceans is fully or partially regulated by the UNCLOS and that any subsequent regulations, which may be negotiated and adopted in the future, have to be compatible with the UNCLOS.

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<sup>1</sup> Text: United Nations, *The Law of the Sea, United Nations Convention on the Law of the Sea*, New York 1983.

<sup>2</sup> For the origins, course and results of the Third UN Conference on the Law of the Sea, as discussed in Polish literature, see, J. Gilas, *Status obszarów morskich*, [in]: W. J. Łopuski (ed.), *Prawo Morskie*, Bydgoszcz, 1996, pp. 15 ff.; L. Łukaszuk *Międzynarodowe prawo morza*, Warszawa, 1997, pp. 18 ff.; J. Symonides, *Nowe prawo morza*, Warszawa, 1986, pp. 16 ff. The outcome of proceedings of individual sessions of the Third Conference is presented in a series of articles by W. Góralczyk and J. Symonides, published in the years 1977 - 1982 in *Technika i Gospodarka Morska*. Under the auspices of the Committee for Marine Research of the Polish Academy of Sciences a collective monograph on the Third UN Conference on the Law of the Sea was published in 1981 in *Studia i Materiały Oceanograficzne*. J. Symonides, Z. Knypl (eds.), *Współczesne tendencje prawa morza*, Wrocław, 1981.

The Convention is of a comprehensive character, reflecting the principle that all matters related to the law of the sea are closely interconnected. It specifies the boundaries and legal status of marine areas and the legal status of the seabed and ocean floor beyond national jurisdictions. It also provides for the establishment of a Seabed Authority, regulates the protection and preservation of the marine environment, and sets out the rules governing marine research. The UNCLOS, on the one hand, codifies the existing norms and repeats many provisions of the 1958 Geneva Convention concerning the legal status of the territorial sea, contiguous zone, continental shelf and seas, and on the other, introduces many new concepts, such as the exclusive economic zone and archipelagic waters; it also provides a new legal definition of the continental shelf and recognises the seabed and ocean floor as the common heritage of humankind. It subjects coastal states' claims to the strict legal regulation and sets out the limits of these claims: 12 miles for the territorial sea, 200 miles for the exclusive economic zone and 350 miles for the extended continental shelf.

The international community's interest in the freedom of navigation has been granted through the introduction of new concepts – such as the right of transit passage in straits used for international navigation, the right of passage through archipelagic waters – and the maintenance of navigational freedom of the high seas in the exclusive economic zone. The package of solutions adopted reflects a compromise that has been reached between coastal states and the international community.

Has the Convention on the Law of the Sea met the expectations of the international community? How could and should its outcome be assessed? Critics frequently voice an opinion that the solutions of the Third Conference boil down to nothing less than another division of the world as unilateral claims gained the upper hand, while the solutions are far from equitable and favour the States which have already been geographically advantaged. In order to dispel the doubts it should be stressed that: “the creeping of national jurisdiction on the sea” or putting forward unilateral claims has neither been nor is the outcome of the Third Conference, but only one of the reasons behind its convocation. Without the Third Conference it seems that the territorial sea could have transgressed the 12-mile boundary, and the economic zone could have gradually won precisely that status, too.

Various dangers could have threatened the freedom of navigation considering the expansion of the breadth at the territorial sea as well as the restriction of the right of innocent passage with respect to warships and government ships operated for non-commercial purposes. Another important implication of the Conference is the adoption of the institution of free transit passage through straits which

guarantees not only the freedom of navigation but also of flight over those crucial communication routes.

Although the Third Conference had failed to roll-back, but only restricted unilateral claims, at the same time, it adopted a number of solutions which were taking account of the interests of humankind of the international community as a whole. This especially concerns the legal regime of the sea-bed and ocean floor beyond the limits of national jurisdiction, and the recognition of the Area as the common heritage or humankind immune to monopolisation, unilateral appropriation or exploitation.

However, the high overall approval of the Convention should by no means lead to a naive idealisation. As it were, the Convention is not entirely flawless. Some terms lack the necessary precision and definition. A number of issues have been left unresolved. The Convention does not provide, and has never been intended to provide, an answer to every single problem that could arise in sea-related matters. It is a framework Convention which enjoys almost universal acceptance and, as such, it has proved to be a flexible instrument providing a solid legal foundation for the further progressive development of the international law of the sea, as a platform on which new emerging issues relating to the international governance of activities in the oceans are to be addressed<sup>3</sup>.

Although the UNCLOS addresses issues relating to the management of marine resources in a rather extensive way, it does not cover a number of emerging issues such as the conservation of marine biodiversity, or the use of marine genetic resources. Likewise, it does not address some issues arising from global warming. The General Assembly, in a number of resolutions, has reiterated its serious concern over the current and projected adverse effects of the climate change on the marine environment and marine biodiversity, as well as it has emphasized the urgency of addressing this issue. More specifically, the General Assembly has underlined its deep concern over the vulnerability of the environment and the fragile ecosystems of the polar regions including the Arctic Ocean and the Arctic ice cap, particularly affected by the projected adverse effects of the climate change<sup>4</sup>. It has also expressed concern that the climate change continues to increase the severity and incidence of coral bleaching throughout tropical seas, and weakens the ability of reefs to withstand ocean acidification<sup>5</sup>. Many key climate indicators, including the sea-level rise, global ocean temperature, the Arctic sea ice extent, and the

<sup>3</sup> D. Pyć, *Prawo Oceanu Światowego. Res usus publicum*, Gdańsk 2011, pp. 121–128.

<sup>4</sup> J. Symonides, M. Symonides, *L'Arctique: région de coopération ou de conflits ?*, Annuaire français des relations internationales - 2013, volume XIV, pp. 197-211.

<sup>5</sup> New issues continue to arise and need to be addressed. A limited size of this paper unables the full presentation of the all emerging challenges and yet unresolved issues, nevertheless, at least some of them are raised and analyzed. See the General Assembly: Resolutions: 64/71, 64/72.

ocean acidification, have been already moved beyond the patterns of natural variability, within which a contemporary society and economy have developed and thrived.

