



Degree Program in Politics: Philosophy and Economics

Course of International Law

THE BIODIVERSITY BEYOND  
NATIONAL JURISDICTION  
AGREEMENT  
A Comprehensive Critical Analysis

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## INTRODUCTION

On March 4, 2023, at the United Nations headquarters in New York, amid applause and standing ovations, the Biodiversity Beyond National Jurisdiction Agreement<sup>1</sup> was finally approved under the leadership of President Rena Lee. In an era marked by escalating environmental crises and geopolitical tensions, this High Seas Treaty emerges as a groundbreaking milestone in international maritime governance, aiming to protect the vast, unregulated expanses of our planet's oceans.

As a political science student with a keen interest in environmental sustainability, I have written this thesis with fervent enthusiasm, combining the deep fascination for nature and the sea instilled in me by my sailing family with my academic passion for multilateral relations and international environmental law. Building upon these personal inclinations, this dissertation aims to explore, analyse, discuss, and praise this new environmental and pacifist instrument with both a passionate and critical eye.

Given the very recent conclusion of the Agreement, the scope of this study is intentionally broad and general. My goal was indeed to examine all the main aspects of the Treaty to deeply understand its nature and unique characteristics. Consequently, a more detailed and specific study was forgone. Additionally, for the sake of completeness, the first chapter adopts a more scientific rather than legal approach, despite this being an international law thesis. This was necessary to provide a comprehensive overview of the topic, which is inherently interdisciplinary in its nature and essence.

Regarding the methodology used for this research, an extensive review of existing literature was conducted, considering both academic studies and official United Nations publications. The official draft of the BBNJ Agreement served as the primary source for the entire discussion. Similarly, the text of UNCLOS was extensively consulted, not only for its presentation but also as an important basis for comparison. The recent approval of the Agreement also explains the lack of extensive available literature. Most of it focuses on celebrating this multilateral triumph and the context in

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<sup>1</sup> Official name: 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, also known as High Seas Treaty.

which it emerged. However, there is a scarcity of material providing for more critical arguments. Therefore, the critical analysis presented in the final chapter includes more personal conclusions and judgments compared to the previous sections. This approach aims to fill the gap in the literature and offer insights into the weaknesses of the Agreement.

The dissertation is structured into three main chapters, each encompassing a core area of importance for the subject matter. It is organised as follows:

The first chapter outlines the contemporary framework in which the BBNJ Agreement is situated, starting with a historical-legal discussion that traces the evolution of the Law of the Sea, beginning with the philosophical principle of *mare liberum*, which was conceived by Hugo Grotius in the early 17th century and has dominated the notion of absolute freedom of the ocean until today. To follow, the 1982 UN Convention on the Law of the Sea, which codified Grotius' principle and which represents the key legal instrument currently regulating maritime affairs, will be briefly presented in its historical context and main elements.

The first chapter then shifts to an environmental and scientific overview. The discussion focuses on the climate crisis, increasing threats to marine biodiversity, consequences of ongoing losses in marine ecosystems, and the weakening of the ocean as a vital climate regulator. This reflection aims to highlight the importance of concluding this Treaty at this historical moment. It emphasises that it represents not only a crucial achievement for environmental protection but also a step toward addressing significant power imbalances in an unregulated ocean.

The focus will then turn to the significant gaps in UNCLOS, which paved the way for the negotiations of the new BBNJ Agreement, aimed at filling these voids.

The second chapter is devoted to the Treaty per se, outlining its history and main content. This includes an analysis of the twenty years of negotiations, culminating in the approval of the Agreement on March 4, 2023. By examining the nature of these negotiations, the opposing parties, the interests at stake, and the primary tensions, this chapter will highlight the historical significance of the Treaty, defined by many as a triumph for multilateralism.

The second and third parts of this chapter will focus on an analysis of the Treaty's official draft text. First, the goals and key principles will be presented, following the structure of the document. Special attention will be given to the Common Heritage of Mankind principle, which contrasts with the freedom of the seas principle discussed earlier and which signifies a fundamental shift in the perception of the sea and its resources, promoting more equitable collaboration among all states.

Finally, the four core and innovative elements of the Agreement will be presented, as codified in Parts II to V of the latter.

The third and final chapter of this dissertation presents a critical analysis. After discussing the significance, importance, and innovativeness, the focus will shift to identifying potential gaps, ambiguities, and weaknesses in the Treaty text. Specifically, the first part will examine certain provisions to highlight these critical points through a textual analysis. Following this, the principle of the Common Heritage of Mankind will be revisited in relation to Marine Genetic Resources, emphasising the ambiguity of its inclusion in the Treaty. The third part will consider the absence of a robust international liability system for environmental violations and damages committed on the High Seas. This section will discuss the BBNJ Agreement's failure to systematically address this legal gap and the resulting doubts about its effectiveness, particularly regarding benefit-sharing and compliance. The chapter will conclude with a reflection on the importance of the swift entry into force and implementation, considering the possible and probable obstacles to this process.

**CHAPTER I**  
**UNDERLYING REASONS BEHIND THE HIGH SEAS TREATY**  
**Environmental Assessment of the Oceans and the Law of the Sea**

This first chapter aims to provide an overview of both the environmental conditions and legal framework behind the oceans, and in particular the High Seas. This contextual analysis is necessary to gain a better understanding of the reasons for which the international community deemed the negotiation of the new High Seas Treaty necessary and urgent.

The chapter will be divided into two main sections, dealing respectively with the historical evolution of the Law of the Sea and with a general environmental assessment of the oceans. In particular, the first section is further divided into two sub-chapters. The first presents the pivotal principle of freedom of the sea, from its conception by Grotius and its more ancient roots to the present recognition by the UNCLOS and the contemporary challenges it encounters nowadays. The second chapter focuses instead on the 1982 UN Convention on the Law of the Sea, which still represents the most important legal instrument for the regulation of the seas. Besides the history of the Convention, the discussion includes the main principles that have been acknowledged as customary International Law, and as such are respected by every state. One last mention is given to the two main legal institutions established by the Convention, respectively the International Seabed Authority and the International Tribunal for the Law of the Sea.

The second section opens with a general definition of the High Seas and with a brief description of the other existing maritime zones, according to the UN Convention on the Law of the Sea. Additionally, this first administrative overview focuses on the Areas Beyond National Jurisdiction (ABNJ), which are the main subject of the BBNJ Treaty, highlighting the urgent need for global ocean governance and the challenges associated with their management. The discussion delves then into the crucial relationship between the ocean and human lives and economies. This linkage highlights the fundamental importance of the climate-regulating capacity of the ocean, as well as the dramatic consequences of the climate change crisis. The latter translates into threats both to the

marine environment, e.g. due to acidification of the water, and to coastal communities, in terms of food production and sea level rise. The focus is then placed on threats to marine biodiversity, given the central importance it has for the BBNJ Treaty.

A brief analysis of the exploitative human maritime activities, underlining the relevance of the seabed and the issues of inequities related to resource sharing, closes this section.

An additional paragraph outlines the main gaps of the UNCLOS, which need to be urgently filled and represent one of the main reasons at the basis of the High Seas Treaty.

Finally, concluding observations close the chapters.

## **1. THE EVOLUTION OF THE LAW OF THE SEA**

### ***From the Mare Liberum principle to the present management of the High Seas.***

#### ***1.1 The principle of freedom of the seas***

Since the early 17th century, in the new Westphalian State system context, the core principle behind the management of the sea was the Grotian “*mare liberum*” principle, which still nowadays is of crucial relevance in customary international law and maritime law (Young, 2016).

