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Making Sense of the Agreement on Biodiversity Beyond National Jurisdiction: The Road Ahead

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Abstract. The negotiations of the future regulation governing the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction successfully concluded last March 2023 and the BBNJ Agreement was formally adopted by consensus on 19 June 2023. The previous article "Biodiversity Beyond National Jurisdiction: ways forward to reach a necessary Agreement", published in the EPL 52 (1) 2022, defended the BBNJ Agreement potential to make a very positive impact on the governance of the oceans in general and proposed some formulas to facilitate the adoption of the treaty in a scenario where States had very different expectations. The present work reviews that article, first, to update what the result of the negotiation has been with respect to the main issue areas of the regulation; secondly, to identify which negotiation formulas have certainly helped to adopt the treaty; and thirdly, to reflect on to what extent the final text of the Agreement will be ambitious and effective enough to fulfil its objectives.

Keywords: Marine biological diversity, marine genetic resources, areas beyond national jurisdiction, law of the sea, public interests, BBNJ agreement

1. Introduction

The work presented below is an update of the article "Negotiating an International Legal Instrument on Biodiversity Beyond National Jurisdiction: A Look Ahead", published in the *EPL* 52 (1) 2022. That first work defended that the BBNJ Agreement that was being negotiated then had the potential to make a very positive impact on the governance of the oceans in general. Therefore, one the one hand, it proposed some formulas to facilitate the adoption of the agreement in a scenario where States had very different expectations; and, on the other hand, it claimed that they have the responsibility not to abandon the ambition and the transformative power of the future legal regime.

In March 2023, after a breathtaking last negotiation session, the delegations finally reached an agreement on the BBNJ treaty. This outstanding achievement deserves a review of the aforementioned article. First, to reflect on the results of the negotiation. Second, to try to ascertain the scope and the strength of the treaty.

Therefore, this revisited work maintains the structure of its predecessor, as well as the content that continue to be valid. But at the same time, it updates the work by exposing what regulatory options have finally been incorporated in the treaty (Section 4); identifying which negotiation formulas have certainly helped to adopt

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the treaty (Section 5); and reflecting on to what extent the final text of the BBNJ Agreement is ambitious and effective enough (Section 6).

2. Biodiversity Beyond National Jurisdiction

Marine areas beyond national jurisdiction (ABNJs) make up 40% of the surface of the planet, 62% of the surface of the oceans and nearly 95% of their volume.[1] The high seas and the international seabed area (the Area) provide important resources (such as seafood, raw materials, genetic and medicinal resources) and services (climate regulation, carbon sequestration, air purification and habitat services, as well as cultural and supporting services).[2] Indeed, the high-seas ecosystems are responsible for almost half of the total biological productivity of the global ocean.[3] Today, scientific, and technological knowledge have opened up the possibility of accessing and exploiting some of the resources of these remote areas. Therefore, there is an increasing interest in marine genetic resources (MGRs) from these ABNJs, and in recent years bioprospecting activities have intensified- by 2025, the global market for marine biotechnology is projected to reach $6.4 billion, spanning a broad range of commercial purposes for the pharmaceutical, biofuel, and chemical industries.[4] As a result of these new activities such as seabed mining and bioprospecting together with traditional ones such as shipping and fishing, overexploitation of the oceans and intensive use of their components as well as the harmful effects of human activity (pollution, destruction of habitats) have increased. The effect has been the aggravation and acceleration of marine biological diversity loss in these ABNJs.

The current legal and institutional frameworks for addressing this global threat are fragmented, incomplete, and inadequate. They are *fragmented* for the following reasons: because there are two different governing principles applicable to those areas, the freedom of the seas regarding the high seas and the Common Heritage of Humankind (CHH) in relation to the Area and its mineral resources; because norms and rules protecting the biodiversity of ABNJs are contained in a non-systematic corpus of global and regional instruments – among them, the *United Nations Convention on the Law of the Sea* (UNCLOS), which in its Part XII regulates the protection and preservation of the marine environment, and its 1995 Fish Stocks Agreement; because the UN *Convention on Biological Diversity* (CBD), which, although in general not applicable to ABNJs, establishes in its article 3 that States Parties are responsible for ensuring that activities conducted within their jurisdiction do not cause damage to the environment of other States or of ABNJs; and also multiple sectoral and regional instruments such as the UNEP *Regional Seas Programme*[5], some provisions contained in the *Antarctic Treaty System* (ATS), which represents an example of a regional regime for biodiversity beyond national jurisdiction (BBNJ)[6], the 1995 *Code of Conduct for Responsible Fisheries* or the 1998 *International Guidelines for the Management of Deep-sea Fisheries in the High Seas* adopted by the Food and Agriculture Organisation of the United Nations (FAO); and because, from an institutional perspective, multiple global and sectoral organisations exercise their mandates and competences over those same ABNJs – specifically, the International Maritime Organisation (IMO) in relation to shipping, the International Seabed Authority (ISA) regarding mining activities in the Area, or the FAO and multiple Regional Fisheries Management Organisations (RFMOs) in relation to fishing – leading, in some cases, to overlapping mandates, unnecessary duplication of effort, and inefficiency.

1 Food and Agriculture Organisation of the United Nations, *Common Oceans-ABNJ. Global sustainable fisheries management and biodiversity conservation in areas beyond national jurisdiction* (2017),*www.fao.org/3/i7539e/i7539e.pdf.*

2 Wright, G., Rochette, J., Gjerde, K., Seeger, I. (2018). The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. *IDDRI, Studies 08*, 1-82, 14, *https://www.iddri.org/en/publications-and-events/study/long-and-winding-road-negotiating-high-seas-treaty.*

3 *Ibid.*

4 Blasiak, R. et al. (2018). Corporate control and global governance of marine genetic resources. *Science Advances*, 1-7, 1, DOI*:10.1126/sciadv.aar5237.*

5 In particular, the 1976 *Convention for the Protection of the Mediterranean Sea Against Pollution* (Barcelona Convention) and the 1992 *Convention for the Protection of the Marine Environment of the North-East Atlantic* (OSPAR Convention).

6 Nickels, P. P. (2020). Revisiting Bioprospecting in the Southern Ocean in the Context of the BBNJ Negotiations. *Ocean Development and International Law 51* (3), 193-216, 194, DOI:*https://doi.org/10.1080/00908320.2020.1736773.*

The existing frameworks are *incomplete* because, despite the existence of these numerous instruments, not all the issues or all the areas are covered. In part, this is because they were adopted in a different historical context when biological resources in these areas were mostly inaccessible and of no great interest. In summary, these frameworks are *inadequate* because they have to preserve BBNJ effectively. On the other hand, the uncertainty derived from these frameworks has generated a phenomenon of concentration of rights and unequal distribution that confirms the maxim 'first come first served'. Illustrating this, in 2018 a scientific study showed how there are patents associated with 12,998 sequences extracted form 862 marine species, 84% of which belonged to private corporations (and 47% to a single firm, BASF), 12% to universities and their commercialisation partners and only 4% to public institutions; and that from a geographical perspective, 10 countries have registered 98% of all patents and 165 countries do not yet have a single registered patent associated with a marine species.[7]

In 1995, the Conference of the Parties in the CBD, concerned about the inadequacy of these legal and institutional frameworks, called for a more thorough exploration of these issues.[8] Since then, a global public interest has emerged in establishing a fair and equitable international legal regime that guarantees the conservation and sustainable use of BBNJ. In its creation, the United Nations General Assembly (UNGA) has played a central role. In 2004, it set up an *Ad Hoc Open-ended Informal Working Group* (BBNJ Working Group)[9] which studied various possibilities for addressing this challenge for almost a decade, from 2006 to 2015. Having considered its recommendations[10], on 24 December 2017, the UNGA decided to take a step forward to strengthen the governance framework[11] and convened an intergovernmental conference (IGC) to up the text of an international legally binding instrument on the conservation and sustainable use of BBNJ (the BBNJ Agreement, or the Agreement)[12] which was expected to address four core elements included in the 'Package Deal' set out in 2011[13]: marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; and capacity-building and the transfer of marine technology.

To reach that Agreement, multiple negotiation rounds of the IGC have been held between September 2018 and March 2023. Although initially only four IGC sessions were planned, finally five were held, plus a 'resumed fifth session' (IGC5bis) and several informal sessions. Throughout these years, the results of the negotiations have been successively incorporated into different provisional texts that reflected, in many brackets and proposals, several regulatory options – the main negotiation drafts were the *Draft text* (May 2019)[14], the *Revised draft text* (November 2019)[15], the *Further revised draft text* (June 2022)[16], and the *Further refreshed draft treaty v2* (December 2022).[17] At the beginning of March 2023, in the overtime of the IGC5bis and after thirty-six hours of uninterrupted negotiations, its President, Ms. Rena Lee, announced that the Agreement has been reached with

7 Blasiak, R. et al. (2018), note 4.

8 *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, Decision 11/10: Conservation and Sustainable Use of Marine and Coastal Biological Diversity*, 30 November 1995, para. 12.

9 UNGA Resolution of 17 November 2004 (A/RES/59/24), para. 73.

10 See: UNGA Resolutions of 24 December 2011 (A/RES/66/231), preamble, para. 2; 27 July 2012 (A/RES/66/288), para. 162; 11 December 2012 (A/RES/67/78), para. 181; 9 December 2013 (A/RES/68/70), para. 198; and 19 June 2015 (A/RES/69/292).

11 Harden-Davies, H. *et al*. (2020). Rights of Nature: perspectives for Global Ocean Stewardship. *Marine Policy 122*, 1-11, 1, DOI: *https://doi.org/10.1016/j.marpol.2020.104059.*

12 UNGA Resolution of 24 December 2017 (A/RES/72/249), para. 1.

13 *Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly,* (A/66/119), 30 June 2011.

14 *Draft text of an Agreement 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,* (A/CONF.232/2019/6), May 2019.