## 1. DECISIONS OF THE GENERAL ASSEMBLY TO FILL IN THE GAP IN THE UNCLOS CONCERNING THE PROTECTION OF MARINE BIOLOGICAL DIVERSITY

The protection of biological diversity, including marine biodiversity and marine genetic resources, as have already been mentioned, is not covered by the UNCLOS. The Convention does not use at all, the terms ‘marine biological diversity’ and ‘marine genetic resources.’ The only provision in the UNCLOS that relates to biodiversity or ecosystems is Article 194 (5), which provides that: “The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

The protection of marine biological diversity was mentioned for the first time, in international law, ten years after the adoption of the Convention on the Law of the Sea by two instruments issued after the 1992 UN Conference on Environment and Development in Rio, namely: Agenda 21 and the 1992 Convention on Biological Diversity (hereinafter: CBD). The CBD specifically recognizes that the UNCLOS establishes the legal framework for dealing with the marine environment<sup>6</sup>. Nevertheless, the Biodiversity Convention opens the way to challenge the legal regime in the UNCLOS when its implementation may cause serious damage or threat to biological diversity. It provides in Article 22 (1): “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”.

Thus, one of the challenges to the UNCLOS is to interpret and apply its provisions in a manner that is consistent with subsequent developments in international environmental law concerning the conservation and sustainable development of marine living resources and on the protection of marine ecosystems and marine biological diversity<sup>7</sup>.

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<sup>6</sup> CBD, in its Article 22 (2) provides: “Contracting parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea”.

<sup>7</sup> R. Beckman, T. Davenport, *The EEZ Regime: Reflections after 30 Years*, LOSI Conference

In 2004, the United Nations General Assembly created an Ad-Hoc Open-Ended Informal Working Group to engage in discussions on the conservation and sustainable use of marine biodiversity. The Working Group convened a series of 9 meetings (from 2006 to 2015) to explore issues of the ocean governance in areas beyond national jurisdiction. Since the commencement of discussions the focus has mainly been on gaps in the current international framework and whether they necessitate the adoption of a new instrument. In particular, the States have discussed the possible adoption of an implementing agreement to the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

At the 2012 United Nations Conference on Sustainable Development (Rio +20), the States agreed to decide, by the end of the 69<sup>th</sup> session of the General Assembly (by September 2015), whether to launch the negotiations for the conclusion of such a new global agreement or not. In the opinion of the majority, a new UNCLOS implementing agreement is needed to implement and update the environmental protection and conservation provisions of the UNCLOS in order to address new threats and intensifying uses which are undermining health, productivity and resilience of the oceans, in general, and marine biodiversity beyond national jurisdiction, in particular. It was agreed that the Implementing Agreement should address the gaps and weaknesses of the current system, including the lack of a global framework for the establishment of marine protected areas for the conduct of environmental impact assessments.

The General Assembly, in the resolution of 2015, decided to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction<sup>8</sup>. It also decided to establish a Preparatory Committee, open to all Member States of the United Nations, members of the specialized agencies and parties to the Convention, to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the UNCLOS. The Preparatory Committee should start its work in 2016 and, by the end of 2017, report to the Assembly on its progress. The General Assembly also decided that negotiations should address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; in particular, together and as a whole, marine genetic resources, including questions on sharing of benefits, measures such as area-based

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Papers, 2012, p. 37; K. J. Marciniak, *Morskie zasoby genetyczne w prawie międzynarodowym*, Warszawa 2016.

<sup>8</sup> United Nations, General Assembly, Resolution 69/292 of 19 June 2015.

management tools, including marine protected areas, environmental impact assessments and capacity-building, as well as the transfer of marine technology.

The Preparatory Committee held two sessions in 2016 and 2017, respectively. At its fourth session, held from 10 to 21 July 2017 it adopted the report for the General Assembly, including recommendations<sup>9</sup>. Debates in the Committee show existence of divergent views on several questions, in particular, concerning the legal regime applicable to marine genetic resources of areas beyond national jurisdiction: the common heritage of humankind and/or the freedom of the High Seas. Different views were also expressed as to whether the common heritage of humankind and the freedom of the High Seas are mutually exclusive or could apply concurrently in an international instrument, by applying the common heritage of humankind to the marine genetic resources of the Area and the freedom of the High Seas to marine genetic resources of the High Seas.

While the importance of sharing information and knowledge, as well as the dissemination of results from such research, were generally underscored, different views were expressed concerning whether access should be regulated and, if so, to what extent. Suggestions ranged from the institution of a notification requirement, to a prior informed consent procedure, access permits and fees, and conditioning access to payments for a benefit-sharing fund. The discussions on whether to distinguish between marine scientific research and bioprospecting or not, also took place, including suggestions to regulate access to marine genetic resources for bioprospecting only.

Taking note of the report of the Preparatory Committee, the General Assembly decided, on 24 December 2017,<sup>10</sup> to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing that instrument as soon as possible<sup>11</sup>.

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<sup>9</sup> See: Document A/AC.287/2017/PC.4/2).

<sup>10</sup> United Nations, General Assembly, Resolution 72/249.

<sup>11</sup> General Assembly has decided that initially, with respect to 2018, 2019 and the first half of 2020, the conference shall meet for four sessions of a duration of 10 working days each, with the first session taking place in the second half of 2018, the second and third sessions taking place in 2019, and the fourth session taking place in the first half of 2020. Decisions of the conference on substantive matters shall be taken by a two-thirds majority of the representatives present and voting, before which, the presiding officer shall inform the conference that every effort to reach agreement by consensus has been exhausted.

## 2. LIMITATION OF THE FREEDOM OF NAVIGATION IN THE ARCTIC

### 2.1. DOUBTS AND DISPUTES CONCERNING THE APPLICATION AND INTERPRETATION OF ARTICLE 234 OF THE UNCLOS

The only article of the UNCLOS, which takes into account the particular situation and the sensitivity of the Arctic marine environment is Article 234, called ‘the Arctic’ or ‘the Canadian exclusion.’ It was negotiated by Canada, the Soviet Union and the United States and approved by the governments of these countries before placing it on the agenda of the Conference.