Hugo Grotius, a major Dutch humanist and jurist of the 17th century, first presented this overarching principle of freedom of the sea in his 1609 *Mare Liberum*, the only published chapter of his argumentative work *De Iure Praedae*. The latter was written as a defence, before the Dutch Court, of the general and free accessibility to all seas by all states, in the occasion of the tensions in 1603 between the Dutch East India Company and the Portuguese claims of exclusivity in the East Indies ports<sup>2</sup> (Young, 2016; Rodrigo, 2020; Britannica, 2023).

Although the freedom of the sea principle gained its international and long-lasting recognition thanks to Grotius, the roots of this concept are even older. Indeed, one century earlier, between 1532 and 1564, Francisco de Vitoria and Fernando Vázquez de Menchaca from the Spanish School of International Law had already defended the freedom of trade and of the seas. But even before that, the idea of the sea as a common property open and accessible to all can be traced back to the Roman Empire. Although

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<sup>2</sup> According to a Papal Bull dated 1494, right after Columbus’ discoveries, the Pacific Ocean and the Gulf of Mexico had been granted to Spain’s jurisdiction, whereas the South Atlantic and the Indian Ocean had been conceded to Portugal (United Nations, 1998).

in practice the sea was not free, given Rome's dominion over the Mediterranean, the Roman citizens' perception was exactly comparable to that of *Mare Liberum* (Young, 2016). The end of the Roman Empire opened the path to dominium claims, which were eventually rejected after the acknowledgement and establishment, firstly in European thought, of the Grotian's argument. Furthermore, in the 19th century, the idea of freedom of the sea was strengthened by other overarching freedom theories, such as the *laissez-faire* economy approach (Britannica, 2023).

Grotian's theory is derived from natural law, according to which both land and sea were originally of common property of mankind. The main argument defended by Grotius was that everything characterised by infinite supply capacity and impossible to circumscribe for possession lies under the definition of common property (*res communis*). Including the sea.

This reasoning introduces the assumption that resources offered by the sea, both in terms of space for navigation and food production, are inexhaustible. Such a concept is majorly challenged in contemporary times, as highlighted in the previous section (Schrijver & Prislán, 2009).

In the Westphalian State system, the freedom of navigation and commerce in the seas was guaranteed and regulated by a minimum legal order, and supported by the principle of exclusive jurisdiction of the flag state<sup>3</sup> (Rodrigo, 2020). Nowadays, the UNCLOS includes the concept in its Part VII, section 1, and in particular in Art 89, codifying the "invalidity of claims of sovereignty over the high seas" (United Nations, 1982). However, with the historical evolution of the law of the sea and with the environmental changes, this principle is now encountering some conflicts of interest.

The complete freedom has indeed led to the well-known "tragedy of the commons" (Hardin, 1968). In his 1968 homonymous work, the American ecologist Garrett Hardin highlighted exactly how the human tendency to maximise the own benefits, in a "free-for-all" context, would have rather meant the "ruin for all", as well as to the extinction of many resources and species (Hardin, 1968; Rodrigo, 2020).

That the challenges to common resources resulting from collective actions need to be addressed through a global governance of the marine environment, also to avoid the potential rivalry of the goods between countries, has already been theorised by the

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<sup>3</sup> UNCLOS, Art 92(1): "ships shall sail under the flag of one state only and [...] shall be subject to its exclusive jurisdiction on the high seas".



Economics Nobel Prize winner Elinor Ostrom in her pivotal work “*Governing the Commons*” (Ostrom, 1990; Rodrigo, 2020). The *mare liberum* is indeed in great contrast with the arising concerns about conservation and with the need for stronger regulations previously discussed. Indeed, the limitations set by the UNCLOS to the principle, which still covers a central role in maritime governance, are not sufficient to ensure the sustainable use, protection and preservation of marine resources beyond national jurisdiction embraced in the Preamble of the same Convention (Schrijver & Prislán, 2009; Young, 2016).

### 1.2 The United Nations Convention on The Law of The Sea

The freedom of the seas doctrine suffered a setback in the mid-twentieth century, when the first important claims of the coastal states started to create some tensions. Indeed, the free access of anyone to all sea spaces fuelled a growing concern regarding delicate aspects, such as rights over off-shore resources and fishing, security, conservation, and pollution. Coastal areas in particular were indeed increasingly affected by accidents such as oil spills or by impacts on coastal fish stocks caused by distance fishing fleets (United Nations, 1998; Britannica, 2023).

Furthermore, in the 1960s the ocean reached the highest levels of exploitation, displaying initial indications of depletion, mainly concerning food production (United Nations, 1998).

These sovereignty conflicts between maritime powers, as well as the increasing aspirations toward the exploitation of the seabed, induced some states to challenge the principle of the *mare liberum*, by extending their jurisdiction over marine areas. The first to do so was the United States in 1945, followed by Argentina in 1946. Traditionally, since the eighteenth century, the general right to national jurisdiction over the territorial sea, already acknowledged under international law, was confined to three nautical miles. That limit was derived by the “cannon shot” rule, taking into account the maximum distance covered by a cannon based on the shore, which indeed was three nautical miles (Kent, 1954). The three-mile rule was exceeded during the early post-World War II by many countries, including Eastern European states, Egypt, Saudi Arabia, etc. Their new jurisdictional claim was extended to 12 nautical miles. Some

Latin American countries, between 1947 and 1950, reached 200 miles (United Nations, 1998).

In this context, the need for better management of ocean spaces and resources, revisiting the freedom of the sea principle, was evident and urgent. And that led eventually to what is often considered the “Constitution of the Sea” (Barrett & Barnes, 2016), the 1982 United Nations Convention on the Law of the Sea. With 169 state parties, this Convention is currently the most important legal instrument regulating all matters concerning ocean governance (United Nations, 1998; Barrett & Barnes, 2016; Henderson, 2023).

This achievement was reached after the failing of two other United Nations Conferences on the Law of the Sea, respectively in 1958 and 1960 in Geneva, which aimed at solving the many existing issues concerning the legal framework of the ocean, and in particular of the high seas (Britannica, 2023).

Afterwards, on 01 November 1967, a decisive speech was held at the United Nations General Assembly by Malta's Ambassador to the United Nations, Arvid Pardo. The speech gave voice to the widespread urge for substantive solutions. Pardo indeed highlighted how the contemporary serious risks related to pollution and tensions for sovereignty claims, and in particular, the great potential of the sea floor, could have led to an irreversible conflict scenario. Pardo's proposal regarded indeed the reservation of the ocean floor beyond national jurisdiction to peaceful activities and for the benefit of mankind (Cremin, 1979; Mangone & Burke, 1987; United Nations, 1998).

The many significant steps made in the following years for the protection of the seabed, including the establishment of an Ad Hoc Seabed Committee and the 1972 Seabed Arms Control Treaty, proved to be very useful also for broadening the diplomatic efforts to all ocean issues. Indeed, in 1973 the Third United Nations Conference on the Law of the Sea was convened between New York and Geneva. Nine years later, in 1982, the UNCLOS was adopted (United Nations, 1998; Britannica, 2023). After the first sixty accessions, the Convention entered into force on 16 November 1994<sup>4</sup>.

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<sup>4</sup> as codified in art 24(4) of the 1969 Vienna Convention on The Law of the Treaties, the minimum number of signatories required for a treaty to enter into force can be established by the treaty itself.

The Convention addressed an unprecedented range of issues concerning the ocean. Some of the most important included navigational privileges, boundaries of territorial waters, economic jurisdictions, legal classification of seabed resources beyond national boundaries, passage rights in narrow straits, preservation and governance of marine life, environmental safeguards, regulations for marine research, and notably, a structured process for resolving interstate disputes (Pacheco Castillo, 2022).