15 *Revised draft text of an Agreement 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*, (A/CONF.232/2020/3), 18 November 2019.

16 *Further revised draft text of an Agreement 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*, (A/CONF.232/2022/5), 1 June 2022.

17 *Further refreshed draft text of an Agreement 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*, (A/CONF.232/2023/2), 12 December 2022.

an iconic 'the ship has reached the shore'.[18] On June 2023, the IGC adopted by consensus the definitive text of the treaty, composed of 76 articles and two annexes.[19]

3. BBNJ for the Protection of General Interests: A Brief Overview

The BBNJ Agreement is formally conceived as the third implementing agreement under the UNCLOS, after the 1994 *Agreement on Part XI* and the 1995 *Fish Stock Agreement*. From a substantive perspective, this Agreement can be considered a treaty for the protection of general interests[20] or, in other words, a treaty 'whose purpose is to regulate and protect general interests of the international community by creating public interest norms that generate collective obligations with a universal vocation'.[21] This category of treaties has three main features: their objective is to protect the general interests of the whole international community; they create public interest norms that generate collective obligations (particularly obligations*erga omnes partes*); and they have universal appeal, as a result of both the aspiration for universal participation in the treaty and for the public interest norms to be applicable to everybody. The BBNJ Agreement meets these three criteria. Firstly, the conservation and sustainable use of BBNJ can now be considered as a general interest of the international community (a global public interest) and a global priority, as reflected in SDG 14 of the 2030 *Agenda for Sustainable Development*.[22] Secondly, the treaty incorporates several public interest norms establishing collective obligations that protect common values to all the States Parties to the treaty, not being subjected to any reciprocity. Thus, some collective obligations included in the treaty could be the obligation to act guided by certain general principles and approaches, such as the precautionary principle (art. 7 of the BBNJ Agreement); to cooperate to conserve and sustainably use the marine biodiversity of ABNJs (art. 8); to conduct environmental impact assessments (art. 28); and to cooperate in capacity-building and transfer of marine technology (art. 41). Thirdly, the Agreement has a strong universal appeal, which is the result of not only being open to all States and regional economic organisations (art. 66) but also containing strategies that seek to broaden the personal scope of its obligations. These strategies are the inclusion of provisions regulating the relations of the Parties to the Agreement with respect to third parties (art. 62) and the incorporation of provisions that indirectly affect the relation between its States Parties and third parties, through the relevant legal instruments, frameworks, and bodies in which both participate (arts. 5, 8 17 and 29, among others). It also has to be noted that some provisional dispositions that tried to protect the core of the regulation against other incompatible obligations assumed by the States Parties (art. 67.2 of the *Revised draft text*) and link different types of actors (art. 44. 4 of the *Revised draft text*) have not been finally incorporated.

Since the BBNJ Agreement meets the characteristics of a treaty of this kind and incorporates some of their strategies, its eventual entry into force can generate certain benefits for the governance of the BBNJ and of the oceans in general. First, the Agreement can give *legitimacy* to the global norms to be adopted. It does so because the Agreement has been negotiated in a law-making process that has been wide open and inclusive.[23] Moreover, it provides legitimacy as the proceedings relate to an agreed package deal, in a way that, a priori, takes into consideration the concerns and preferences of all parties involved ensuring that there is no agreement if a decision is not reached on all of them.

The BBNJ Agreement may also enhance the *coherence* of the governance of ABNJs, as the effect of some of the already mentioned universalisation strategies incorporated in the Agreement, which should not be able

18 United Nations, '*The Ship Has Reached the Shore*', *President Announces, As Intergovernmental Conference Concludes Historic New Maritime Biodiversity Treaty* (3 March 2023), *https://press.un.org/en/2023/sea2175.doc.htm.*

19 *Agreement 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* (A/CONF.232/2023/4), 19 June 2023.

20 Abegón Novella, M. (2020). Hacia una regulación sobre la conservación y el uso sostenible de la diversidad biológica marina de las zonas situadas fuera de la jurisdicción nacional: el futuro acuerdo como un tratado de protección de intereses generales.*Revista Catalana de Dret Ambiental 11* (2), 1-50. DOI: *https://doi.org/10.17345/rcda2919*.

21 Rodrigo, Á. J, and Abegón, M. (2017). El concepto y efectos de los tratados de protección de intereses generales de la Comunidad internacional. (2017). *Revista Española de Derecho Internacional 69* (1) 167-193, 170. DOI: *http://dx.doi.org/10.17103/redi.69.1.2017.1.06*.

22 UNGA Resolution of 25 September 2015 (A/RES/70/1) 'Transforming our world: the 2030 Agenda for Sustainable Development'.

23 According to the mandate of the UNGA contained in its Resolution of 24 December 2017 (A/RES/72/249), para. 8 and 9.

only to expand the effects of the treaty, but also to contribute to mitigating or resolving future conflicts between regimes.[24] This would be especially interesting since the future Agreement will eventually coexist with other existing global and regional regimes, like the regime of the Area or the ATS.[25] In addition, the coherence of the regime may also be boosted by the capacity of some of the norms included in the Agreement eventually to generate international customary law (the obligation to cooperate to conserve and sustainably use the BBNJ, for instance, could have the capacity to generate universal norms that harmonise the conduct of the States in those areas, however, it will depend very particularly on subsequent practice by third States not participating in the Agreement).

Finally, a third benefit of the Agreement may be its *dynamism* and capacity to adapt to change. The Agreement can contribute in this respect, as this kind of treaty tends to have the power to create or operate within general international regimes characterised by containing – alongside primary rules regulating the Parties' conduct – secondary rules on their identification, creation and application, as well as, in some cases, on liability for non-compliance or damages. In this respect, the BBNJ Agreement not only incorporates primary rules such as the obligation to cooperate or to share benefits, but it also contains secondary rules attributing powers to develop the provisions of the Agreement to the bodies created by it that will allow the regulation to evolve.[26]

4. Final BBNJ Agreement: Individual State Interests and Divergences in the BBNJ Negotiations

Preserving and regulating the sustainable use of marine biodiversity in ABNJs constitutes a global public interest with a community dimension. It means that all States, as well as other international actors, have the same interest in protecting and guaranteeing the sustainable use of the marine biological diversity of these common areas. At the same time, however, during negotiations States have had different expectations about the resulting legal regime, how they would be allowed to behave in those areas, and what resources and profits they would be able to gain therefrom and at what cost. Therefore, they have negotiated the Agreement with a dual role: as 'interpreters of the demands of the international community'[27] and as individual States with particular interests. These are the result of the different contexts, capacities and resources of each State, and differ depending on whether the States are developing, industrialised, coastal or landlocked, whether or not they have a fishing industry, and whether or not they possess the economic resources and technical capacities to access and exploit the marine genetic resources of these ABNJs. The different positions of States have been evidenced through the groups and coalitions participating in the process which, according to their positions and statements during the negotiations, have even been generally classified as favouring, facilitating or opposing the Agreement.[28]

This diversity has been evident during all the negotiation sessions, but especially in the final round, the IGC5bis[29], where pressure made the role of the five designed Facilitators of each issue area even more relevant.[30]

24 In this respect, it is particularly relevant the provisional conflict clause contained in art. 5, para. 2 of the *BBNJ Agreement*, as well as the interpretative clause of art. 5, para. 1.

25 About the risks of overlapping between the BBNJ Agreement and the current ATS, see: Oude Elferink, A. G. (2019). Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction. *Review of European, Comparative and International Environmental Law 28* (3), 236–243, DOI: *https://doi.org/10.1111/reel.12301*. On the possibilities of normative and institutional integration of both regimes, see: Nickels, Ph. P. (2020), note 6, 202-207.

26 *BBNJ Agreement*, arts. 47, 49 and 50.

27 Rodríguez Carrión, A. J. (1987). Un supuesto de superación del contractualismo en Derecho Internacional: los tratados colectivos. In VV.AA. *Política y Sociedad. Estudios en Homenaje a Francisco Murillo Ferrol*. Madrid: CIS/CEC, 325-346, 330.

28 Wright, G., Rochette, J., Gjerde, K., Seeger, I. (2018), note 2, 47-54. See also: Humphries, F. and Harden-Davies, H. (2020) Practical policy solutions for the final stage of BBNJ treaty negotiations. *Marine Policy 122*, 1-7. DOI: *https://doi.org/10.1016/j.marpol.2020.104214.*

29 See a chronicle of those exciting two weeks in: Mendenhall, E., Tiller, R. and Nyman, E. (2023), The ship has reached the shore: The final session of the 'Biodiversity Beyond National Jurisdiction'negotiations. *Marine Policy* 155, 1-10. DOI: https://doi.org/10.1016/j.marpol.2023.105686.

30 Those Facilitators were: Kurt Davis, form Jamaica, for General provisions; Janine Coye-Felson, from Belize, for MGRs; Réné Lefeber, from Netherlands, for EIAs; Thembile Joyini, from South Africa, for institutional arrangements; and Victoria Hallum, form New Zeland, for implementation and compliance, and dispute settlement.

Against all odds, the treaty was finally reached. Thus, below, the main controversial points in each of the issue areas of the treaty are identified, as well as what regulatory options have finally been incorporated into the treaty.