That article created the legal basis for unilateral actions which had been taken earlier by Canada in 1970, when the parliament recognized Canadian jurisdiction to regulate navigation in the zone extending up to 100 miles from its coasts to prevent marine pollution from ships. The Arctic Waters Pollution Act adopted, prohibited the discharge and disposal of waste from ships in that area. Extending jurisdiction over the 100-nautical-mile zone, before accepting the UNCLOS concept of the exclusive economic zone, was controversial at that time<sup>12</sup>.

Article 234 provides: “Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence”.

A detailed analysis of the wording of Article 234 allows to identify a number of doubts and ambiguities concerning the scope and rights which it gives to the coastal States. Therefore, a question arises how to define areas where the presence of ice creates obstructions to navigation. Another unclear issue is a degree of coverage or the occurrence of ice. It refers to the ice-covered areas “for most of the year”. Can a regulation, by coastal States, be justified only when there is more than six months occurrence of compact ice cover or whether an occasional and periodic appearance of ice throughout the year is sufficient? Is the adoption of special legislation for the whole exclusive economic zone justified when ice covers only

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<sup>12</sup> B. K. Carnahan, *The Canadian Arctic Water Pollution Act: Analysis*, Louisiana Law Review, 1970, vol. 31, no. 4, p. 631. The adopted Act met the protests, especially of the United States, which considered it an attempt to submit claims to the maritime areas. *U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction*, 62 Department of State Bulletin, 1970, pp. 610–611.



a part of it? What does a phrase: “creating obstructions or exceptional hazards to navigation” mean? Does it justify special regulations concerning icebreakers and ships of high polar class which are not really endangered by the occurrence of ice, particularly thin one year ice? Should any specific legislation be applicable to warships?

Further doubts concern the issue whether the regulations adopted may relate to the limiting or excluding the possibility of pollution from ships only or whether they can impose requirements concerning safety of ships, their construction, equipment and crewing<sup>13</sup>. The possibility of a unilateral adoption of laws and regulations on navigation in the exclusive economic zone without an explicit requirement of their acceptance by the International Maritime Organization (IMO) leads to undermining the uniformity of requirements and standards concerning international navigation.

In June 2010, Canada launched the obligatory system NORDREG (The Northern Canada Vessel Traffic Services Zone Regulations) implementing the requirements for vessels to give a series of mandatory information concerning navigation. Notification, including a daily sailing plan and a position report of a vessel is obligatory for vessels of 300 gross tonnage or more, sailing through the Canadian waters. If the foreign vessel was in the area without an earlier information, it would be detained in the first port. Fines of up to \$100.000 per person or vessel and/or imprisonment for up to one year can be imposed<sup>14</sup>.

A number of countries, *inter alia*, the United States, Germany, Singapore and also the European Union contested immediately the mandatory nature of NORDREG by diplomatic notes as well as during the sessions of the Maritime Safety Committee of IMO. Despite evaluating positively the Canadian policy aiming at the protection of the Arctic marine environment, at the same time, they firmly criticized unilateral steps taken by Canada<sup>15</sup>. In its response, Canada stressed that the mandatory registration of a vessel in the NORDREG system would enhance safety of ships, crews, passengers in the Arctic waters seeing that search and rescue would be much easier with knowledge of a position of the registered vessels.

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<sup>13</sup> European Commission, *Legal Aspects of Arctic Shipping*, Summary Report, European Union, Publication of the European Union, 2010 p. 13.

<sup>14</sup> M. Bennett, *New Canadian Arctic Shipping rules may contravene international law*, <http://arctic.foreignpolicy.blogs.com/2010/07/09/new-canadian-arctic-shipping-rules>.

<sup>15</sup> The opposition to the mandatory reports is formulated not only by countries but also by shipping companies. The Baltic and International Maritime Council (BIMCO) representing 2/3 ship-owners sent a letter to the Canadian authorities declaring an opposition to these regulations and recognizing them as a violation of freedom of navigation. BIMCO stated that before the entry into force of these regulations, Canada should obtain an approval from IMO.

Canada is the only Arctic State which imposed the mandatory system of information on an entry, a daily sailing plan report, deviation and position on the Arctic waters without the IMO approval. The legislation of Canada can be considered as the exercise of sovereign rights concerning shipping in the exclusive economic zone, which raises serious doubts as to the compliance with the provisions of the UNCLOS.

## 2.2. CONTROVERSIES CONCERNING THE LEGAL STATUS OF THE NORTHEAST PASSAGE AND THE NORTHWEST PASSAGE

### 2.2.1. THE NORTHEAST PASSAGE (NORTHERN SEA ROUTE) ALONG THE SIBERIAN COASTS OF RUSSIA IS THE SHORTEST DIRECT MARITIME CONNECTION BETWEEN EUROPE AND ASIA<sup>16</sup>

The first complete passage of this route from west to east took place in the 19<sup>th</sup> century. It played an important role for the Soviet Union, being the shortest communication line between the western and far eastern regions of the country. It was the only seaway completely under the Soviet jurisdiction. The name of the Northern Sea Route replaced the old one – the Northeast Passage. In 1933 the Northern Sea Route was officially opened and its commercial exploitation began in 1935.

The rules of navigation on the seaways of the Northern Sea Route,<sup>17</sup> adopted in 1990, entered into force on the 1<sup>st</sup> July, 1991. The route was opened to international shipping. The rules state that the Northern Sea Route is open to navigation on a non-discriminatory basis for the vessels from all countries. They aim at ensuring the safe navigation and preventing, reducing and keeping under control, as stated by the rules, the marine environment pollution from vessels which is necessary, since severe climatic conditions that exist in the Arctic regions and the presence of ice during the larger part of the year, create obstacles and the increased danger for navigation.

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<sup>16</sup> See: J. Symonides, *Problem and Controversies Concerning Freedom of Navigation in the Arctic*, [in:] L. del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, Leiden/Boston 2015, pp. 225–242.

<sup>17</sup> These Regulations had been worked out in accordance with the USSR Council of Ministers Decision No. 565 of the 1<sup>st</sup> June 1990 and adopted on 14 September 1990. The text has been published and it is available on the Internet: Rules of Navigation. Regulations for Navigations on the Sea Ways of the Northern Sea Route, approved by the USSR Minister of Merchant Marine, 14 September 1990. In 1995, Russia adopted a guide for shipping in the Northern Sea Route as well as the rules concerning construction and equipment of ships using that sealine. The Rules, in their first part, explain that the Northern Sea Route is a national transportation route, which is situated within the internal waters, territorial sea and the exclusive economic zone.