Setting jurisdictional limitations was definitely a major aspect to solve. As many countries already exceeded the three-mile rule for territorial waters, asserting their control rather over a twelve-mile area, this latter distance was eventually established. In the territorial waters, States are “free to enforce any law, regulate any use and exploit any resource” (United Nations, 1998). This limit<sup>5</sup> was the result of negotiations reflecting the contrasting interests of coastal states, on the one hand, and naval and maritime powers on the other. The first willing to protect their surrounding waters, the second defending the freedom of movement and commerce.

This debate, already before the Third Conference, was particularly heated on the question of international straits passage. The twelve-mile limit, indeed, would have enclosed more than 100 straits under national jurisdiction, impeding the free navigation. From the negotiations on this issue, the UNCLOS codified in its Section 2 on Transit Passage one of the major principles that became widely acknowledged as customary international law (Pacheco Castillo, 2022). As stated in Article 37, the transit passage right “applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone” (United Nations, 1982). Under the conditions outlined in Article 38, paragraph 2<sup>6</sup>, navigation and overflight by international ships and aircraft cannot be impeded within the straits. To enjoy the transit passage right, however,

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<sup>5</sup> the other maritime zones were set as described in the first section of this dissertation.

<sup>6</sup> Article 38(2) UNCLOS: “[...] solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State”

respect for international rules on safety, traffic, pollution, and peaceful purposes remains mandatory (United Nations, 1998).

The latter principle, falling now under customary international law, is binding not only for countries members of the 1982 Convention but for any existing state. Indeed, for a norm to be considered customary international law, it has to embody two *conditio sine qua non*, respectively the general practice by states and the *opinio juris*, meaning its acknowledgement as binding law. Customary international law is defined by Article 38(b) of the Statute of the International Court of Justice (International Court of Justice, 1945; Pacheco Castillo, 2022).

Other fundamental principles embraced by the UNCLOS and recognised as customary laws include the right to innocent passage in territorial and archipelagic waters, previously mentioned in the first section, the provisions on living resources, mainly Articles 62 and 63, the specifications on strait baselines in Article 7, and the limits of the continental shelf outlined in Article 76 (United Nations, 1982; Mangone & Burke, 1987). The customary nature of the latter, together with that of the Exclusive Economic Zone, was asserted by the International Court of Justice in 1984, in the “*Delimitation of the Maritime Boundary in the Gulf of Maine Area*” case. The inclusion of the EEZ was indeed derived from a previous important declaration<sup>7</sup> of customary law regarding fishery zones, where the coastal State has jurisdiction over the exploration, exploitation, conservation and management of offshore fisheries. Given that State practice had extended this zone to 200 miles, the establishment by the UNCLOS of the EEZ reflected an already existing customary norm. Hence, the 200-mile EEZ has been recognised with the same nature (Mangone & Burke, 1987).

The respect of these principles and of the Convention is granted by the two main legal institutions established by the Convention itself, in Annex I - Resolution I. Specifically, the activities and resources in the subsoil and seabed are regulated and administered by the International Seabed Authority (ISA). On the other hand, ocean-related disputes concerning the application of the Convention are settled by the International Tribunal for the Law of the Sea (ITLOS) (United Nations, 1982; United

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<sup>7</sup> In the ICJ ruling of the 1974 *Fisheries Jurisdiction* case (Mangone & Burke, 1987)

Nations, 1998). The relationship between these bodies and the new High Seas Treaty will be discussed in the following chapter.

## 2. AN ENVIRONMENTAL ASSESSMENT OF THE HIGH SEA

The High Seas, together with the Area, as recognised under International Law and as defined by the 1982 United Nations Convention of the Law of the Sea (UNCLOS), represent the Maritime Areas Beyond National Jurisdiction (Gu, J. 2023; Fletcher School, 2017; Morgera et al., 2023). Until now, indeed, these international waters, as they are also referred to, have not been legally protected or regulated (Gu, J. 2023), despite the other maritime zones closer to the coastlines. The ocean, which occupies more than 70% of the Earth's surface (Fava, 2022) and more than 97% of the living spaces (Laffoley et al., 2019), is indeed divided into six main zones, which are certified and regulated in different sections of the UNCLOS (United Nations, 1982). It is worth briefly describing also the other five, in order to understand the substantial legal difference of their administration compared to the High Seas' lack of regulation.

The extent to which States possess jurisdictional rights over the sea decreases as the distance from the coastlines increases (Fletcher School, 2017). Starting from internal territories, a state exercises jurisdiction over its internal, or inland, waters to the same degree as over the territory itself. Within 12 nautical miles from the baseline, in the so-called Territorial Waters, this complete sovereignty is limited only with regard to the right to innocent passage of foreign vessels. The latter represents a principle well recognised under customary international law, and it is defined in Art 19(1)<sup>8</sup> of the UNCLOS as a navigation “not prejudicial to the peace, good order or security of the coastal State” (United Nations, 1982). If these conditions are respected, and if the passage is “continuous and expeditious” (according to Art 18(2) of the UNCLOS), any foreign vessel shall not be discriminated against or subject to specific requirements<sup>9</sup> (Hakapää & Molenaar, 1999; United Nations, 1982).

Within the 24 nautical miles, in the Contiguous Zone, the State is entitled to the prevention and punishment of “infringement of its customs, fiscal, immigration or

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<sup>8</sup> The right to innocent passage is also granted in archipelagic waters, as stated in Article 52 of the UNCLOS.

<sup>9</sup> Art 24(1) UN Convention on The Law of the Sea.

sanitary laws and regulations within its territory or territorial sea”, as stated in Article 33.

The Contiguous Zone is then embedded in Exclusive Economic Zone, if the State claims the latter, which is still “beyond and adjacent to the territorial sea” (Art. 55). This important maritime area, which is extended to 200 miles, grants to the coastal state “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil” (Art. 56(a)). Furthermore, paragraph b of this provision entitles the state to jurisdiction over the “establishment use of artificial islands, installations, and structures; marine scientific research; and, the protection and preservation of the marine environment”.

The seabed and subsoil beyond the Territorial Sea and generally within the 200 miles<sup>10</sup> are instead comprised in the Continental Shelf, over which the coastal state has sovereign rights to explore and exploit natural resources. This zone is defined and regulated in Part VI of the UN Convention (United Nations, 1982; Pacheco Castillo, 2022).

Finally, beyond the 200 nautical miles, the Areas Beyond National Jurisdiction cover roughly two-thirds of the world’s ocean and half of the Earth's surface (Directorate-General for Maritime Affairs and Fisheries, 2023; Gu, J. 2023; Blasiak et al., 2016). They consist of the waters of the High Seas and the seabed and subsoil of the Area, which are respectively addressed in Part VII and XI of the UN Convention. With 90% of the total marine biomass, ABNJs represent the “largest habitat for life on the planet” (Blasiak et al., 2016; Morgera et al., 2023). However, this incredibly rich and extended marine environment is increasingly threatened due to the lack of regulations, which derives from the “freedom of the sea” principle<sup>11</sup> (Gu, J. 2023). The latter is ensured by UNCLOS through the acknowledgement of the Area as a “Common Heritage of Mankind”<sup>12</sup> in Article 136, and through the numerous freedoms listed in Article 87 (United Nations, 1982).

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<sup>10</sup> Art. 76 outlines some other specific possibilities.

<sup>11</sup> The principle of freedom of the seas will be discussed in the following section

<sup>12</sup> Art 136 UN Convention on The Law of the Sea. This principle, will be further discussed in the second chapter.