4.1. Marine Genetic Resources, Including Questions on the Sharing of Benefits

The regulation of MGRs and the question of benefit sharing have always been the core issues of the BBNJ Agreement and the chapter of the negotiation where the most 'red lines' were concentrated.[31] First, regarding MGRs' legal status, the States' positions have been strongly polarised, ranging from those that advocated considering MGRs as the CHH – in a similar way to mineral resources in the Area (mainly, developing States that intend to reverse the *status quo*)[32] – to those that claimed that MGRs were subjected to the principle of the freedom of the high seas (mainly, certain industrialised States favoured by the uncertainty of the *status quo*).[33] Second, concerning access to MGRs, there were fundamental discrepancies when determining the types of access that the Agreement should regulate (developed States defended a regulation only of access *in situ*, while developing States supported a broad Agreement including access *ex situ* and *in silico*) and the ways to which the access was provided (free access, prior notification or licensing system).[34] Third, the sharing of benefits was also controversial, especially in regard to the type of benefits that should be distributed (i.e., only non-monetary benefits related to the dissemination of knowledge and results, as defended by the developed States and recognised, for example, in the ATS[35], or monetary benefits as well, as was established in the UNCLOS regarding the Area[36], which was the main claim of the developing States) and how.[37] Finally, there were wide discrepancies about the possibility of addressing intellectual property rights. Since both industrialised States and private corporations already had patents that represented for them a lucrative source of benefits, the exclusion of intellectual property rights from the scope of the future Agreement constituted a red line in the negotiation.[38]

In the final Agreement, this section is made up of eight articles, from art. 9 to 16. Regarding MGRs' legal status, the big surprise is that the principle of CHH has been recognized, both explicitly as a general principle (art. 7b of the BBNJ Agreement), and in the MGRs section – without naming it in that section –. Thus, art. 11.4 establishes that 'no State shall claim or exercise sovereignty rights over marine genetic resources of areas beyond national

31 See: Leary, D. (2019). Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction. *Marine Policy 99*, 21-29. DOI: *https://doi.org/10.1016/j.marpol.2018.10.031.*

32 For instance, Algeria, on behalf of the African Group, has even claimed that 'adopting a new instrument without this principle [the common heritage of humankind] would be like giving life to a treaty of this importance without a soul', United Nations, *Delegates Begin Text-Based Deliberations for First-Ever Treaty on Managing Marine Biodiversity beyond National Jurisdiction Areas, at Start of Conference Session* (19 August 2019), *www.un.org/press/en/2019/sea2108.doc.htm*.

33 On this point, the European Union's delegate affirmed that 'While he agreed with the Group of 77 that access to marine genetic resources should be open, [. . .] [that] did not mean such access should be unregulated. Elaborate provisions on how access would be addressed in the instrument are not needed, as general rules will apply in default', United Nations, *Principles, Objectives of Benefit-Sharing among Issues Discussed in Conference to Draft Marine Biological Diversity Treaty* (12 September 2018), *www.un.org/press/en/2018/sea2083.doc.htm.*

34 *Revised draft text,* art. 10. For example, the European Union and its Member States, as well as the United States, proposed a restricted access, *Textual proposals submitted by delegations by 20 February 2020* (A/CONF.232/2020/3), 75 and 79; Indonesia, on the contrary, advocated for a more ambitious regulation, 76.

35 Antarctic Treaty, art. III (1) (c).

36 UNCLOS, art. 140.2.

37 *Revised draft text,* art. 11. See: Statement by the President of the Conference at the Closing of the First Session, A/CONF.232/2018/7 (20 September 2018), 23; and Kantai, T. et al. (2019). Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019. *Earth Negotiations Bulletin 25* (218), 1–24, 8, *http://enb.iisd.org/oceans/bbnj/igc3/.* According to the European Union and its Member States, only non-monetary benefits should be distributed, *Textual proposals submitted by delegations by 20 February 2020, in response to the invitation by the President of the Conference in her Note of 18 November 2019* (A/CONF.232/2020/3):*Article-by-article compilation*, 89; and for the Republic of Korea, the sharing should on a voluntary basis, 94

38 *Revised draft text,* art. 12. See, for example, Israel observations, *Textual proposals submitted by delegations by 20 February 2020*, 102.

jurisdiction'; art. 11.6 confirms that 'activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction are in the interests of all States and for the benefit of all humanity, particularly for the benefit of advancing the scientific knowledge of humanity and promoting the conservation and sustainable use of marine biological diversity, taking into particular consideration the interests and needs of developing States'; and art. 11.7 determines that such activities 'shall be carried out exclusively for peaceful purposes'. It is also important to note that, in order to build consensus, the text also recognizes the freedom of the high seas (art. 7c).

Concerning access to MGRs, the BBNJ Agreement only refers to collection *in situ* (arts. 1.4, 11 and 12), but activities with respect to digital sequence information are also subjected to the regulation (arts. 9, 11, 12, 14, 15, 16). In this sense, the Preamble of the Agreement acknowledges that 'the generation of, access to and utilization of' digital sequence information to MGRs of ABNJ contribute to research and innovation and to the general objective of the Agreement. According to it, however, both types of activities will have to be notified to the Clearing-House Mechanism created by the treaty (art. 12) and hence are not subjected to previous authorisation.

Regarding benefit-sharing, one of the most challenging issues, developing States maintained 'strong, and consistently unified positions'[39] and the treaty establishes that both non-monetary and monetary benefits shall be shared (art. 14.2 and 5). To implement this, the Agreement creates an Access and Benefit-Sharing Committee with competences for establishing guidelines, providing transparency and, at the end, ensuring a fair and equitable sharing of both types of benefits (art. 15).

The fourth controversial aspect, the question of intellectual property rights, appears to have been some sort of compensation for the cessions made in this chapter –and others–. Thus, after all the discussions around provisional art. 12, the final text of the Agreement does not include any reference to intellectual property rights. The 'not undermining' mandate of the UNGA has clearly benefited the *status quo*.

4.2. Measures such as Area-based Management Tools, Including Marine Protected Areas

Divergences had also emerged concerning measures such as area-based management tools (ABMT), an expression that includes a variety of approaches for conserving biodiversity which are regulated by other relevant legal instruments, frameworks, and global, regional and sector bodies. Effectively, in several marine areas beyond national jurisdiction a plurality of marine protected areas (MPAs) are recognised today under the auspices of different regional and sectoral organisations – in particular, 'areas of special environmental interest' designated by the ISA, 'particularly sensitive marine areas' and 'special zones' created by the IMO, 'specific zones' articulated by RFMOs, or sanctuaries delimited by the International Whaling Commission. Precisely because numerous States that were negotiating the future BBNJ Agreement also participated in these instruments and structures, beyond the consensus in understanding these mechanisms as a useful and essential tool to support ecosystem approaches at national, regional and global levels[40], there was substantial disagreement about how to articulate new MPAs without undermining the existing tools – particularly as the Agreement was likely to create extra obligations in addition to those already imposed by the other instruments[41]. Thus, discrepancies were becoming evident when deciding on the design and management model of these tools[42]: just as there were proposals for the new marine protected areas in ABNJs to be managed

39 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 5.

40 *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs' summary of discussions*, 13 June 2012, (A/67/95), 6, para. 20. See also: Ardron, J. A., Rayfuse, R., Gjerde, K. M., Warner, R. (2014). The sustainable use and conservation of biodiversity in ABNJ: what can be achieved using existing international agreements?. *Marine Policy 49*, 98-108, 103, DOI: *10.1016/j.marpol.2014.02.011*.

41 About the implications and possibilities of the mandate of the UNGA to 'not undermine' relevant existing legal instruments and frameworks and relevant global, regional, and sectoral bodies, see: Scanlon, Z. (2017). The Art of 'Not Undermining': Possibilities Within Existing Architecture to Improve Environmental Protections in Areas Beyond National Jurisdiction. *ICES Journal of Marine Science 75* (1), 405–416, *https://doi.org/10.1093/icesjms/fsx209*; and Friedman, A. (2019). Beyond 'not undermining': possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction. *ICES Journal of Marine Science 76* (2), 452-456. DOI*: https://doi.org/10.1093/icesjms/fsy192*. Some considerations about the ambiguity of the term also in: Mendenhall, E., De Santo, E., Nyman. E, and Tiller, R.. (2019). A soft treaty, hard to reach: The second inter-governmental conference for biodiversity beyond national jurisdiction. *Marine Policy 108*, 1-8, 2. DOI:*10.1016/j.marpol.2019.103664*

42 *Revised draft text,* esp. art. 15.

at the regional level, there were also calls for the creation of a centralised management system under the responsibility of a global body.[43] After the fourth IGC session, other additional questions emerged in the debate. Among the most relevant were the possibility to establish an 'opting-out' mechanism for States opposing the creation of a particular ABMT; and the opportunity to recognise some sort of procedure for adopting emergency measures.

Part III of the final BBNJ Agreement goes from art. 17 to art. 26. Arts 19 to 24 regulate the procedure to designate ABMT (including MPAs) in ABNJ, a long-awaited possibility. This procedure, centralised and guided by consensus if possible (art. 23), is made up of several steps: the proposals, that could be submitted by Parties, individually or collectively (art. 19 and Annex I); the publication of the proposal by the Secretariat and its preliminary review by the Scientific and Technical Body (art. 20); the consultation process, opened to all relevant stakeholders (art. 21); and the establishment of the ABMT, which could be decided by the COP 'taking into account the contributions and scientific input received during the consultation process', 'and the scientific advice and recommendations of the Scientific and Technical Body' (art. 22).

The procedure has finally incorporated an 'opting-out' mechanism for States making and objection with respect the creation of a particular ABMT (art. 23.4), a possibility requiring the explanation of the grounds of such opposition (art. 23.5), as well as the adoption of alternative measures and approaches equivalent in effect (art. 23.6). It has recognised, too, the competence for the BBNJ Conference of the Parties (BBNJ COP) to adopt emergency measures 'when a natural phenomenon or human-caused disaster has caused, or is likely to cause, serious or irreversible harm to marine biological diversity of areas beyond national jurisdiction, to ensure that the serious or irreversible harm is not exacerbated' (art. 24).

Among the objectives of this Part there is that of '(s)trengthen cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies' (art. 17b). Thus, the question of the relationship between the BBNJ regulation and other legal instruments, frameworks and bodies, in regard to the designation of an ABMT, has been resolved, not by establishing the possibility for the BBNJ COP to recognise the ABMT created by those other instruments, frameworks and bodies, but by a more moderated option, a disposition under which the BBNJ COP shall decide for regular consultations to enhance such cooperation and coordination (art. 22.3).