The owner or the master of a vessel intending to navigate through the Northern Sea Route submits to the Administration a notification and a request for guiding through the Northern Sea Route in compliance with deadlines – not earlier than 120 calendar days and not later than 15 working days before the estimated date of arrival of a vessel in the Northern Sea Route water area<sup>18</sup>. The Administration considers the application within 10 working days of receiving thereof for consideration. It can also require an inspection of a vessel as a condition of acceptance of a passage. An inspection can take a place in Murmansk, Nakhodka and Provideniya, or in any another port adequate to an ownership. Guiding of vessels through the Northern Sea Route shall be performed during the navigational period, the beginning and the end of which shall be determined by the Administration.

The requirements concerning pollution from ships are more demanding than those provided in the Convention for the Prevention of the Pollution from Ships (MARPOL). The doubts are also raised by the compulsory charges for the icebreakers support regardless of their use. The mandatory icebreaker guiding of vessels has been established in the Vilkitsky Strait, the Shokalskiy Strait, the Dmitry Laptev Strait and the Sannikov Strait due to an unfavorable navigational situation and ice conditions and for ensuring the safe navigation. In other regions, the Administration decides what kind of assistance can be chosen. In a case of unfavorable ice, navigation, hydrographic and causing a threat to the ecological situation conditions, a representative of the Administration may carry out an inspection of a vessel while she navigates the Northern Sea Route. It can suspend navigation of vessels in specific parts of the Northern Sea Route for the period during which the circumstances, which have caused such a measure, exist.

The Rules of navigation in the Northern Sea Route, adopted at the beginning of the 1990s., required a necessary amendment and elimination of the existing gaps. The elaboration of a new law concerning the legal status of that route, undertaken by Duma at the end of 20<sup>th</sup> century, lasted for a very long time and ended by the adoption thereof on 28 July, 2012<sup>19</sup>. The law introduced amendments to the earlier rules regulating the navigation on that route keeping the most of the existing solutions and only in a few questions changed the previous norms, adapting them better to the increasing maritime traffic on that route.

It confirms that the Northern Sea Route is a “historically established national transportation route” of the Russian Federation (this term is rather unknown in international law of the sea) open to the ships of all flags without any

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<sup>18</sup> The Northern Sea Route Information Office, *How to Get Permit*. [http://www.arctic-lio.com/nsr\\_howtogetpermit](http://www.arctic-lio.com/nsr_howtogetpermit), 2014-02-20.

<sup>19</sup> *Vladimir Putin sign law on the Northern Sea Route*, arctic info, 30 July 2012. <http://www.arctic.info.com/News/page/vladimirputin-signs-law-on-the-northern-sea-route>

discrimination. It covers the water area adjacent to the northern coast of Russia, comprising the internal waters, the territorial sea, the contiguous zone and the exclusive economic zone. It extends from the Bering Strait and the outermost eastern edge of the coast to the archipelago of Novaya Zemlya in the west. An important novelty is the creation of a uniform, one administration with its headquarters in Moscow and elimination of two Marine Operation Headquarters. The Administration started its activity at the beginning of the shipping season in 2013<sup>20</sup>.

Russian legislation concerning the Northern Sea Route does not regulate the issue of a passage of warships anymore. The strategy of the development of the region, approved on 20 February 2013, also refers to the Northern Sea Route<sup>21</sup>. It clearly confirms the necessity of further improvement of the legal basis concerning its management, especially the payment for a service as well as the compulsory insurance system.

On 29 May 2015, the United States delivered a diplomatic note to the Russian Federation regarding its Northern Sea Route (NSR) regulatory scheme, which had been subject to legislative changes in 2012 and the new regulations issued in 2013. The note presents U.S. objections to several aspects of the scheme that are inconsistent with international law, including: requirements to obtain Russia's permission to enter and transit the exclusive economic zone and territorial sea; the persistent characterization of international straits that form part of the Northern Sea Route as internal waters; and the lack of any express exemption for sovereign immune vessels. The note also encourages Russia to submit relevant aspects of the scheme to the International Maritime Organization for consideration and adoption.

### 2.2.2. THE NORTHWEST PASSAGE

The Northwest Passage includes several seaways passing through the Canadian Arctic Archipelago. It connects the Atlantic and Pacific Oceans allowing the shortening of the route compared to a passage through the Panama Canal or circumnavigation of the Cape Horn<sup>22</sup>. The legal status of the Northwest Passage became a subject of the dispute between Canada and the United States in the late seventies and eighties. In the current phase of the dispute, the United

<sup>20</sup> Recent Russian legislation is analyzed by J. Symonides, M. Symonides, *Les perspectives d'utilisation de la route maritime du nord pour la navigation internationale: enjeux et problèmes*, *Revista Europea de Derecho de la Navegación Marítima y Aeronáutica*, 2013, no. 30, pp. 1–23.

<sup>21</sup> The text in the Russian language is available at: <http://prawitielstwo/ff/docs/22846>

<sup>22</sup> The first passage referred to in literature, took place in 1905 and it was Roald Amundsen, a Norwegian explorer who sailed through the Northwest Passage in three year journey. Whereas, the first transit passage during a single season, and in the both directions, took place in the 40s. of the 20<sup>th</sup> century. It was achieved by the Canadian ship *RCMPVSt. Roch*.

States consider that route to be the international straits the legal regime of which is governed by the UNCLOS provisions on the transit passage in the international straits, while Canada stresses that the passage constitutes its internal waters under its full national sovereignty, and using of that seaway depends on its acceptance. The United States do not challenge sovereignty of Canada over the islands. This dispute concerns the question whether the right of transit passage exists on these waters and whether it can be exercised without the Canadian permission. In 1969, the U.S. *SS Manhattan*, a specially reinforced tanker, made the passage to test the viability of the passage for the transport of oil. A few years later in 1985, the same was made by the U. S. Coast Guard icebreaker *Polar Sea*<sup>23</sup>.