Nevertheless, there are crucial and urgent reasons for which substantial protection and regulation are needed (Laffoley et al., 2019). Among them, the role the ocean plays and has always played both in relation to human needs and for the functioning of the entire planet is of fundamental importance (Johansen, 2020).

Humans, on the one hand, have historically taken advantage of the benefits deriving from the marine environment throughout their entire existence (Johansen, 2020). This wide range of benefits to humanity includes “ecological, economic, social, cultural, scientific and food security” (Directorate-General for Maritime Affairs and Fisheries, 2023) aspects. Several coastal communities have always based their subsistence on the resources provided by the sea, which inevitably intersect with the High Seas and deep-sea zones (Morgera et al., 2023).

If these profits have long been considered inexhaustible and taken for granted in human life, what is generally undervalued is the essential relationship between the ocean and climate regulation (Morgera et al., 2023). Indeed, the carbon storage function, through which excessive dioxide and heat are absorbed (Laffoley et al., 2019), together with the great generation of oxygen (Siekiera, 2021), not only preserve the planet's habitability, but are of central relevance in contemporary times for the global warming crisis.

Indeed, nearly one-quarter of carbon dioxide (CO<sub>2</sub>) and 90% of “excess energy”, meaning the surplus of heating deriving from climate change and human activities, is soaked up by the ocean surface (Boyle, 2020; Siekiera, 2021). This important climate-moderating action, however, is being increasingly exasperated, resulting in major threatening consequences (Johansen, 2020). Among the most generally known are ice melting, increase in water temperature, loss of coral reefs and marine ecosystems, as well as depletion of fish stocks, and land rising sea levels (Boyle, 2020). Increasing deoxygenation, meaning a decline in oxygen levels in the water, and acidification are the other most alarming trends in contemporary times (Laffoley et al., 2019; Morgera et al., 2023; Siekiera, 2021).

Regarding acidification, it represents a decrease in the ocean pH caused by this rapid changing of chemical components of seawater (Laffoley et al., 2019; Scott, 2020). Due to the excess of carbon dioxide in the atmosphere, ocean acidity increased by roughly

30 per cent since the Industrial Revolutions of the 18th century (Scott, 2020). Scientific research suggests that calcifying organisms and ecosystems might be severely damaged by this phenomenon of acidification (Scott, 2020). Detrimental effects on, for instance, pteropods, shelled molluscs and mainly coral reefs, 90% of which are already compromised, are evident (Laffoley et al., 2019).

However, scientists lack precise predictions on the possible ripple effects caused by these chemical and temperature alterations. These processes are moving faster and deeper than expected, and some scientific studies indicate that it is not to exclude that the absorbing capacity of the ocean has reached its limit (Siekiera, 2021). This could result in a reverse process, with the release of excessive stored heat and a consequent increase in global warming (Laffoley et al., 2019). Furthermore, the interaction between the ocean and the climate forms a “negative feedback loop”, whereby the more climate change, which is temperate by the absorption of carbon by the ocean, advances, the more this ocean’s climate regulation capacity is undermined (Morgera et al., 2023).

Despite these scientific concerns and the visible dramatic transformations just discussed, ocean acidification, along with climate change impacts on the ocean, is still poorly considered by policymakers, and this is another important reason why global systematic solutions are urgently needed (Scott, 2020).

As previously mentioned, this climate change-related ocean metamorphosis has its most dramatic impacts both on marine biodiversity and on coastal and island communities (Siekiera, 2021; Boyle, 2020; Goyal & Gupta, 2020; Laffoley et al., 2019; Morgera et al., 2023). The latter are indeed encountering many difficulties due to their livelihood dependence on seafood and on sea level conditions, as well as on meteorological events. Hence, on the one hand, the decline of fish stocks for instance results in severe economic losses (Paulus, 2021; Boyle, 2020) for these communities, which belong mainly to the Global South, and which often represent the poorest and most vulnerable populations (Morgera et al., 2023).

On the other hand, the so-called “SIDS”, Small Island Developing States, as well as all coastlines, are dangerously threatened by the rise in sea levels. The damages provoked by the latter, including damages and infiltrations to the freshwater aquifers and



inundations, are becoming more and more frequent (Boyle, 2020; Goyal & Gupta, 2020).

Regarding instead marine biodiversity, the distribution of species of organisms, ranging from plankton to mammals, is experiencing significant alterations due to the change in climate and ocean conditions (Laffoley et al., 2019). More than 20% of coral reefs and coastal ecosystems are already threatened, and so are more than one-third of mammals (Siekiera, 2021). Of the 2.2 million ocean species, 90% of which have not been described yet, many are at risk of potential extinction (Paulus, 2021).

A crucial aspect related to biodiversity is that of resilience. Biodiversity is indeed crucial for the preservation of ecosystem functions. Ocean-increasing temperatures and acidification, which are considered long-term disturbances, undermine this resilient capacity, making the return to the original state possibly unachievable. The outcome is again a higher rate of biodiversity loss (Paulus, 2021).

Coastal areas and marine ecosystems and biodiversity are ultimately interconnected and linked by an “ecological connectivity”, which implies that the conditions of the Areas Beyond National Jurisdiction are of vital importance also for them (Morgera et al., 2023; Laffoley et al., 2019).

The threats and changes discussed above are mainly traceable to human activities. Indeed, if in the past the ABNJ were considered inaccessible and hence the anthropogenic impacts were limited, with recent industrial and technological advancements states rapidly extended their activities beyond the 200 nautical miles (Blasiak et al., 2016).

Among these activities, the most impactful include shipping, overfishing (deep-sea fishing as well), bioprospecting, deep-sea mining, and illegal practices (Tessnow-von Wysocki & Vadrot, 2020; Gu, J. 2023).

Currently, on the one hand, there are no substantial regulations to tackle overfishing and to ensure the sustainable management of fisheries. Indeed, no limitations are imposed by the International Law of the Sea on fishing and natural resources in the High Seas (Fletcher School, 2017), with an increase of overexploited fisheries to 93%, according to FAO’s data of 2018 (Laffoley et al., 2019). Exploitation, together with climate

change, is severely compromising the ocean's productive capacity and provoking fish stocks to dwindle (Laffoley et al., 2019; Paulus, 2021).

On the other hand, the commercial mining zone spans an estimated area of more than four million square kilometres, with an increasing number of countries interested in the exploration and exploitation of the seabed areas (Laffoley et al., 2019). This requires some further specifications on the “deep-sea”, classified by the UNCLOS as the abovementioned Area.

The latter includes all the ocean zones below 200 meters, and it is still largely unexplored and generally less known. Indeed, surveys in the deep sea have been run only for a few decades, hence past and future ecosystem changes are very difficult to predict. Yet, threats related to exploitation in these areas are as dramatic as on the surface (Paulus, 2021). This is because the deep sea is incredibly rich in precious biotic and abiotic resources for human life and commercial aims. These include for instance fish, oil, gas, minerals and metals (Morgera et al., 2023), and are related to the specific activities of intense fishing through bottom trawling, gas and oil drilling and deep-sea mining. Marine biodiversity is once again threatened also by the change in sediment topography (Blasiak et al., 2016; Laffoley et al., 2019; Paulus, 2021).

The extraction of materials such as zinc, copper or gold is surely fundamental also for renewable energy technologies; however, the scarcity of regulations makes it difficult to ensure responsible and sustainable mining and to confine it to the specific use for tackling global emissions (Paulus, 2021).

However, if threats to the surface zones are widely acknowledged, regarding the deep sea there tends to be a general opinion that climate change impacts should be less negative and dramatic there. This underestimation is fuelled also by insufficient knowledge about important aspects of ecology and biodiversity in the deep sea, mainly in ABNJs. International cooperation is once again urgently needed, because broadening knowledge is essential to promote effective solutions for environmental protection and climate change mitigation (Morgera et al., 2023).