4.3. Environmental Impact Assessments

The obligation to conduct environmental impact assessments (EIAs) is already contained in art. 204 of the UNCLOS which stipulates that 'States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organisations, to observe, measure, evaluate and analyse, by recognised scientific methods, the risks or effects of pollution of the marine environment'. However, the Convention does not establish either the procedure or the standards for conducting these evaluations and, in practice, the existing structures and mechanisms are fragmented and underdeveloped compared to those applicable to marine areas within national jurisdiction.[44] Once again, there was a consensus in recognising that EIAs should be conducted in these areas but, beyond that, disagreements were evident on several points. The first disagreement was in relation to the activities to be evaluated, i.e., whether only those originating in ABNJs should be evaluated (the 'outside-in' approach) or also activities that took place in marine areas within national jurisdiction that may have an impact on ABNJs (the 'inside-out' approach) – which was unacceptable to coastal States.[45] Secondly, there were also discrepancies about whether the EIAs should be conducted based on the type of activity or on the expected impact, and whether the Agreement should include a list of activities to be evaluated

43 See: *Chair´s overview of the third session of the Preparatory Committee. Preparatory Committee established by General Assembly resolution 69/292: Development 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*, 12, *https://www.un.org/depts/los/biodiversity/prepcom_files/Chair_Overview.pdf*

44 Warner, R. (2018). Oceans in transition: incorporating climate-change impacts into environmental impact assessment for marine areas beyond national jurisdiction. *Ecology Law Quarterly 45*, 31-51, 39, DOI:*https://doi.org/10.15779/Z38M61BQ0J*.

45 *Revised draft text,* art. 22. See the European Union allegations as an example of the first position, *Textual proposals submitted by delegations by 20 February 2020*, 219; and Senegal's observations as representatives of the second one, 221.

or a list of exempted activities.[46] Thirdly, differences had also emerged regarding the procedure for conducting EIAs and the competences that the bodies created under the Agreement would have for controlling them.[47]

The final BBNJ Agreement regulates EIAs in its Part IV (arts. 27 to 39). Under this Part, Parties will have two basic obligations, reflecting both the 'outside-in' and the 'inside-out' approach, respectively. On the one hand, that of ensuring that the potential impacts on the marine environment of planned activities under their jurisdiction or control that take place in ABNJs are assessed according the BBNJ regulation before they are authorised (art. 28.1). Secondly, when a planned activity under their jurisdiction or control that is to be conducted in areas within national jurisdiction may cause 'substantial pollution of or significant and harmful changes to the marine environment' of ABNJ, Parties shall ensure that an EIAs is conducted, either under the BBNJ regulation or under national process (art. 28.2).

According to the text of the BBNJ Agreement, EIAs should be conducted based on the expected impact, rather than on the type of activity. Thus, art. 30 regulates thresholds and factors for conducting EIAs. It could be deduced from this article that EIAs are not compulsory when Parties determine that the planned activity may only have 'minor or transitory effects'. In all other cases, Parties shall conduct EIAs according to a process that includes several steps: an screening to determine if the activity may cause 'substantial pollution of or significant and harmful changes to the marine environment' and whether, therefore, an EIA is required (art. 31.1a); and impact assessment and evaluation using the 'best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities' (art. 31.1c) and including, at least, the information established in art. 33.2; the identification and analyse of measures to prevent, mitigate and manage the potential adverse effects of planned activities (art. 31.1d); and some obligations of public notification and consultations (art. 31.1e and f, and art. 32). The final decision to authorise a planned activity corresponds to the Party under whose jurisdiction or control the activity falls (art. 34.1) but this authorisation shall only be made when, 'taking into account mitigation or management measures, the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment' (art. 34.2).

It is important to note that it is in this Part that there is the only mention to 'human health' in the entire BBNJ Agreement. Thus, there is the obligation for Parties to ensure that not only environmental impacts of potential harmful activities are identified, but associated impacts, too, such as economic, social, cultural, and human health impacts (art. 31.b). These same impacts will have to be monitored once the activity is eventually authorised.

4.4. Capacity-Building and the Transfer of Marine Technology

Regarding capacity-building and the transfer of marine technology, there was a widespread recognition that not all States had the same scientific, technical, and technological capacities for using and exploiting the biodiversity of the ABNJs[48], and about the suitability of including, as a general objective to be pursued by the Agreement, the need to strengthen capacity-building and technology transfer.[49] However, profound discrepancies were becoming evident, firstly, when it came to deciding on the voluntary or compulsory nature of the mechanisms to be created to implement that capacity-building and technology transfer[50], and, secondly, on how to identify the necessities and priorities in this field. Here, some text proposals explicitly stipulated the transfer of technology and capacity 'to developing States', while some delegations asked for the inclusion of pertinent criteria to identify which States in particular should be the recipients.[51]

In the final BBNJ Agreement, capacity-building and the transfer of marine technology is regulated in its Part V (arts. 40 to 46). The general objective of this Part is to assist Parties in implementing the provisions of the

46 *Revised draft text,* art. 29.

47 See, especially, *Revised draft text*, art. 38.

48 See, for example: United Nations, *Adopting Two Texts on Oceans, Seas, General Assembly Also Tackles Sustainable Management, Conservation of Marine Life beyond National Jurisdiction* (5 December 2017), *https://www.un.org/press/en/2017/ga11985.doc.htm.*

49 See: Vierros, M.K., and Harden-Davies, H. (2020). Capacity Building and Technology transfer for improving governance of marine areas both beyond and within national jurisdiction. *Marine Policy 122*, DOI*: https://doi.org/10.1016/j.marpol.2020.104158* .

50 *Revised draft text,* art. 44.

51 In this sense, see the observations made by European Union and its Member States, *Textual proposals submitted by delegations by 20 February 2020,* 306.

Agreement and to achieve its objectives (art. 40a). Therefore, Parties shall cooperate, directly or through relevant legal instruments, frameworks, and bodies, to assist Parties, in particular developing States Parties, in achieving the objectives of the BBNJ Agreement through capacity-building and the development and transfer of marine science and marine technology (art. 41.1).

Several considerations are required here. First, according to this Part, Parties assume real obligations regarding capacity-building and transfer of technology. However, the intensity of these obligations differs depending on whether it is related to capacity-building – Parties, within their capabilities, *shall ensure capacity-building*– or to transfer of marine technology – Parties *shall cooperate to achieve the transfer of marine technology*–.

Second, developing States Parties have also succeed in explicitly incorporating their special necessities in the treaty. Art. 42.1 is particularly explicit when recognises the need for capacity-building of developing States Parties, and of transfer of marine technology 'of developing States Parties that need and request it, taking into account the special circumstances of small island developing States and of least developed countries'. Likewise, they have assured a representation in the Capacity-Building and Transfer of Marine Technology Committee established by the treaty (art. 46), which will be competent to submit reports and recommendations to the BBNJ COP.

Third, this Part makes no distinction between types of technology– technology already available or technology under research or development – nor includes any mention to biotechnology –it is only mentioned in art. 1–.[52]

And fourth, although the developing States proposal to include financial capacity building in this Part was discarded, art. 44 lists types of capacity-building and of transfer of marine technology, including support for the creation or enhancement of the human, financial management – a more ambiguous expression–, scientific, technological, organizational, institutional and other resource capabilities of Parties.

4.5. Some Cross-cutting Issues

Finally, many important differences had existed with respect to certain cross-cutting issues. The first was the scope of the treaty. While there was no agreement on the 'outside-in' or 'inside-out' approach that the regulation should adopt, at a more elementary level it had not yet been decided whether the future Agreement would cover fish.[53] On this point, fishing States were belligerent and their inclusion in a broad sense constituted a red line in the negotiations.[54] They argued that their exclusion would be consistent with the mandate of the UNGA not to undermine existing legal instruments or frameworks.[55] Secondly, with respect to the institutional model of the Agreement: some proposals had advocated the establishment of a centralised governance model that would attribute implementation and control competences to a global body, either newly created or already existing, but with an expanded mandate; other proposals had defended a decentralised governance model that granted competences to regional or sectoral bodies, or even a 'hybrid' one which would have extend these competences also to domestic institutions.[56] During the negotiations, it seemed highly probable that the institutional model of the future Agreement would be made up of a COP, a Scientific and Technical Body, and a Secretariat.[57] However, the competences each one of them were difficult to define, as was the relationship they would maintain with other international organisations or already operational bodies that exercise competences over the same marine areas. Thirdly, the decision regarding the dispute settlement system[58] was also controversial, as was the financing

52 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 7.

53 *Revised draft text*, art. 8.

54 Iceland, for example, proposed the inclusion a new art. 6bis in order to 'clarify that the BBNJ Agreement is not intended to deal with regular fisheries management or undermine the existing international legal framework for fisheries', *Textual proposals submitted by delegations by 20 February 2020*, 57. In the same sense, the European Union and its member States, 64. In the opposite view, for instance, Indonesia, *Ibid.*

55 UNGA Resolution of 24 December 2017 (A/RES/72/249), para. 6, 7 and 10.

56 *Chair´s overview of the third session of the Preparatory Committee*, note 39.

57 *Revised draft text*, arts. 48 to 50.

58 See: Shi, Y. (2020). Settlement of Disputes in a BBNJ agreement: Options and analysis. *Marine Policy* 122, DOI: *https://doi.org/10.1016/j.marpol.2020.104156;* and Jiménez Pineda, E. (2021). The Dispute Settlement System of the Future Third UNCLOS Implementation Agreement on Biodiversity beyond National Jurisdiction (BBNJ): a Preliminary Analysis. *Paix et SécuritéInternationales 9*, 1-18, *https://revistas.uca.es/index.php/paetsei/article/view/8147.*

mechanism of the regime – here, the interest of developing States in providing broad funding was opposed to the much more limited proposals put forward by industrialised States.[59]

Regarding the scope of the treaty, as demanded by fishing States, fishing activities in ABNJ have been excluded from the BBNJ Agreement, in favour of the existing international fisheries regime. It is clearly stated in art. 10, 'except where such fish or other living marine resources are regulated as utilization' under Part II. In other words, the treaty exclude fish caught as commodities. Although predictable, this important exclusion conflicts with the treaty's overall objective of protecting marine biodiversity of ABNJ. As has been stated, unsustainable fishing practices are one of the main threats to marine biodiversity and to exclude them from the BBNJ regulation would be a mistake[60].