In 1985, Canada applied a system of straight lines for determining the baseline of the territorial sea, in such a way that the archipelago was placed on its inner side, and thus allowing the recognition of these waters as internal. The U.S. protest concerning that decision was supported by the European Commission of the European Union which recognized that the Canadian position relating to the system of straight lines was incompatible with international law. The Commission paid particular attention to 'unusual' lengths of several of these lines exceeding limits allowed by the UNCLOS with regard to the delimitation of archipelagos<sup>24</sup>.

Despite the existing dispute, the United States and Canada signed, in 1988, an agreement on the Arctic cooperation. It provides that all navigation, by the U.S. icebreakers within waters, claimed by Canada to be internal, will be undertaken upon the Canadian consent. Nevertheless, both Parties declared that nothing in that agreement nor any practice thereunder affected the respective positions of the United States and Canada on the law of the sea in that or other maritime areas or their respective positions regarding third parties<sup>25</sup>. In other words, the States confirmed their positions and agreed to continue their dispute which boils down to the question whether the Northwest Passage can be recognized as the strait used for international navigation.

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<sup>23</sup> G. Killaby, *Grate Game in a Cold Climate: Canada's Arctic Sovereignty in Question*, text: <http://www.journal.forces.gc.ca/vo6/no4/north-nord-01-eng.asp>

<sup>24</sup> The Convention, in its Article 47 para 2 provides: "The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles". The thesis of the applicability, by Canada, of the system of straight lines to determine the baseline and the limit of the internal waters and territorial sea has been also questioned by reference to Article 5 of UNCLOS which states: "[...] the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast" [...].

<sup>25</sup> The text: *Canada Treaty Information, Agreement between the Government of Canada and the Government of the United States of America on Arctic cooperation*, E 101701- CTS 19888, N°. 29, [treaty-accord.gc.ca](http://treaty-accord.gc.ca).

The Convention explains in Article 37 that a conception of the transit passage applies to: “[...] the straits which are used for international navigation between one part of the High Seas or an exclusive economic zone and another part of the High Seas or an exclusive economic zone”<sup>26</sup>. This condition to connect a part of the High Seas or/and an exclusive economic zone is fulfilled. However, it is not clear whether this geographic criterion is sufficient for the recognition of straits as international, or whether that should be supplemented by a functional one-long-lasting use for international shipping. The UNCLOS does not explain that question. In that situation, Canada states that this functional criterion has not been satisfied<sup>27</sup>. The occasional use of the sea route and the passages of the U.S. vessels cannot be recognized as a proof of a long-term practice.

However, this condition for obvious reasons could not be fulfilled by a strait which had been frozen. Now, in time of the climatic changes, the possibilities of its present and potential use exist. It should not be forgotten that the Northwest Passage has been used for the military navigation by the American nuclear-powered submarines. In 1957, the *USS Nautilus* was the first vessel to complete a submerged transit through this passage and there are indications that the similar transit took place in 2005<sup>28</sup>.

There is also another aspect to be considered. If the islands are treated as a whole, unified archipelago, the question arises, whether in such a case, the UNCLOS provisions concerning the right of archipelagic sea lanes passage should be applied or not. The Convention defines, in Article 53, the right of archipelago passage as: “[...] the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the High Seas or an exclusive economic zone and another part of the High Seas or all exclusive economic zone”.

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<sup>26</sup> An excellent presentation of the concept of the transit passage is given by H. Caminos, V. Cogliaty-Bantz, *The Legal Regime of Straits. Contemporary Challenges and Solutions*, Cambridge 2014.

<sup>27</sup> Canada refers to the ICJ judgment concerning the Corfu Strait where the Court indicated two elements necessary to recognize a strait to be international-geographical and functional situation.

<sup>28</sup> N. Loukacheva, *Legal Challenges in the Arctic*, a position paper presented for the 4<sup>th</sup> NRF Open Meeting in Oulu, Finland and Lulea, Sweden. 5-8 October, 2006.

### 3. THE 'EQUITIBLY SOLUTION PRINCIPLE' IN THE DELIMITATION OF THE EXCLUSIVE ECONOMIC ZONE AND THE CONTINENTAL SHELF

Undoubtedly, the delimitation of maritime areas may be regarded as one of the most important problems of the law of the sea. The disputes over the extent of territorial sovereignty, over the spatial dimension of sovereign rights, belong inherently to the most bitter and protracted ones, since they directly involve vital interests of the States. The difficulties connected with the delimitation of maritime areas have rapidly multiplied with the introduction of the notion of a continental shelf into international law, and then by the acceptance by the Third Conference on the Law of the Sea of the right to the exclusive economic zones. When the continental shelf may be extended to 350 miles, and the exclusive economic zone to 200 miles, all these areas may, as it were, overlap very frequently, creating thus the need to delimit them. Whereas the historical dispute over the extension of the territorial sea concerned rather not too big areas, the disputes over the continental shelf and economic zone may involve very extensive areas and frequently – as in the case of small archipelagic States – more extended than the territory of the State concerned.

Thus, the question of the principles which were to be applied to the delimitation of maritime zones became one of the most important issues facing the Third Conference of the Law of the Sea. As the Geneva Conventions of 1958 – on the Territorial Sea and Contiguous Zone and on the Continental Shelf had laid down provisions for the delimitation of the territorial sea, contiguous zone and continental shelf, the question of whether these provisions should be reiterated in the new convention or whether new provisions should be worked out, had to be solved from the very beginning of the Conference. The postulate, that the wording of the Convention on the Law of the Sea should be identical in respect of the economic zone and the continental shelf, had not aroused any doubt. However, many States, though agreeing to the necessity of adopting identical solutions for the delimitation of both areas, resisted, from the very beginning, the possibility of mechanical repetition of Article 6 of the 1958 Geneva Convention. This article stipulates: "2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured".

It was the judgement, delivered in 1969 by the International Court of Justice, on the Delimitation of the North Sea Continental Shelf that basically influenced the definition of the delimitation principles of the continental shelf<sup>29</sup>.

Almost from the very beginning of the Third Conference on the Law of the Sea, two distinct groups of interests emerged, which had expressed opposing points of view on the delimitation of the exclusive economic zone and the continental shelf. One of them, favoured the median line, while the other stressed that delimitation should be based on equitable principles.