Ultimately, the important carbon sink, oxygen production and climate regulation role of the deep sea must not be considered less fundamental than the more well-known ocean zones (Paulus, 2021; Morgera et al., 2023).

An important theme arises from this discussion on human exploration and exploitation of resources in marine Areas Beyond National Jurisdiction. It regards the inequities lying behind these activities. Indeed, only a minimal number of countries and companies, mainly coming from the Global North, have access to the patents and technologies necessary for research and biodiscovery and for gaining the variety of benefits offered by the marine environment (Blasiak et al., 2016; Morgera et al., 2023). This is of course exacerbated when dealing with the deep sea areas. This is problematic not only for the uneven distribution of resources, that penalises the poorest countries, but also for the sharing of knowledge and for promoting the general sustainable conservation of biodiversity and ecosystems (Morgera et al., 2023). The urgent need to create a wider net of cooperation, including the rest of the developing and developed countries, reflects Sustainable Development Goal number 10, together with number 14<sup>13</sup>. The first is indeed aimed at reducing existing inequalities, and the second at “conserve and sustainably use the oceans, seas and marine resources” (Blasiak et al., 2016; SDG 10&14). Ultimately, the international legal framework must be strengthened in many aspects, regarding information sharing, funding, benefit distribution, and, mainly, sustainable access to and use of the ocean’s resources (Morgera et al., 2023).

### *2.1 Gaps in the UNCLOS*

Many reasons behind the urgent need for the new High Seas Treaty have already been concluded previously in this chapter, focusing mainly on the environmental issues to be solved. In addition to this, however, the incomplete and insufficient nature of the 1982 UN Convention, regarding the protection and regulation of international waters and their biodiversity ecosystems, must also be highlighted. Before the entering into force of the BBNJ Treaty, indeed, a comprehensive legal framework for these aspects will still be lacking (Deasy, 2023).

In particular, four macro areas have been granted central importance in the High Seas Treaty, to ensure substantive protection of the ocean and better sharing of resources, and

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<sup>13</sup> United Nations. (2015). *Transforming our world: the 2030 Agenda for Sustainable Development*. Resolution adopted by the General Assembly on 25 September 2015. A/RES/70/1.

to fill the main gaps of the UNCLOS. Respectively, the collection and sharing of marine genetic resources, the area-based management tools, the environmental impact assessments, and the capacity building and technology transfer (Henderson, 2023). These fundamental provisions will be further analysed in the following chapter.

In conclusion, the general lack of international regulations and of a global management body for the High Seas and the Area proves to be a crucial contemporary issue, which is hindering marine protection and, as a consequence, accelerating the climate and environmental crisis. The existing fragmented regional framework is not sufficient anymore (Tessnow-von Wysocki & Vadrot, 2020). Hence, a new international agreement under the UNCLOS, which would represent “an overarching framework for conservation and management of biological diversity in beyond areas of national jurisdiction (BBNJ)” (Blasiak et al., 2016) is urgently needed (Laffoley et al., 2019; Tessnow-von Wysocki & Vadrot, 2020)

## **Conclusion**

This chapter provided many arguments to understand how crucial the need for new regulations and a new, specific, treaty for the High Seas is (Blasiak et al., 2016; Britannica, 2023).

The oceans are suffering increasing issues related to climate change and human exploitation, which have led to irreversible threats to the marine environment as well as to many vulnerable coastal communities and the entire planet. Furthermore, the lack of regulations in the Areas Beyond National Jurisdiction, which are still dominated by the old principle of freedom of the sea, has resulted in a level of human exploitation of the marine resources and the seabed way higher than the sustainable standards. Human activities are not only threatening marine ecosystems and biodiversity, but they are also highly exclusive, conducted only by a few maritime powers. The majority of the countries, and mainly the most underdeveloped ones, are completely left out of the sharing of resources and knowledge.

Additionally, the 1982 UN Convention on the Law of the Sea, with its broad and general nature, is not sufficient to tackle these specific and urgent issues related to the ABNJs. It indeed involves several crucial gaps that must be filled as soon as possible.

In conclusion, to recall the words of the UN Secretary-General António Guterres, the adoption of the new High Seas Treaty, which will be deeply discussed in the following chapter, is a “massive victory of multilateralism” to “counter the destructive trends facing ocean health” and to “reach the goals of the 2030 Agenda for Sustainable Development and the Kunming-Montreal Global Biodiversity Framework” (United Nations, 2023).

**CHAPTER II**  
**THE BIODIVERSITY BEYOND NATIONAL JURISDICTION AGREEMENT**  
*Historical Background and Content Analysis*

This second chapter is aimed at providing a historical overview of the negotiations that led to the approval of the BBNJ Agreement, as well as a brief analysis of the main contents of the latter. With this purpose, the chapter is divided into three main sections.

Respectively, the first presents the background of the Treaty, with the main steps taken through twenty years of negotiations. From the first Ad Hoc Open-ended Informal Working Group created in 2004 by the UN General Assembly, to the preliminary phase of discussions until 2017, including the fundamental 2011 package of issues which will become the backbone of the Agreement. Afterwards, five main sessions were held by the newly established Intergovernmental Conference, respectively in 2018, March-April 2019, August 2019, March 2022, August 2022, and February - March 2023, until the final approval with a standing ovation on the 4th of March. An additional paragraph analyses the nature of these negotiations and the main oppositions at the centre of them. The second section opens instead the analysis of the Agreement itself, with a first focus on the core aims and principles presented in the First Part of the latter. A major focus is given to the Common Heritage of Mankind principle, which mainly represents the interests of the developing states, as opposed to the *mare liberum* principle discussed in the first chapter and sought by the more developed countries. The inclusion of the concept of CHM is indeed crucial for establishing a co-partnership and cost-sharing regime necessary to reach the targets and objectives of the Treaty.

To follow, the third section analyses the four main topics of the Agreement, covering parts II to V of the latter. As already defined in the 2011 package, these topics include Marine Genetic Resources, with mention of Digital Sequence Information (section 3.1), Area Based Management Tools, embracing also Marine Protected Areas (3.2), Environmental Impact Assessments, with mention of the Strategic Environmental Assessments (3.3), and Capacity Building and Transfer of Marine Technology (3.4). These themes represent the main gaps of the UN Convention on The Law of the Sea discussed in the first chapter, and for this reason, are incredibly innovative and

important. For each of these four sub-sections, the aim is to provide a brief overview of the core aspects, including definitions, legal procedures, debated issues, and peculiar features.

Finally, the last paragraph draws the conclusions of this second chapter.

## **1. HISTORY, BACKGROUND AND NEGOTIATIONS**

Given the premises discussed in the first chapter, at the beginning of the new millennium, most States shared the desire for a new legal instrument of governance for the sustainable use and conservation of biodiversity beyond national jurisdiction (BBNJ). After two decades of diplomatic effort and negotiations, in March 2023 the international legally binding agreement under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction was finally approved (Scovazzi, 2016; Directorate-General for Maritime Affairs and Fisheries, 2023; Gu, 2023). Also known as the BBNJ Treaty, or the High Seas Treaty, it represents “the most important ocean agreement to be adopted in more than a quarter century” (Bodansky, 2024).

The first step was taken in 2004, when the UN General Assembly established an “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” (GARD, 2023; Gu, 2023; IUCN, 2023; Bodansky, 2024; Kuc, 2024). From 2004 until 2017, the formation of a preparatory Commission and the definition of the negotiation methods mainly characterised a preliminary phase.