Part IX of the BBNJ Agreement regulates the settlement of disputes, which has been essentially solved by establishing the general obligation to settle the disputes concerning the interpretation or application of the treaty by peaceful means (art. 57); making a referral to Part XV of UNCLOS (art. 60.1); and adding some provisions to determine the procedure in case of a dispute affecting a Party to the Agreement that is not Party to the UNCLOS (art. 60.2, 5, 6 and 7).

Finally, the question of financial resources of the Agreement, regulated in Part VII, connects funding with benefit-sharing by creating a mechanism (art. 52) that will include, together with a voluntary trust fund to facilitate the participation of representatives of developing States Parties, a 'special fund' composed, among others, of annual contributions and payments by Parties (art. 14. 6 and 7), as a way to share monetary benefits from the utilization of MGRs and digital sequence information on marine genetic resources of ABNJ.

5. Some Formulas and Strategies that Facilitated the BBNJ Agreement

According to its Resolution of 24 December 2017 and recognising the urgency to fight the global challenge of marine biological diversity loss in ABNJ, the UNGA decided to convene the IGC 'with the view to developing the instrument *as soon as possible*'.[61] At the same time, the IGC President, Ms. Rena Lee, highlighted the importance of 'bring[ing] on board as many people as possible, which means seeking to achieve a high rate of ratification of the new instrument'.[62] However, until the end the negotiations did not seem to be moving towards an agreement, making the finalization of the treaty announced by Ms. Rena Lee 'surprising'.[63]

The multiple discrepancies between the delegations illustrated how, on the one hand, the actors seeking to reverse the *status quo* were proposing wide-ranging regulating formulas (MGRs as CHH; regulation of all types of access to MGRs; treatment of intellectual property rights; sharing of monetary and non-monetary benefits, etc.); while, on the other hand, those who 'have incentives to exploit and exacerbate the current uncertainty'[64] had a preference for a narrow regulation and for reducing States' commitments to the minimum (MGRs subjected to the freedom of the seas; regulation only of access *in situ*, sharing only non-monetary benefits; exclusion of intellectual property rights, etc.).

In this scenario, finding avenues to overcome the divergences that were hindering the path to this necessary treaty was crucial, particularly when the IGC had to exhaust every effort in good faith to reach agreement on

59 *Revised draft text*, art. 52. Proposals goes from the transparent and voluntary funding defended, for example, by the United States, *Textual proposals submitted by delegations by 20 February 2020*, 367, to the funding model based on voluntary and mandatory contributions proposed by Indonesia, *Íbid*., 363.

60 See: Friedman, A. (2019), note 41, 454; and Barnes, R. (2016). The Proposed LOSC Implementation Agreement on Areas beyond National Jurisdiction and Its Impact on International Fisheries Law. *International Journal of Marine and Coastal Law* 31 (4), 583-619.

61 UNGA Resolution of 24 December 2017 (A/RES/72/249), para. 7. Emphasis added.

62 Lee, R. (2021). The Journey to realisation. In Nordquist, M. H., and Long, R. (eds). *Marine Biodiversity of Areas beyond National Jurisdiction. Leiden:* Brill/Nijhoff, 3-6, 5. See also O'Brien, E., and Gowan, R. (2012) *What Makes International Agreements Work: Defining Factors for Success*. New York: Center of International Cooperation, New York University, 1-38, *https://odi.org/en/publications/what-makes-international-agreements-work-defining-factors-for-success/.*

63 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 1.

64 De Santo, E. M. et al. (2019). Protecting biodiversity in areas beyond national jurisdiction: An earth System governance perspective. *Earth System Governance 2*, 1-7, 2, DOI: *https://doi.org/10.1016/j.esg.2019.100029.*

substantive matters by consensus'.[65] Thus, this section aimed to identify some formulas and strategies that have been considered in the negotiations, and eventually incorporated in the *Revised draft text* – the latest version of the text at the time – as possible regulatory options, that could have the potential to facilitate the Agreement. Those formulas were five: avoiding to explicitly mention the legal status of MGRs; the incorporation of differential and contextual norms; the introduction of due diligence obligations; the incorporation of internal *soft law*; and the reduction of the scope of the treaty. The following sections explain each one of the formulas, adding an assessment of the extent to which they have been incorporated in the final version of the BBNJ Agreement. Identifying what formulas have been used to reach an agreement that seemed to be unattainable can be helpful to understand the scope and strength of the final treaty.

5.1. Avoiding Explicit Reference to the Legal Status of MGRs

The aspect that was generating the most controversy in the BBNJ negotiations was, without doubt, that of the legal status of MGRs. As had been pointed out, 'as long as the North and South continue their ideological battles over the common heritage of mankind, then concluding negotiations on more important aspects of the package deal will be further delayed'.[66]

The concept of CHH, which was actually incorporated in the *Revised draft text* as a potential governing principle[67], 'presupposes a third kind of regime that is different from both the traditional regimes of sovereignty, applicable in territorial seas, and of freedom, applicable on the high seas'.[68] In short, the CHH is 'a principle that sets out that certain global common resources should be owned collectively by mankind, and the benefits arising from their utilisation should be shared'.[69] Thus, it could imply the prohibition of claim or exercise of sovereignty or sovereign rights, as well as the prohibition of recognising any national appropriation; the use of resources exclusively for peaceful purposes; the equitable sharing of resources; the need to carry out activities for the benefit of humankind as a whole, irrespective of their geographical location, with particular consideration for the interests and needs of developing countries; and the subjection of activities of exploration and exploitation to an international regime.[70]

The recognition of MGRs as the CHH seemed to be, for developing States, a *sine qua non* requirement to accept the regulation. But at the same time, industrialised States rejected it out of hand. Since this issue was generating profound controversy, the main strategy of the IGC President had been to try to negotiate its substantive elements but with no explicit reference to the CHH[71], a pragmatic position, focusing more on consequences than on principles.[72] The idea was that such an omission may facilitate further progress in the negotiation and perhaps obtain certain concessions on the part of both industrialised and developing States. Moreover, not mentioning

65 Resolution of 24 December 2017 (A/RES/72/249), para. 17.

66 Leary, D. (2019), note 31, 24. In the same sense, Mendenhall, E., De Santo, E., Nyman. E, and Tiller, R.. (2019), note 41, 3.

67 *Revised draft text*, art. 5.

68 Scovazzi, T. (2007). The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond the Limits of National Jurisdiction. *Agenda internacional 25*, 11-24, 11, *http://revistas.pucp.edu.pe/index.php/agendainternacional/article/view/7337/7555.*

69 De Lucia, V. (2020). The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas beyond National Jurisdiction: No End in Sight? *McGill Journal of Sustainable Development Law 16* (2), 140-157, 143, *https://www.mcgill.ca/mjsdl/files/mjsdl/mjsdl_16.2-vito_de_lucia-common_heritage_of_mankind.pdf.* See also: Baslar, K. (1998). The Concept of the Common Heritage of Mankind in International Law. Netherlands: Kluwer Law.

70 See: arts. 137 UNCLOS and the subsequent articles, regarding the Area and its resources, as adapted in the 1994 *Part XI Agreement*; as well as art. 11 of the *Agreement governing the activities of States on the Moon and other Celestial Bodies* (1979). Regarding the BBNJ instrument, see: The Group of 77 and China, *Development 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-Group of 77 and China's Written submission* 1, para. 1: *http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Group_of_77_and_China.pdf.*

71 De Lucia, V. (2020), note 69, 155.

72 Tladi, D. (2015), The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas Beyond National Jurisdiction: The Choice between Pragmatism and Sustainability. *Yearbook of International Environmental Law 25* (1), 2015, 113-132, DOI:*https://doi.org/10.1093/yiel/yvv060.*

the CHH would have avoid the identification between the regime under negotiation and the regime of the Area and its resources.[73]

Given that the failure to mention the legal status of MGRs was considered unacceptable by several delegations[74], and since the omission strategy had not proven effective to date, an alternative that had been suggested was to change the framework by declaring the conservation and sustainable use of marine biodiversity of ABNJs as a Common Concern of Humankind (CCH) instead.[75] Along these lines, the International Union for Conservation of Nature proposed the following text for the preamble of the Agreement:

> 'Aware that the conservation of marine biodiversity is a *common concern* and the shared responsibility of all States and that States have the obligation to protect and preserve the marine environment in ABNJ and to assist other States to do the same'.[76]

The CCH approach was identified as one requiring further discussion by the Preparatory Committee established by General Assembly resolution 69/292.[77] Its legal implications would certainly not be equivalent as those of the CHH.[78] However, as has been pointed out, it may succeed in providing a global framework for approaching the conservation and sustainable use of BBNJ by emphasising certain principles of interest to States, such as intergenerational equity, international solidarity, shared decision-making and accountability, and benefit- and burden-sharing through financial cooperation.[79] One potential positive impact of mentioning the CCH may also have been linking the regime under negotiation with others also facing global problems, such as the 'conservation of biological diversity'[80], 'change in the Earth's climate and its adverse effects'[81] or 'the atmospheric pollution and atmospheric degradation'[82], in so far as the concept of CCH 'is particularly suited to environmental problems, which do not respect national boundaries'.[83] Although this would offer a powerful way forward in the negotiations, huge efforts would be required to convince certain delegations to accept it, as some of them had identified the use of alternative concepts as a 'red line'.[84]

It has been said that the question of the recognition of MGRs as the CHH "produced some of the most passionate, strident, and apparently well-prepared speeches of the resumed IGC-5".[85] Certainly, even in the latest rounds of negotiation, developing States have not renounced to its incorporation in the Agreement. Thus, neither the omission strategy nor the one consisting in changing the framework towards the recognition of MGRs as CCH have succeeded. On the contrary, as explained in the previous section, the treaty not only explicitly includes

73 See: Rovere, M. (2018-2019). The Common Heritage applied to the resources of the seabed. Lessons learnt from the exploration of deep-sea minerals and comparison to marine genetic resources. *Marine Safety and Security Law Journal 5*, 78-98, *https://www.marsafelawjournal.org/wp-content/uploads/2018/12/MarSafeLawJournal_Issue5_Rovere.pdf.*

74 See, for example: South Africa's comments on art. 5, *Textual proposals submitted by delegations by 20 February 2020,* 48.