Difficulties in finding a compromise in direct negotiations prompted president T. Koch to take initiative in his own hands and submit a compromise formula. He proposed the following formulation for Articles 74 and 83: "1. The delimitation of the exclusive economic zone /continental shelf between States whose coasts are opposite or adjacent to each other shall be effected by agreement on the basis of international law, along the lines of Article 38 of the Statute of International Court of Justice, with the view of achieving an equitable solution".

Having gained a significant support, the proposal was finally entered into the Convention on the Law of the Sea and adopted by the Conference as paragraph 1 of Article 74 (Delimitation of the exclusive economic zone between States with opposite or adjacent coasts) and Article 83 (Delimitation of the continental shelf between States with opposite or adjacent coasts). The provisions of paragraph 1 of Article 74 and Article 83 on the delimitation of the economic zone and continental shelf consist of three elements indicating that the delimitation should be effected by: a) agreement ; b) in accordance with international law ; c) with the aim of achieving an equitable solution. In other words, the Convention determines the basis, criterion and aim of delimitation, approaching them as a *sui generis* dialectical unity. Thus, the process of delimitation is based on three principles: an agreement, consistency with international law and an equitable solution.

The analysis of the international practice shows clearly that the States do not regard the application of the equidistance median line as obligatory, and that many treaties do not mention it at all. At the same time, one cannot disagree with the viewpoint that, where the median or equidistance line gives equitable result,

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<sup>29</sup> ICJ, North Sea Continental Shelf Cases, the Federal Republic of Germany, Denmark; Netherlands, judgement of 20 February 1969. In its judgement, the ICJ stated by 11 votes against 6, that: "a) the application of equidistance method is not necessary; b) there is no other single method of delimitation, the use of which would be obligatory in all circumstances; c) delimitation should be effected by agreement in accordance with equitable principles, while all relevant circumstances should be taken into consideration; d) in the course of negotiations the following factor should be taken into consideration: general configuration of the coast, as well as the presence of all special or exceptional elements, physical and geological structure and the natural resources of the continental shelf, the element of the reasonable degree of proportionality."



it is frequently applied also by the States which, in general, opt for delimitation in accordance with equitable principles<sup>30</sup>. The circumstances which determine, whether the equidistance method should be applied in a given case, and whether its employment is to secure an equitable result, may be of a different nature. The doctrine has not worked out any comprehensive enumeration of them, and that may be explained by the specificity of particular situations, hardly permitting any generalization attempts<sup>31</sup>.

It seems, however, that a few categories of relevant circumstances may be enumerated. They may be connected with: a) geography – a specific configuration of the coast, the presence of islands, rocks, etc.; b) geology or geomorphology – configuration of the sea-bed/ normal prolongation or disconnection of the continental shelf; c) natural resources – their kind, apportionment, rules of their exploitation; d) navigation – the presence of canals, navigation security problems; e) fishing – conservation problems, breeding grounds, fishing problems; f) conservation of the natural environment; g) historical titles and the positions of the parties with regard to the disputed areas; h) security problems.

Y. Tanaka divides relevant circumstances into two groups: a) geographical factors: configuration of coasts, proportionality, baselines, presence of islands, geological and geomorphological factors, presence of third States, and b) non-geographical factors: economic factors, conduct of the parties, historic rights, security interests, navigational factors and environmental factors<sup>32</sup>.

One can agree with M. N. Shaw that: “equity is not a method of delimitation and nature cannot be totally refashioned, but some modification of the provisional equidistance line may be justified for the purpose of, for example, abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result”<sup>33</sup>.

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<sup>30</sup> M. F. Feldman, P. Colson, *The Maritime Boundaries of the United States*, AJIL 1981, p. 749 state that though the American position on maritime boundaries is based on the conception of ‘equitable principles’, the hitherto boundaries have been negotiated and delimited, to a considerable degree, in accordance with the median line principle.

<sup>31</sup> This question is also dealt with by A. O. Adede, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts*, Virginia Journal of International Law 1979. Vol. 19, p. 215; M. N. Antunes, *Towards the Conceptualization of Maritime Delimitation*, Leiden 2003; D. Evans, *Relevant Circumstances and Maritime Delimitation*, Oxford, 1987; R. Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries*, The Hague 2003; R. Lagoni, D. Vignes (eds.), *Maritime Delimitation*, Leiden 2006; D. C. Mc Rae, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration*, The Canadian Yearbook of International Law 1977, vol. XV, pp. 182-184; J. P. Quenedec, *L'affaire de la délimitation du plateau continental entre France et le Royaume-Uni*, RGDIP 1979, pp. 77-82.

<sup>32</sup> Y. Tanaka, *The International Law of the Sea*, Second Edition, Cambridge 2015, pp. 209-224.

<sup>33</sup> M. N. Shaw, *International Law*, Seventh Edition, Cambridge 2014, p. 439.

#### 4. UNDERWATER CULTURAL HERITAGE – THE NEED FOR ADEQUATE REGULATION

A significant part of the humanity's common heritage, the underwater cultural heritage, is coming under increasing threat. The remains of more than three million ships and their cargoes are thought to lie beneath the world's oceans. Historical monuments, such as the lighthouse in Alexandria (Egypt) and entire towns, such as Port Royal (Jamaica), also lie at the sea bed. These underwater treasures attract professional looters who use increasingly advanced technology to systematically pillage them.

The United Nations Convention on the Law of the Sea does not sufficiently ensure the protection of underwater cultural heritage. It has been rightly criticized as being inadequate. Article 149 of the UNCLOS governs archaeological and historical objects found in the Area, that is, the seabed beyond national jurisdiction<sup>34</sup>. Article 303 provides that coastal States have a duty to protect objects of an archaeological and historical nature found at sea and to cooperate for such purpose. It further provides, that coastal States may regulate the removal of such objects in their territorial seas as well as in their contiguous zone. However, the UNCLOS is silent on the regulation of such objects in the economic zone<sup>35</sup>.

At its 29<sup>th</sup> session, the UNESCO General Conference decided that the protection of the underwater cultural heritage should be regulated by an international convention. It invited the Director General to convene a group of governmental experts for this purpose. The UNESCO Convention on the Protection of the Underwater Cultural Heritage, after several years of discussions and debates, was adopted on 2 November 2001 by the 31<sup>st</sup> General Conference<sup>36</sup>. For the purposes of the Convention “underwater cultural heritage” means: “all traces of human

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<sup>34</sup> Article 149 declares: “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”.