In particular, in 2006 Resolution 61/105 was adopted by the UN General Assembly during the first meeting of the Informal Working Group (InforMEA, 2023). This resolution is aimed at prohibiting fishing on “species for which population size has not yet been determined” and at promoting “sustainable bottom fishing in areas beyond national jurisdiction” (Gu, 2023). It is interesting to notice that the European Union had already expressed its complete support for the negotiations of a new implementing agreement in that early stage (Bodansky, 2024).

After three other meetings, in 2011 the Informal Working Group agreed upon a package of issues that will represent the basis for the later negotiations of the BBNJ Treaty (Gu,

2023; InforMEA, 2023; IUCN, 2023; Bodansky, 2024). This important package included “together and as a whole” (InforMEA, 2023), meaning that “none of them can be separated from the others” (Scovazzi, 2016), the four main topics that will be addressed by the final Agreement. Namely, marine genetic resources (MGRs), including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments, and capacity-building with the transfer of marine technology (Scovazzi, 2016; IUCN, 2023). The negotiations could not start yet, however, due to the opposition of some countries, including the United States, Russia and Japan, for which adding a new treaty to the many others addressing the BBNJ was unnecessary (Bodansky, 2024).

More than 190 are indeed the existing legal instruments on this subject matter. It is worth mentioning a few of them, to understand the framework in which the new High Seas Treaty should be integrated, and which those opposing countries were defending. In particular, in addition to the UNCLOS, the Convention on Biological Diversity (CBD), which complements the BBNJ Agreement by addressing biodiversity within national jurisdiction; The International Convention for the Regulation of Pollution from Ships (MARPOL); The Convention on International Trade in Endangered Species (CITES); Species-specific agreements such as the International Convention for the Regulation of Whaling; The UNEP Regional Seas Program (Bodansky, 2024).

The identified issues have then been specifically addressed during two intersessional workshops held in 2013. After the definition of the feasibility, scope and parameters of an international instrument under UNCLOS, in 2015 the Ad Hoc Informal Open-Ended Working Group completed the work and submitted the defined recommendations to the UN General Assembly. The latter ultimately adopted Resolution 69/292, establishing a Preparatory Committee to develop the legally binding instrument for these specific issues (Scovazzi, 2016; GARD, 2023; Gu, 2023; InforMEA, 2023). Of equal importance, the General Assembly also deliberated that the process “should not undermine existing legal instruments and frameworks and relevant global, regional and sectoral bodies”, as well as not affecting “the legal status of parties and non-parties to UNCLOS or any other related agreements”(InforMEA, 2023).



It was only in 2017 that the General Assembly established<sup>14</sup> the Intergovernmental Conference (IGC) which will lead to the approval of the BBNJ Treaty through five main sessions of negotiations in six years (GARD, 2023; Gu 2023; Kuc, 2024).

Mrs. Rena Lee of Singapore, also referred to as “the mother of BBNJ” (Bodansky, 2024), was elected president of the Conference. The UN Under-Secretary-General for Legal Affairs and United Nations Legal Counsel Mr. Miguel de Serpa Soares, was instead appointed as Secretary-General. Finally, the UN Secretariat Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs represented the Secretariat of the Conference (InforMEA, 2023).

The first session was convened by the IGC in 2018, between the 7th and the 14th of September. Given that President Lee was not entitled to issue a draft text yet, IGC1 was aimed at creating the basis for the zero-draft through questions and discussions. The same went for the second session, held between 25 March and 5 April 2019, with more detailed “aids to negotiations” and choices regarding textual components of the Agreement (IUCN, 2023; Bodansky, 2024). In the third session (19-30 August 2019), the draft text was finally circulated by President Lee for negotiations. The text included the 2011 four issues package, as well as other cross-cutting provisions (De Lucia, 2020; IUCN, 2023).

The Covid-19 pandemic forced an interruption of the in-person sessions until March 2022, when IGC4 was convened. During these two years, however, President Lee ensured that informal discussions continued online, mainly through the virtual program “High Seas Treaty Dialogue” (Bodansky, 2024).

Nevertheless, the fourth restricted session (with only two representatives per country and no NGOs allowed to participate) did not prove to be satisfactory, with several disagreements still unresolved. Hence, the UN General Assembly had to authorise a fifth conference from 15 to 26 August 2022. Despite some progress regarding technical questions, thanks to the new “homework groups” established by the President, this session was not conclusive either. The core issues, in particular regarding the section of the agreement concerning Marine Genetic Resources, but also the voting rules of the

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<sup>14</sup> through Resolution 72/249

Conference Of the Parties<sup>15</sup> or the Environmental Impact Assessments, were still hugely debated (Derrig, 2022; IUCN, 2023; Bodansky, 2024).

Recalling the words of the UN Secretary-General António Guterres at the United Nations Ocean Conference in Lisbon in July 2022, “Some people still think they are powerful enough to think international waters should be theirs”. States’ egoism ultimately represented the “greatest obstacle” to the conclusion of the treaty (Derrig, 2022).

Between the 20th of February and the 3rd of March 2023, a resumed session of IGC5 was held, resulting in the last of the five conferences. After a final thirty-six straight hours rush of negotiations, on Saturday the fourth of March States, together with academic institutions, non-governmental organizations, civil society and the scientific community, reached the deal (IUCN, 2023; Nguyen et al., 2023; United Nations, 2023; Bodansky, 2024). With a standing ovation at the UN Headquarters in New York City, President Lee proclaimed: “Ladies and gentlemen, the ship has reached the shore”, and officially closed the negotiations (United Nations, 2023).

The BBNJ Agreement was then translated into the five official UN languages and formally adopted by consensus on 19 June 2023 (Gu, 2023; IUCN, 2023; Bodansky, 2024; Kuc, 2024). On the 20th of September, it was opened for signatures, and so far it has been signed by 88 countries. These include all the EU Member States, as well as China and even the United States, although not being members of the UNCLOS (Loctier, 2024).

However, only Palau, Chile, Belize, the Seychelles and Monaco have already ratified the BBNJ Agreement. Given that at least 60 ratifications are required for the Treaty to come into force, according to Article 68 of the draft agreement, that date remains unknown (Deasy, 2023; Bodansky, 2024; Loctier, 2024). It took twelve years for UNCLOS to be ratified, and there is no certainty the process will be shorter with this Treaty (Deasy, 2023). One hundred twenty days after the minimum threshold of ratification is reached, the Agreement will finally come into effect (UN Environment Program, 2023). Afterwards, Article 47 stipulates that within one year of the Agreement

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<sup>15</sup> The BBNJ Agreement, in Part VI, establishes a branch of new institutions to enforce and implement the provisions set out in the other part (Bodansky, 2024). In particular, it creates a Conference of the Parties, as presented in Article 47, a Scientific and Technical Body (Art. 49), a Secretariat (Art. 50) and a Clearing-House Mechanism (Art. 51) (United Nations, 2023).

coming into effect, its inaugural Conference of the Parties (COP) will be convened. During this meeting, pivotal decisions may be made, such as approving a budget and forming subsidiary bodies to aid in implementing the Agreement (Blasiak & Jouffray, 2024).

### *1.1 Nature of the negotiations and opposing parties*

Recalling the words<sup>16</sup> of the Italian Ambassador in Hanoi Marco Della Seta, who participated in the negotiations, those have been “fairly classic discussions, with traditional interests and oppositions”. However, as highlighted by the Ambassador, although being characterised by the usual “role of the presidency, and with a final rush in which no sleep”, the geopolitical context at the basis of these negotiations is completely new. The ongoing “crisis of multilateralism and the several economic crises have decreased the urgency of environmental issues” (Della Seta, 2024). This is why, the adoption of this High Seas Treaty is considered “the most important accomplishment for multilateralism in decades”, as well as “the most significant advance in international ocean law since the adoption of UNCLOS” (IUCN, 2023).