75 See: UN biodiversity, Prep Com Files, Bowling, Ch., Pierson, E. and Ratté, S. (2016). The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas, 1-15, *https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf.* This possibility could be part of the 'practical' or 'possibly hybrid' solution that Iceland referred to during the Preparatory Commission, Iceland, *Iceland's written submission to the Preparatory Committee established by the General Assembly Resolution 69/292: development 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 beyond national jurisdiction* (2016), 1, *www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Iceland.pdf.*

76 *Textual proposals submitted by delegations by 20 February 2020*, 5.

77 *Chair's overview of the second session of the Preparatory Committee,* 13.

78 See: Cardesa-Salzmann, A. (2015). Desarrollo sostenible, preocupación común de la humanidad y bienes públicos globales. In Bouza, N., García, C., and Rodrigo, Á. J (Dirs.). *La gobernanza del interés público global. XXV Jornadas de la Asociación Española de Profesores de Derecho internacional y Relaciones Internacionales*. Barcelona: Tecnos, 374-381, 377.

79 Bowling, Ch., Pierson, E. and Ratté, S. (2016), note 75, 1.

80 CBD, Preamble, para. 3.

81 United Nations Framework Convention on Climate Change, Preamble, para. 1.

82 *Text of the draft guidelines on the protection of the atmosphere*, Preamble, para. 3, ILC, Report on the work of the seventy-second session (2021), (A/76/10), Chapter IV, Protection of the Atmosphere.

83 Bowling, Ch., Pierson, E. and Ratté, S. (2016), note 75, 3.

84 South Africa expressed regarding the CHH that it 'does not support other versions of text to replace this or additional text to qualify it', *Textual proposals submitted by delegations by 20 February 2020*, 48.

85 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 3.

the CHH as a general principle in art. 7, but some of its main substantive elements are detailed in art. 11 as well.

Such unexpected result can only be explained by assuming that developing States represent a clear majority of the UNGA – therefore, a clear majority of potential States Parties to the Agreement – and by enlarging the picture to see what the trade-offs have been. Undoubtedly, the treaty also recognises the freedom of the high seas as a general principle in art. 7 and, among many other exclusions, intellectual property rights have been eliminated from the regulation.

5.2. Differential and Contextual Norms

A second strategy with potential to facilitate the agreement was to pay special attention to the existing differences between States by designing and incorporating different types of norms. This was a strategy that has been used, too, for example, in the *Paris Agreement on Climate Change* 2015.[86] Thus, the *Revised draft text* included in some of its wording different types of norms that could be classified, in line with the categorisation developed by Daniel B. Magraw, as absolute, differential, and contextual norms.[87] The final BBNJ Agreement also incorporates these types of norms.

According to Magraw, an absolute norm is a norm that provides identical treatment to all countries. In the BBNJ Agreement, this would be the case, for example, of the norm included in art. 16.2, which requires Parties to "periodically submit reports to the access and benefit-sharing committee on their implementation of the provisions in this Part on activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction and the sharing of benefits therefrom".[88] In norms of this kind, no differential treatment is applied. In contrast, the norm that requires Parties to 'ensure capacity-building for developing States Parties" and "cooperate to achieve the transfer of marine technology, in particular to developing States Parties that need and request it, taking into account the special circumstances of small island developing States and of least developed countries" (art. 42.1) could be considered a differential norm[89] or, according to this author, a norm that provides different standards for one set of States and others. Another clear example – maybe the most direct differential norm in the treaty- is the norm establishing that the implementation of the measures adopted under the Part on ABMT 'should not impose a disproportionate burden on Parties that are small island developing States or least developed countries, directly or indirectly' (art. 25.3). In general, in the Agreement, this type of norm is aimed at developed States, for the benefit of developing States. They are used to acknowledge the existence of different capabilities or geographic characteristics in order to provide some compensation in the regulation. As a result, a certain dose of equity and compensation is reflected in the treaty, as generally required by multilateral environmental treaties and by the principle of 'common but differentiated responsibilities'. In this kind of norm, 'disputes may arise regarding whether or not a country qualifies as 'developing".[90] This has been fairly evident in the BBNJ negotiations since, in return, many delegations have expressed their interest in maintaining a certain margin of interpretation. For example, the European Union and its Member States proposed maintaining the objective of building the capacity of developing States, but defining them not as 'least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries', but rather as 'developing States *that might need and request technical assistance*'.[91] It should be noted that the final BBNJ Agreement maintains such recognition (art. 9b) – also incorporating a reference to archipelagic States- and even made it more explicit when it lists as a general principle/approach the '(f)ull recognition of the special circumstances of small island developing States

86 See: Rodrigo, Á.J. (2018). El Acuerdo de París sobre el Cambio Climático: un nuevo tipo de tratado de protección de intereses generales. In Borràs Pentinat, S. and Milenka Villavicencio Calzadilla, P. (eds), *El Acuerdo de París sobre el cambio climático: ¿un acuerdo histórico o una oportunidad perdida?: análisis jurídico y perspectivas futuras*. Madrid: Thompson Reuters Aranzadi, 69-98.

87 Barstow Magraw, D. (1990). Existing Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms. *Colorado Journal of International Environmental Law and Policy 1*, 69-99, 73-76, https://heinonline.org/HOL/LandingPage?handle=hein.journals/colenvlp1&div=5&id=&page=" .

88 Other obligations of this kind can be identified, for example, in arts. 25.1, 26.1, 28.1 and 31.1 of the *BBNJ Agreement*.

89 Some other differential norms are those included in arts. 14.2(f), 14.2(g) or 31.2 of the *BBNJ Agreement*.

90 Barstow Magraw, D. (1990), note 87, 73.

91 *Textual proposals submitted by delegations by 20 February 2020*, 59 (emphasis added). In the same way, the International Union for Conservation of Nature's comments, 63.

and of least developed countries' (art. 7 m) and the '(a)cknowledgement of the special interests and needs of landlocked developing countries' (art. 7n).

Finally, according to Daniel B. Magraw, a contextual norm is a norm that provides identical treatment to all States affected by the norm but the application of which requires or permits the consideration of some characteristics that might differ from country to country. One such case is the norm establishing that "Parties shall ensure that samples of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction that are in repositories or databases under their jurisdiction can be identified as originating from areas beyond national jurisdiction, in accordance with current international practice and *to the extent practicable*" (art. 12.6, emphasis added).[92] Another example is the norm according to which, when developing or updating standards or guidelines for the conduct of EIAs, 'the Scientific and Technical Body shall, *as appropriate*, collaborate with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies' (art. 29.3, emphasis added). This type of norm 'typically involves balancing multiple interests and characteristics'[93] and its indeterminacy can be advantageous for several reasons.[94] Firstly, because it is easier to reach agreement on a contextual norm than on a more precise one. Secondly, because they serve to recognise that a certain situation is a legitimate concern of all or part of the international community and can lead to the subsequent formulation and acceptance of more precise norms. Thirdly, because their indeterminacy may lead to flexibility in interpreting and applying the norm.

Although the strategy of using different types of norms has been retained in the final BBNJ Agreement, some of the rules have varied in type throughout the negotiation. A clear example is the obligation to conduct EIAs. While in the provisional versions of the Agreement, that was a contextual norm requiring Parties '[as far as practicable] to assess the potential effects of planned activities under their jurisdiction or control' (art. 22.1 of the *Revised draft text*), in the BBNJ Agreement this is an absolute norm according to which '(p)arties shall ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control that take place in areas beyond national jurisdiction are assessed as set out in this Part before they are authorized' (art. 28).

5.3. Due Diligence Obligations

Closely related to the above, the introduction of due diligence obligations in the text was also a formula to facilitate agreement between the negotiators. Due diligence obligations are contained within norms 'that prescribe or express the expectation of a certain *standard of conduct*, rather than of result. It is generally a standard of reasonableness (and appropriateness) responding both to the complexity of the challenge at hand and the large and shifting diversity of states' national circumstances'.[95]

Due diligence obligations can be explicitly or implicitly incorporated[96] and, from a material perspective, they can be divided into two types: obligations of a procedural type and obligations relating to the States' institutional capacity.[97] The former include obligations to notify or report certain events and to warn other States, obligations to consult or cooperate with other States or actors, as well as obligations to conduct environmental impact assessments. Examples of the latter include obligations to take legislative or administrative measures. The final BBNJ Agreement, just as the *Revised draft text* did, contains both kinds of due diligence obligations. Article 39.1, for example, incorporates a procedural due diligence obligation when it establishes that 'Parties shall, individually or in cooperation with other Parties, consider conducting strategic environmental assessments for plans and programmes relating to activities under their jurisdiction or control, to be conducted in areas beyond national jurisdiction, in order to assess the potential effects of such plans or programmes, as well as of

92 Similar expressions in the *BBNJ Agreement* are "when practicable" (art. 12.4) or "as far as practicable" (arts. 4 and 32.1).