<sup>35</sup> UNCLOS gives coastal States the sovereign rights for the purpose of exploring and exploiting, as well as conserving and managing the natural resources in their exclusive economic zones, as well as sovereign rights and jurisdiction with respect to other activities for the economic exploitation and exploration of the zone. Archaeological and historical objects are clearly not natural resources. It can be argued that a coastal State can regulate the commercial salvage of archaeological and historical objects in its economic zone on the ground that it has a right to regulate economic activities. The right of coastal States to regulate otherwise archaeological and historic objects in the exclusive economic zone can be challenged. Nevertheless, some States, namely: Australia, Ireland, Spain, China and Morocco have enacted national legislation which asserts the right to regulate underwater cultural heritage in the economic zones.

<sup>36</sup> UNESCO, 31<sup>st</sup> General Conference, DOC. 31 C/24.

existence having a cultural, historical or archeological character which have been partially or totally under water, periodically or continuously, for at least 100 years". State parties are obliged to preserve underwater cultural heritage for the benefit of humanity and cooperate in its preservation. The preservation *in situ* of underwater cultural heritage is considered as the first option before allowing or engaging (using non-destructive techniques) in any activities directed at this heritage, which cannot be commercially exploited. Any discovery of, or an activity directed at, underwater cultural heritage located in the exclusive economic zone, on the continental shelf of the coastal State or in the Area, shall be subject to a specific system of reporting, notification and authorization. The protection is ensured by a "coordinating State", which takes practicable measures and/or issues any necessary authorizations to prevent any immediate danger to the underwater cultural heritage in consultation with all interested (having a verifiable link with this heritage) States. The parties are obliged to cooperate with, and assist each other in order to protect and manage the underwater cultural heritage and take all appropriate measures to raise public awareness of cultural heritage.

The UNESCO Convention establishes a common framework and standard for the protection of underwater cultural heritage against looting and destruction<sup>37</sup>. It also provides for the practical rules for the treatment and research of underwater cultural heritage. Article 10 of the Convention provides that the coastal State has the right to take all practicable measures to prevent immediate danger to the underwater cultural heritage. The Convention also states that nothing in it shall prejudice the rights, jurisdiction and duties of States under international law, including the UNCLOS.

However, some States have expressed their concern that the provisions in the UNESCO Convention exceed the rights and jurisdiction of the coastal States in the exclusive economic zone. The US delegation noted two separate issues of concern during the Convention negotiations: the potential for 'creeping jurisdiction' of coastal States, and the treatment of sunken warships. The LOSC says that all States including both, the coastal States and the flag States, have a duty to protect "objects of an archaeological or historical nature found at sea and shall cooperate for that purpose" (Article 303(1)). The seaward limit of coastal State jurisdiction over such underwater cultural heritage is 24 nautical miles from the baseline from which the territorial sea is measured, which corresponds with the seaward limit of the contiguous zone (Article 303(2)). One of the US delegation's primary

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<sup>37</sup> T. Scovazzi, *The protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention*, [in:] D. Freestone, R. Barnes, D. Ong (eds.), *The Law of the Sea: Progress and Prospects*, Oxford 2006, p. 125; J. Symonides, *Międzynarodowa ochrona podwodnego dziedzictwa kulturowego*, *Stosunki Międzynarodowe*, 1-2, (vol. 27), 2003, p. 51; S. Dromgoole (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague 1999.

concerns was that certain provisions of the UNESCO Convention, that apply to the continental shelf and the exclusive economic zone, upset the delicate balance of jurisdiction and authority under the LOSC between the coastal States and the flag States, with preference given to coastal States. The increase in jurisdiction or authority perceived is often referred to as 'creeping jurisdiction' of a coastal State<sup>38</sup>. The UNESCO Convention entered into force in 2009 after ratification thereof by 20 States. By 2018 it has been ratified by 50 countries. Therefore, it can hardly be qualified as an universal treaty.

## 5. WAYS AND MEANS OF FURTHER DEVELOPMENT OF THE LAW OF THE SEA

The adoption of the Convention on the Law of the Sea has not, by any means, brought to a close the process of further development and evolution of that part of the international law. It is so, for a number of reasons<sup>39</sup>. In spite of all its complexity and comprehensiveness, the UNCLOS has not addressed, nor could it have ever done so, all issues that had to be regulated. For example, the agenda of the Third Conference did not include the legal status of internal waters, especially ports, nor was the question of historical waters ever raised. Several issues require a more detailed analysis and definitions, for example, the artificial islands, illicit traffic in drugs and psychotropic substances, liability for damage to the natural environment or the principle of the peaceful uses of the High Seas and the sea-bed and ocean-floor beyond national jurisdiction.

It is clear that scientific and technological progress keeps bringing new questions that will have to be accommodated through new solutions and changes in the currently accepted norms. Issues, such as, as alternative energy sources (temperature gradient or salinity), sources of drinking water (icebergs), mineral production from sea-water, or superports and cities in the economic zones or at the High Seas could be pointed at, which may become urgent and important in the not such a distant future.

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<sup>38</sup> O. Varmer, J. Gray, D. Alberg, *United States : Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, *Journal of Maritime Archeology* 2010, vol. 5, No 2, p. 131.

<sup>39</sup> A. Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, *International and Comparative Law Quarterly*, 2005, vol. 54, p. 563 ; J. Symonides, *Geographically Disadvantage States*, *Recueil des Cours*, The Hague Academy of International Law 1988, vol. 208 – I, p. 400.

Does the Law of the Sea Convention contain a mechanism to adapt the existing norms and regulations to the new circumstances? The answer to this question should be in the affirmative. Under Article 312, 10 years after the Convention's entry into force, the State parties may ask the UN Secretary-General, in writing, to amend the Convention, and request for the convocation of a conference to consider such proposed amendments. If, within a year, no less than a half of the State parties reply favourably to the request, the Secretary-General will have to convene such a conference. A simplified system to accept amendments without a special conference is also put in place: written proposals may be sent to the UN Secretary-General who makes them known to all parties to the Convention; if any State party objects within 12 months, the proposal gets rejected, but the absence of objection means the acceptance. These procedures have not been put into practice and are unlikely to be employed soon.