As previously mentioned, different visions and opposing factions characterised the long years of discussions and negotiations. In particular, the traditional divergence of interests between developed and developing countries was vivid. Respectively, the first seeking the conservation of the environment and biodiversity through Marine Protected Areas and Environmental Impact Assessments. On the other hand, the second fighting for a fair share of benefits from Marine Genetic Resources and for technological support, through a more resource-oriented regime. The only solution was eventually to include all these core themes in the Agreement, which ultimately represents four treaties merged into one (Bodansky, 2024).

The other main opposition regarded the inclusion of the MGRs from Areas Beyond National Jurisdiction in the principle of the Common Heritage of Humankind, against the supporters of the freedom of the seas. Those claiming new legal instruments and

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<sup>16</sup> I personally collected these informations from the Ambassador's speech during the conference “Biodiversity and the Sea”, held on the 21st of March, 2024, at the University of Bologna *Alma Mater Studiorum*. In this dissertation I will report only the information that can not be drawn from published sources.

bodies for the protection of the ABNJ, versus those willing to keep and protect the authority of the existing ones (Bodansky, 2024). Russia in particular, as narrated by Ambassador Della Seta, opposed the new treaty to the end, and had a dissident position included in comments in the report on the negotiations (Della Seta, 2024). A further debated issue concerned the strict defence of freedom of research, as opposed to the technology transfer for research benefit, and whether to make this technology transfer, as well as funding and capacity building mandatory or voluntary (Bodansky, 2024).

## **2. AIMS AND PRINCIPLES: *Part I of the Agreement***

Article 2 of the Draft Agreement published by the UN General Assembly on the 4th of March, 2023, clearly presents the core objective of the High Seas Treaty. Namely, “to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” (United Nations, 2023). The article further specifies how such an aim is to be intended “for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination” (United Nations, 2023; Kuc, 2024).

Through its 75 articles, the Agreement draws the guidelines to reach exactly the protection of the marine environment and its responsible and sustainable use sanctioned by Article 2 (Hemingway Jaynes, 2023; UN Environment Program, 2023). In particular, the second part of the provision, by highlighting the long-term nature of the objective, makes the achievement of the Kunming-Montreal 30x30 target more realistic (UN Environment Program, 2023). The latter, agreed in December 2022 within the Global Biodiversity Framework of COP15, seeks to conserve and manage 30% of land and sea by 2030 (Directorate-General for Maritime Affairs and Fisheries, 2023).

Interesting to notice about the Article 2 provision is also the equal importance given to conservation, on the one hand, and sustainable use on the other. This highlights how this Treaty, although aimed at preserving the ocean ecosystems, does not intend to preclude active development, but rather to regulate it (UN Environment Program, 2023; Bodansky, 2024).

More debated during the negotiations was the question of which overarching

principles and approaches to be included in the Agreement. Eventually, fourteen of them have been listed in one provision, Article 7, with the aim of guiding the Parties in achieving the objectives abovementioned<sup>17</sup> (United Nations, 2023; Bodansky, 2024). These include, among others, the polluter-pays principles, fair and equitable sharing of benefits, the precautionary principle, the use of relevant traditional knowledge of Indigenous Peoples and local communities, where available, etc (United Nations, 2023). For the sake of importance, only paragraphs b and c of Article 7 will be discussed. Namely, the principle of the Common Heritage of Mankind and the Freedom of the High Seas. (United Nations, 2023)

Indeed, from the very beginning of the discussions in 2004, crucial tensions derived from the opposing defence of these two principles. Although potentially competitive, both have eventually been included in the Treaty, in paragraphs b and c of Article 7 (De Lucia, 2020; GARD, 2023; Bodansky, 2024).

The first principle, extensively discussed in the first chapter of this dissertation, was promoted by developed countries, including the United States, together with the freedom of marine scientific research. In contrast, developing states, including the largest G77 Group, fought to ensure that the Common Heritage of Humankind principle underpinned the Agreement, and in particular marine genetic resources in ABNJ (Derrig, 2022; Bodansky, 2024).

The history of this principle can be traced back to the twenty-second session of the UN General Assembly, where for the first time it was coined by Arvid Pardo, Ambassador of the Permanent Mission of Malta to the United Nations, in a memorable speech (Scovazzi, 2015). Indeed, Ambassador Pardo, in the name of his country, presented the formal question of “reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind” (UN General Assembly, 1967). This very innovative and specific proposal was derived from the increasing concern of developing countries with regard to the national appropriation and utilisation of the seabed and ocean floor by the more technologically advanced nations (Arnold, 1975). It was indeed expected that the recent technological developments would have led to further exploitation of the subsoil for the polymetallic

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<sup>17</sup> Article 7, Part I, begins as follows: “In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches”.

nodules and minerals lying there. In brief, “the strong would get stronger, the rich richer” (Scovazzi, 2015).

As a new concept, it had to be given a legal meaning. To fully understand the latter, it is necessary to analyse all the elements this principle includes. Namely, the term “common” indicated something “shared in respect to title, use or enjoyment, without apportionment or division into individual parts” (Arnold, 1975).

Heritage, instead, represents someone’s patrimony, possibly handed down from the past. Regarding the choice of this specific term, instead of a more generic “good”, Pardo took inspiration from Roman Law. During a Conference on the Common Heritage of Mankind at the University of Bologna in 1983, the Ambassador explained indeed how, according to Roman Law, the owner of an asset has infinite power over it (*ius utendi et abutendi*, meaning the right of using and consuming something). The concept of patrimony, instead, promotes the idea of well-managing the asset, which has to be handed down, and hence not dissipated (Scovazzi, 2024)<sup>18</sup>.

Finally, “mankind” encompasses humanity as a whole, represented by several nations. Recognising the seabed in the ABNJ as the common heritage of mankind ultimately means entrusting it to worldwide common ownership (Arnold, 1975). In other words, States have a legal obligation to act in the collective interests of humanity, rather than for individual or national gains, to safeguard and maintain biodiversity beyond their territorial waters (GARD, 2023).

The Maltese proposal has been eventually embodied in Article 1 of UN General Assembly Resolution 2749, Declaration of Principles Governing the Seabed and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (Arnold, 1975). It has been recognised in the UN Convention on the Law of the Sea, in particular in its part XI on the seabed regime (Scovazzi, 2015; Derrig, 2022). Although the validity of the principle and its relevance for the Area was by then unanimously acknowledged, during the negotiations of the BBNJ Agreement the extension of its applicability to other ocean aspects, such as Marine Genetic Resources, was highly debated (Lorca & Derrig, 2023).

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<sup>18</sup> I collected this information from Professor Tullio Scovazzi's speech during the conference “Biodiversity and the Sea”, held on the 21st of March, 2024, at the University of Bologna *Alma Mater Studiorum*. Professor Scovazzi personally asked Ambassador Pardo about the origin of the term “heritage”, and what I reported in this dissertation is the answer he received.

Nonetheless, the inclusion of this principle also in the new High Seas Treaty was inevitable and fundamental, representing a crucial instrument to fight the contemporary ecological crisis (Lorca & Derrig, 2023). Indeed, a regime of Common Heritage of Mankind integrates the dual goals of the Agreement: the conservation and sustainable utilisation of marine biological diversity, as well as the establishment of a fair ocean governance framework that benefits all nations worldwide (Scovazzi, 2015).