93 Barstow Magraw, D. (1990), note 87, 74.

94 *Ibid.*

95 Voigt, Ch. (2021) Due diligence: Crossing the divide between National Sovereignty and International Cooperation, abstract submitted to the 10th Annual Cambridge International Law Conference.

96 *Ibid.* See also: ILC Study Group on Due Diligence in International Law, 'Draft Study Group First Report' in International Law Association Report of the Seventy-Sixth Conference (Washington DC 2014) (International Law Association, London 2016) 947.

97 Peters, A., Rieger, H., Kreuzer, L. (2020). Due diligence: the risky risk management tool in international law. *Cambridge International Law Journal 9* (2), 121-136, 124. DOI: *https://doi.org/10.4337/cilj.2020.02.01*.

alternatives, on the marine environment'. However, article 13 incorporates a due diligence obligation relating to States' institutional capacity when it stipulates that 'Parties shall take legislative, administrative or policy measures, where relevant and as appropriate, with the aim of ensuring that traditional knowledge associated with marine genetic resources in areas beyond national jurisdiction that is held by Indigenous Peoples and local communities shall only be accessed with the free, prior and informed consent or approval and involvement of these Indigenous Peoples and local communities'.

Due diligence, as a 'requirement *to behave* diligently'[98], can constitute a 'bridge principle between law and other spaces of normativity', facilitating 'dealing with uncertainty in the face of a plurality of actors which are diverse'.[99] Thus, due diligence enables us to consider 'varied situatedness and capacities of actors', thereby allowing 'the grading of legal obligations and concomitant legal responsibility based on distinct degrees of risk proximity'.[100] As long as there were a plurality of interests and polarised positions, the normative openness of the due diligence standard had the potential to facilitate treaty negotiations[101] and it has been effectively used to reach an agreement.

5.4. Internal Soft Law

The incorporation of internal *soft law* in the treaty – that is, *soft law* provisions contained within a legally binding instrument[102] – was a fourth strategy contained in the *Revised draft text*. It included proposals of this kind of provision, for example, when it established that the States Parties that have collected, accessed or used marine genetic resources of the ABNJs 'may share' (as an alternative to 'shall share') the benefits arising therefrom (art. 11.1 of the *Revised draft text*); or when it established that the environmental impact assessment reports 'may include' certain information (art. 35.2 of the *Revised draft text*). Other examples of softness were incorporated in provisions that required States Parties to 'encourage' certain behaviours, such as adopting measures supporting the conservation and management objectives of the measures adopted and area-based management tools (art. 20.5 of the *Revised draft text*) or becoming Parties and adopting laws and regulations consistent with the Agreement (art. 56 of the *Revised draft text*) regarding non-parties to the Agreement.

During negotiations, some delegations seem to had identified the potential impact of the inclusion of *soft law* in the BBNJ Agreement. For instance, the Core Latin American Group proposed differentiating between 'the principles under a normative status (...) and approaches of an *informative character* as implementation guides'.[103] These 'soft' obligations, in general, provide flexibility by including exhortations, requirements or even recommendations to act in a certain way. The aim of incorporating them would be to condition the behaviour of the actors according to the Agreement's objectives. However, they do not entail real obligations, nor does their breach generate liability.

Certainly, the final BBNJ Agreement incorporates some dose of softness in its dispositions. This is the case, for example, of articles encouraging certain behaviours (arts. 25.5, 43.3, 52.13 and 62). Or of many dispositions in Part V regarding capacity-building and the transfer of marine technology, too, an issue area where, in the last negotiation rounds, the debate was mostly focused on the intensity of the obligations assumed by Parties. Discrepancies on whether establish obligations 'to cooperate' or 'to ensure/achieve' have been resolved by combining strong obligations with qualifiers[104] like "within their capabilities" (for example, in art. 42.1).

However, in general, the Agreement language is stronger than the one incorporated in previous versions of the text. With the exception of Part IV, all parts of the package deal have had an increase of the occurrences of 'shall'

98 *Ibid.*, 122.

99 *Ibid.,* 123.

100 *Ibid.,* 126.

101 *Ibid.,* 126.

102 See: Chinkin, Ch. (2000). Normative Development in International Legal System. In D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 24; and D'Aspremont, J. (2008). Softness in International Law: A Self-Serving Quest for New Legal Materials. *European Journal of International Law 19*, 1075-1093, esp. 1081 and following. DOI: 10.1093/ejil/chn057.

103 *Textual proposals submitted by delegations by 20 February 2020*, 45 (emphasis added).

104 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 7.

as opposed to 'may'.[105] From the perspective of the ambition of the regulation, this is good news. Nevertheless, such strong language, as noted in Section 6 of this work, may make it difficult for some States to ratify the treaty.

5.5. Reducing the Scope of the BBNJ Treaty

Finally, a fifth formula that could be identified in BBNJ negotiations was that of reducing the scope of the treaty by leaving certain elements out of the regulation. At a time when the negotiations seemed far from reaching an agreement, that was a potential way to facilitate reaching a consensus over a narrower treaty. Here, there were two possibilities: either leaving some elements simply unregulated, or explicitly agreeing their regulation in a future agreement or decision. Both options could serve to unblock discussions over elements whose resolution did not prevent States from addressing the rest of provisions. The option of leaving certain issues unregulated had already been suggested in the case of the debate over the legal status of MGRs. As some delegations highlighted, its determination was not a precondition for addressing other issues, such as benefit-sharing.[106] It had also been suggested with respect to the treatment of intellectual property rights (art. 12 of the *Revised draft text*).[107] That decision had, however, an important limitation and an inherent problem. The limitation was the decision of the UNGA to address the negotiation of the instrument as an agreed package of elements that must be addressed together and as a whole. Although there was certain opposition to including some of the elements in the package[108], once established, there could not be no new instrument without reaching an agreement on all of them. As a consequence, it was not possible to leave a whole section out of the Agreement. The inherent problem of this strategy was that not answering certain issues, in practice, could be equivalent to taking sides for the position favourable to the *status quo*, something attractive to some States, but not to others, and definitely not in the public interest.

Following those same examples, while the final BBNJ Agreement, against all odds, has not left the CHH principle out, reaching an agreement on MGRs and the fair and equitable sharing of benefits has certainly entailed to 'scratch parts of the treaty that were too difficult to conclude'[109], this is, the provisional art. 12 concerning intellectual property rights. Discrepancies between delegations about how to address this issue without affecting the developments at the World Intellectual Property Organisation have become irreconcilable and any mention to intellectual property rights has been eliminated from the treaty. This, without a doubt, favours those who benefit from the *status quo*, namely, developed States and private corporations already possessing patents associated to MGRs of ABNJ.

A second option was to agree explicitly that certain controversial issues will be regulated later outside the treaty, either through a complementary agreement or a future decision by the competent body established by the Agreement itself. The former option implied the use of a frequent technique in multilateral environmental treaties, the convention-protocol model[110], consisting of dividing the regulation into a framework agreement with

105 *Ibid.*, 3-4.

106 For example: European Union and Member States, *Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of various areas national jurisdiction (BBNJ process)- written submission of the EU and its Member States. Marine genetic resources, including questions on the sharing of benefits* (22 February 2017) para. 1, *www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/EU_Written_Submission_on_Marine_Genetic_Resources.pdf*. Along the same lines, Norway, *Preparatory Committee established by General Assembly Resolution 69/292: development of an international legally binding instruments 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.* Comments by Norway, 6, *www.un.org/depts/los/biodiversity/prepcom_files/ rolling_comp/Norway.pdf.*

107 See, for example, the proposals to delete art. 12 made by Israel, Republic of Korea or the United States of America, *Textual proposals submitted by delegations by 20 February 2020*, 102-104.

108 It has been pointed out, for instance, that little meaningful evidence supported commercial interest in MGR of ABNJ in order to justify their inclusion on the package deal: Leary, D. (2018-2019). Marine Genetic Resources in Areas beyond National Jurisdiction: Do We Need to Regulate Them in a New Agreement?. *Maritime Security and Safety Law Journal 5,* 22-47, *https://www.marsafelawjournal.org/wp-content/uploads/2018/11/MarSafeLawJournal_Issue5_Leary.pdf*; Leary D. (2019), note 31, 21.

109 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 5.

110 Barrett, S. (2005), *Environment and Statecraft: The Strategy of Environmental Treaty-Making*. Oxford: Oxford Scholarship Online, 147. DOI:*10.1093/0199286094.001.0001.*

the general principles, and successive protocols with the technical aspects. In practice, however, this would have involved adding a supplementary technical agreement to the implementing Agreement under negotiation, which seemed a rather complex formula only to be considered as a last resort. The latter option, regulating certain issues through a future decision of the competent body, had already been proposed by the European Union and its Member States in the case of the criteria for identifying marine areas requiring protection according to art. 16 of the *Revised draft text.* In their opinion, the criteria 'may be developed as necessary by the Scientific and Technical Body for consideration by the Conference of the Parties':

> 'The EU and its Member States are not opposed to keeping flexibility regarding the criteria and making sure the process is time-proof. However, whether the criteria are in the body of the text or in an annex, changing (amending/revising/ . . .) them would require a modification of the treaty, which, for many States would be a very heavy procedure. *We are suggesting this* '*development*' *to take place outside the treaty, as a lighter procedure*, hence our proposal for 'guidance"[111].

This second strategy, mostly applied to technical questions, has also been used to reach the BBNJ Agreement. Thus, the question of the criteria for identifying marine areas requiring protection has been definitively resolved by adding an annex with indicative criteria to take into consideration (Annex I), but also by attributing the competence to further develop and revise them as necessary to the Scientific and Technical Body for the consideration by the BBNJ COP (art. 19.5). Similar competences regarding further developments of technical aspects of the regulation have been also attributed to the Scientific and Technical Body (art. 19.6, 21.8), as well as to other bodies established by the BBNJ Agreement, like the BBNJ COP (art. 44.3), or the Access and Benefit-Sharing Committee (art. 15.3).