A more effective way of adjusting the Convention to new requirements is undoubtedly provided by negotiating and adopting special implementation agreements. In 1994, the first of such agreements, relating to the implementation of Part XI of the Convention of 10 December 1982, was adopted followed by the second one, the 1995 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks<sup>40</sup>. The third one, as has already been mentioned, will be negotiated in line with the General Assembly's decision of 24 December 2017, to convene an intergovernmental conference, under auspices of the United Nations, to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

The effectiveness of the UNCLOS and implementation of its provisions depend on the co-operation with the competent international organisations. Article 22 requires that coastal States take into account the recommendations of the competent international organisation when designating sea lanes and prescribing traffic separation. Similarly, under Article 41, the States bordering straits are required to refer to the competent international organisation for adoption of their proposals on sea lanes' designation or substitution. An identical injunction is provided in Article 53 in respect of the archipelagic States. International organisations should

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<sup>40</sup> There is a big difference in a number of ratifications between these agreements. The first one, of 1994 in 2018 has 150 ratifications, whereas the second one, of 1995, only 87. It is not clear how many ratifications may be obtained by the third agreement. It can be agreed with A. Oude Elterink, K. Scott, T. Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford 2015, p. 190, that different and smaller numbers of ratifications of an implementation agreement may lead to differentiation of legal relations between States.

also participate in setting global and regional norms, standards and recommended modes of conduct and procedures for the prevention, reduction, and control of marine contamination<sup>41</sup>.

However, the role of international organisations is not confined to taking part in the implementation of these provisions of the convention. These organisations are now guarantors of further development and consolidation of the law of the sea. It would be hard to imagine regulating fisheries without co-operation involving the sector's international organisations, the European Community, and the FAO. With regard to safety at sea and navigational security, an important role is played by the IMO and the ILO, while UNESCO plays such a role in the field of marine research. International organisations come up with drafts of international agreements, standards and recommendations, and in this way, the law of the sea has been developed and consolidated.

Much attention is devoted to the Law of the Sea Convention by the United Nations, where the agenda of each General Assembly session includes the item *Oceans and the Law of the Sea*. Discussions are based on a report of the Secretary-General, and in the end, a resolution is adopted on matters related to convention implementation and other law of the sea issues.<sup>42</sup> The existing UN mechanisms and bodies, including the Security Council, serve to strengthen the Convention's effectiveness and its universal character. They also help deepen the reflection on all new ocean matters, thus contributing to further development and evolution of the law of the sea.

As the General Assembly has underlined, in its resolutions, the future of oceans and seas depends on the expansion of research, effective implementation of international instruments regulating various fields of activity and cooperation at sea, and on a comprehensive and integrated approach to the management of marine resources. The oceans and seas are threatened by the climate change, natural disasters, environmental degradation, especially from land-generated waste, stock

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<sup>41</sup> Articles 207, 208, 209, 211, 212, 213, 216, and 217. The Convention also provides for the participation of subregional and regional fisheries organisations in the protection and management of living marine resources in economic zones and the High Seas.

<sup>42</sup> Non-binding instruments also provide for policy guidance of relevance *inter alia* to marine biodiversity. These include, in addition to the resolutions of the General Assembly on oceans and the law of the sea and on sustainable fisheries, the Rio Declaration and Chapter 17 of Agenda 21 adopted at the 1992 United Nations Conference on Environment and Development, the Johannesburg Plan of Implementation adopted in 2002 at the World Summit on Sustainable Development, the outcome document of the 2012 United Nations Conference on Sustainable Development, i.e. *The future we want* and the 2030 Agenda for Sustainable Development, in particular Sustainable Development Goal 14 *Conserve and sustainably use the oceans, seas and marine resources for sustainable development*. Non-binding agreements, political norms, soft law may lead to the creation of customary norms of the international law of the sea.

depletion resulting from overfishing, loss of biodiversity, and ineffective control exercised by the flag States. Only through international collaboration and regulation it is possible to maintain a peaceful order at oceans and seas, ensure their proper management and protection in the name of the humankind, and meet the emerging threats and challenges.

## NIEROZWIĄZANE KWESTIE I WYZWANIA PRAWA MORZA

**Słowa kluczowe:** Trzecia Konferencja Prawa Morza, UNCLOS, Zgromadzenie Ogólne, IMO, morze terytorialne, wyłączna strefa ekonomiczna, szelf kontynentalny, morska różnorodność biologiczna, morskie zasoby genetyczne, wolność żeglugi, podwodne dziedzictwo kulturowe, słuszność.

### Abstrakt

Opracowanie podejmuje kwestie wyzwań, przed którymi stoi prawo morza. Wprawdzie UNCLOS określana jest słusznie jako konstytucja prawa morza, ale nie daje ona i nie może dać odpowiedzi na wszystkie problemy i wątpliwości, które powstają w praktyce i są związane z ociepleniem klimatu, ochroną różnorodności biologicznej, statusem prawnym zasobów genetycznych, kontrowersjami dotyczącymi żeglugi, delimitacją obszarów morskich czy ochroną podwodnego dziedzictwa kulturalnego. Stąd powstaje pytanie, jakie są drogi i środki dalszego rozwoju prawa morza. Niewątpliwie jedną z możliwości jest wypracowanie porozumień implementacyjnych, z których trzecie poświęcone jest ochronie i zrównoważonemu korzystaniu z morskiej różnorodności biologicznej poza granicami jurysdykcji narodowej i jest przedmiotem konferencji międzynarodowej zwołanej przez Zgromadzenie Ogólne, którego rezolucje w obszarze prawa morza odgrywają istotną rolę. Niewątpliwie ważne znaczenie ma też działalność organizacji systemu Narodów Zjednoczonych, jak IMO, FAO, UNESCO, UNEP. Istnieje też możliwość przyjmowania umów podejmujących kwestie pozostawione przez UNCLOS bez rozwiązania czy zdefiniowania. Nie bez znaczenia jest też miękkie prawo oraz praktyka państw, a także stanowisko organów powołanych przez UNCLOS.