6. Conclusion: A Potentially Effective Agreement in the Hands of States

In 2022, the above suggested formulas and strategies were seen useful to contribute to bringing negotiators' positions closer together, since they recognised their different situations and introduced flexibility in the obligations created by the regulation. However, the author of this work also warned that some of them involved some risks: the incorporation of many due diligence obligations in the treaty could lead to the *strictness* of the regime being diluted by excessively increasing State discretion[112]; an abuse of internal soft law dispositions had the risk of obtaining a *shallow and ineffective treaty*, which is why several delegations had expressed their preference for keeping hard obligations[113]; and reducing the scope of the treaty also entailed the risk of *losing the momentum* of the negotiation, postponing part of the regulation for a future instrument that may never come.

In this scenario, this paper defended that, since the conservation and sustainable use of BBNJ was a global public interest and States were here 'the interpreters of the demands of the international community'[114], they had the responsibility to find novel solutions for the purpose of reaching an agreement that do not imply reducing its ambition and its effectiveness. Thus, the necessity of States reassuming their true role in the process –*that of interpreters of general interest – and, regarding BBNJ* – not that of owners, but*custodians*– was highlighted. To do that, on the one hand, it was important to going back to basics and reconceptualize the ocean as a 'global commons'.[115] On the other hand, it was exposed that changing States' role also required to recognize*the*

111 *Textual proposals submitted by delegations by 20 February 2020*, 145 (emphasis added).

112 Peters, A., Rieger, H., Kreuzer, L. (2020), note 97, 134.

113 See, for example, the comments to art. 11 made by Indonesia: *Textual proposals submitted by delegations by 20 February 2020*, 90.

114 Rodríguez Carrión, A. J. (1987), note 27, 330.

115 Claudet, J., Amon D. J, and Blasiak, R. (2021). Transformational opportunities for an equitable ocean commons. *Proceedings of the National Academy of Sciences 118* (42), 1-5. DOI: *https://doi.org/10.1073/pnas.2117033118*. See also: Brodie Rudolph, T. et al. (2020). A transition to sustainable ocean governance. *Nature Communications 11*, 1-14, *https://www.nature.com/articles/s41467-020-17410-2.pdf*; and Werle, D., et al. (2019). Looking Ahead: Ocean Governance Challenges in the TwentyFirst Century. In P. R. Boudreau et al. (eds). The Future of Ocean Governance and Capacity Development. Leiden: Brill Nijhoff, 533–542. DOI: https://doi.org/10.1163/9789004380271_094. Thinking 'beyond existing legal and institutional frameworks' is a shared claim by the scientific community, Tessnow-Von Wysocki, I., Vadrot, A.B.M. (2020). The Voice of Science on Marine Biodiversity Negotiations: A Systematic Literature Review. *Frontiers in Marine Science 7*, 1-26, 20, DOI: *https://doi.org/10.3389/fmars.2020.614282*.

intrinsic value of the oceans, and of BBNJ in particular. In this regard, some proposals had examined the possibility of designing the governance of BBNJ from a 'Rights of Nature perspective'[116]. A non-anthropocentric understanding of BBNJ could, among other things, encourage progressive interpretations of existing principles and the development of new principles; underpin strict standards for EIAs; encourage the adoption of ambitious management measures; provide a new framework for MGRs; and foster stronger participation of non-State actors in conservation and sustainable use.[117]

In practice, none of these changes have occurred. The BBNJ Agreement has been reached, but not because a new perspective has been adopted by the negotiators, but rather because, under the gaze of the "eyes of the world"[118], they could not afford not to reach it. Pressure in the last rounds of negotiation, especially in the IGC5bis, was very high. Therefore, some pragmatic formulas were applied, and some *compromises* were made, as well as some *concessions*. As a result, a certain dose of ambition in the regulation has been reduced and some of the aforementioned risks are present now.

Even though no new perspective has been adopted, the final BBNJ treaty is more ambitious than anticipated in some moments during the negotiations. It incorporates stronger language and less *soft law* than expected, as well as a series of principles, obligations, measures and mechanisms potentially effective to protect BBNJ – some of them really unexpected – : the principle of CHH; the obligation to share in a fair and equitable manner the monetary and non-monetary benefits arising from activities with respect to MGRs of ABNJ; the procedure to create ABMT, including MPAs, in the high seas; the obligation to conduct EIAs regarding activities that may cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ; the obligation to ensure capacity-building for developing States Parties and to cooperate to achieve the transfer of technology; some dispositions promoting and encouraging international cooperation in marine scientific research, as well as the sharing of research and development results[119]; the recognition of the relevance of traditional knowledge of Indigenous Peoples and local communities in this field, and the necessity to include them in consultation and decision processes[120]; a corpus of new governing institutions and bodies with competences to manage the regime and to further develop and revise it; a mechanism for the provision for adequate, accessible, and predictable financial resources to assist States Parties in implementing the Agreement; and also a well-articulated system to settle any dispute concerning the interpretation or application of the treaty.

However, none of them are applicable yet. Before that, the BBNJ treaty shall be open for signature by all States and regional economic integration organisations from 20 September 2023 until 20 September 2025 (art. 65) – at the date of this review, the list of signatories amounts to 81.[121] Then, it will be time to see if those compromises are also accompanied by the effective ratification of the treaty and if those concessions equally allow the regulation to achieve its objectives – can the BBNJ be sustainably used and protected even when fishing activities or intellectual property rights have been excluded? –.

The entry into force of the treaty will occur, according to art. 68, '120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession' – sixty ratifications were also needed for the entry into force of the UNCLOS–. Since the BBNJ Agreement has incorporated many of the demands of developing States – which represent a vast majority of the international community – and, for them, the regulation may lead to a better situation than the *status quo*, reaching sixty instruments manifesting their consent to be bound by the treaty does not seem impossible at all. But for the treaty to be effective something more is required.

On the one hand, it will be crucial that a large number of States – many more than sixty – ratify the treaty. On the other hand, to achieve its objective to contribute to the global oceans governance, among those States

116 Harden-Davies, H. *et al*. (2020), note 11. See also: Corrigan, D.P. and Oksanen, M. (eds.) (2021). *Rights of Nature. A Re-examination*. London: Routledge; and Kersten, J. (2017). Can Nature have rights?. *RCC Perspectives 6,* 9-14, *https://www.environmentandsociety.org/sites/default/files/2017_i6_final_hw.pdf.*

117 *Ibid.*

118 Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 3.

119 See, especially, the Annex II of the *BBNJ Agreement*.

120 Art. 7, 13, 19, 21, 24, 31, 35, 41, 44, 48 and 49 of the *BBNJ Agreement*.

121 See the status of the BBNJ Agreement and the list of signatories at: *https://www.un.org/bbnj/*. At the moment, there is only one declaration made upon signature, according to which the United Kingdom recognizes, first, that the Antartic Treaty already provides a comprehensive framework for the management of the Artic and, second, that it does not accept any reference to the rights of indigenous peoples or local communities, since the United Kingdom does not recognise collective human rights in international law.

there must also be the developed States and some of them especially. And this will be one of the main challenges from now on, because for many of them the *status quo* was not a bad situation – at least from their national perspective– and some of the obligations contained in the treaty, as well as its strong language in some of its sections, can be an obstacle. In this regard, it is meaningful that the treaty was adopted by consensus, which is a positive achievement in multilateral negotiations[122], but already at the moment of the adoption two States made individual statements: Venezuela, which emphasized that their participation in the Agreement should not be interpreted as being binding on them because it is an implementing agreement to UNCLOS, to which they are not a party[123]; and Russia, which has dissociated itself from the consensus because 'the instrument was not acceptable and the question of its participation was not considered'[124]. According to Russia, provisions of the most important international treaties 'were undermined and that its norms would allow for intrusion into the mandate and competence of relevant sectoral and regional international organizations including regional fisheries management organizations'.[125] The ratification process will probably not be smooth.

Finally, the key moment to verify whether the BBNJ Agreement is ambitious and effective enough after its entry into force will be the implementation phase. In that moment, the behaviour of the Parties regarding the obligations they have assumed will be revealed. Then, we will know if they effectively transpose the treaty into their domestic laws – creating then obligations for private sector – and if they accept to comply with the decisions of the new institutions in charge of governing the regime. We will also know whether there is a real will to truly cooperate with other legal instruments, frameworks, and bodies to achieve the global interest to protect BBNJ. In conclusion, once the treaty enters into force and become binding for Parties, we will know whether they are really committed to assume their role as custodians of BBNJ or not.

Despite all the celebration statements after the IGC5bis, the work is not only not finished, but just starting now.[126] A lot of questions are to be resolved in the following months, from the seat of the Secretariat to the procedure and financial rules. Then, as it has been noted, it will be important to know who ratifies the treaty in time to participate in the first meeting of the BBNJ COP[127], something that will occur no later than one year after the entry into force of the Agreement (art. 47.2).

The BBNJ Agreement is a historic achievement with the potential to contribute to better manage the global ocean and biodiversity. But whether it is effective or not depends on the States. To foster them to play the BBNJ custodians' role, the "eyes of the world" need to be open like never before. And the scientific community and the Academia will be very attentive to each movement and new development hereinafter.

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122 Tiller, R. and Mendenhall, E. (2023). An so it begins – The adoption of the 'Biodiversity Beyond National Jurisdiction' Treaty. *Marine Policy* 157, 1-4, 2. DOI: *10.1016/j.marpol.2023.105836.*

123 *Íbid.*, 2.

124 *Report of the intergovernmental conference on 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 at its fifth session*, (A/CONF.232/2023/5), para.

125 *Íbid.*

126 In this sense: Mendenhall, E., Tiller, R. and Nyman, E. (2023), note 29, 1; and Tiller, R. and Mendenhall, E. (2023), note 122.

127 Tiller, R. and Mendenhall, E. (2023), note 122, 1.