By appealing to the interests of humanity as a whole, the principle promotes the equitable distribution of benefits, as well as support to developing countries. Recalling once again Arvid Pardo's words, "the use of the common heritage requires a system of management involving all of the users. Although not everybody necessarily has to share to the same extent, everybody participates in management" (Van Dyke et al., 1993).

In conclusion, this principle is particularly suited to conservation efforts because it transforms a global resource into a regulated system, rather than one of unrestricted access (Lorca & Derrig, 2023).

### **3. THE FOUR CORE CONTENT ELEMENTS: *Parts II to V of the Agreement***

#### ***3.1 Marine Genetic Resources - Part II***

States' interest towards Marine Genetic Resources is experiencing an increasing trend, which raises a question of appropriate international governance to reach fair and equitable benefit sharing. Part II of the BBNJ Agreement focuses on this aim, including a regime of monetary benefit sharing (IUCN, 2023).

Paragraph 8 of the first Article of the Treaty defines Marine Genetic Resources as "any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value" (United Nations, 2023), recalling the definitions present in the 1992 Convention on Biological Diversity and the 2010 Nagoya Protocol (InforMEA, 2023). The genes that enable many organisms, especially those living in the harsh environment of the Area, to adapt to the most extreme conditions, can be of incredible utility for scientific progress and for commercial products (Scovazzi, 2015). Since the first discoveries in the 1960s, MGRs have proved to have a wide range of uses in several fields, including medicine, cosmetics, insecticides, bioremediation, and many others (InforMEA, 2023; Bodansky 2024).

However, these important resources are still highly understudied, and the little knowledge has been gained only by those more developed countries with the necessary financial capacity and technological means to carry out the specific research (these could include, among others, oceanographic vessels, submersible vehicles, molecular biology technology, etc) (Scovazzi, 2015; IUCN, 2023). The accessibility gap between developed and developing countries to this field of knowledge made this chapter the most debated during the negotiations, recalling once again the opposition between freedom of the seas and the Common Heritage Principle. Ultimately, the BBNJ Agreement embraces both principles in Article 9, with sharing and technological innovation coexisting (Bodansky, 2024).

A core issue was then to ensure the most “fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on MGRs of areas beyond national jurisdiction”<sup>19</sup> (United Nations, 2023; Bodansky 2024). This objective is now granted by Article 14 of the Treaty, as well as in Article 9(a) on the objectives of Part II (United Nations, 2023).

Ultimately, the Agreement embraces a set of rules to govern sustainable activities related to MGRs and their digital sequence information (DSI)<sup>20</sup> and to regulate monetary and non-monetary benefits. For the achievement of these purposes, specific institutions are established in other parts of the Treaty, in particular the Clearing-House Mechanism (Article 51) and a special fund (Article 52(4)), as well as an “access and benefit-sharing committee” (Article 15) (IUCN, 2023). The respect of these rules is then ensured by a notification system (Article 12), aimed at promoting the sharing of information, which is an important non-monetary benefit, and granting transparency (United Nations, 2023). Monetary benefits, on the other hand, are granted through decoupled payments (developed states are required to pay an amount equal to half of

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<sup>19</sup> Article 9(a) enshrines the following objective: “the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.

<sup>20</sup> As in the Nagoya Protocol and in the International Treaty on Plant Genetic Resource the DSI is not even mentioned, its inclusion in the BBNJ Agreement was opposed by many countries, including the United States. A DSI regime was started in 2022, and is now enshrined in Article 10(1) of the Treaty. However, no definition is given of this intangible component, neither in the Treaty nor elsewhere (Bodansky, 2024).



their assessed contribution to the Agreement’s administrative budget)<sup>21</sup>, reviewed by the Conference of the Parties (IUCN, 2023; Bodansky, 2024).

### *3.2 Area-Based Management Tools, Including Marine Protected Areas - Part III*

Fundamental to the objectives of ecological protection and conservation is the section of the Agreement (Part III) allowing for and regulating Area-Based Management Tools (ABMTs). These are defined in Paragraph 1 of the first Article of the Treaty as “a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement” (United Nations, 2023).

In general, ABMTs embrace several management measures, which are aimed at regulating human activities in order to avoid damage to the ecosystems, resources, or ecological processes, as well as granting the efficiency of scientific research or protecting natural and cultural sites (InforMEA, 2023). The urge for granting these aims and addressing marine degradation with additional measures was highlighted already in the 1992 United Nations’ Agenda 21. This was then strengthened by the 2002 Plan of Implementation of the World Summit on Sustainable Development, with specific mention of Marine Protected Areas (MPAs) (Scovazzi, 2004).

The latter have eventually been included in the ABMTs section of the High Seas Treaty, which is innovative compared to several existing legal instruments. MPAs represent key measures for long-term conservation and restoration of biodiversity, and which are still underdeveloped in the High Seas (Jiang & Guo, 2023). Furthermore, their inclusion strengthens the possibility of reaching the Kunming-Montreal Global Biodiversity Framework 30x30 target. The latter, indeed, requires “ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures” for its achievement (UN Environment Program, 2022). This objective can be perfectly related to Article 17 of the BBNJ Agreement, which states as its first objective “Conserve and sustainably use areas requiring protection, [...], with ecologically representative and well-connected networks of marine protected areas” (IUCN, 2023; United Nations, 2023; Bodansky, 2024).

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<sup>21</sup> According to Article 14(6)

Before the negotiations of this Treaty, only a few regional instruments, such as the Convention for the Protection of the Marine Environment of the North-East Atlantic, provided for the establishment of ABMTs in areas beyond national jurisdiction. A further reason why this third section is particularly relevant for providing an “overarching legal framework” (IUCN, 2023).

The BBNJ Agreement allows for proposals by Parties to establish ABMTs (Article 19(1)), through a specific procedure. The main elements of the latter include “inclusive, transparent and open consultations” (Article 21), with equal importance for this purpose given also to Indigenous People; a review of the proposal in question by the Scientific and Technical Body (Article 20), and the approval by the Conference of the Parties (Article 22) (IUCN, 2023; Bodansky, 2024; United Nations, 2023). Another relevant aspect regards the decision-making process, which involves a three-quarter majority vote and allows for the possibility of opting-out from ABMTs. This last option is the fruit of negotiated compromises to avoid the boycott by a few Parties. Several constraints are however linked to the opting-out, which requires among others, a specific written explanation, the proposal of alternative measures and avoiding undermining the taken decision (IUCN, 2023).

Finally, the importance of support towards developing States Parties “through capacity-building and the development and transfer of marine technology” (Article 17(e)) with regards to ABMTs and Marine Protected Areas, strengthened in the list of objectives of the section, is a further innovative and crucial feature that is worth being highlighted (IUCN, 2023).

### *3.3 Environmental Impact Assessment - Part IV*

Defined in Article 1, Paragraph 7, of the BBNJ Agreement as “a process to identify and evaluate the potential impacts of an activity to inform decision-making”, Environmental Impact Assessments (EIAs) represent fundamental means for policymakers to acknowledge the impacts of projects on the environment, and to reduce possible negative outcomes (IUCN, 2023).

These kinds of tools are not new, and are represented by regional, national and international legal instruments. However, once again, there still are no overarching and uniform requirements in the context of ABNJs (IUCN, 2023). The most important

provisions codifying environmental assessment, although not mentioning specifically EIAs, can be found in the UN Convention on the Law of the Sea, and served as the basis for this fourth part of the BBNJ Agreement (IUCN, 2023; Bodansky, 2024). According to Article 206 of the UNCLOS, indeed, States have the duty to provide records and “assess the potential effects of such activities on the marine environment” when they “have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes” (UNCLOS, 1982). The High Seas Treaty poses as its first objective of this section (Article 27(a)) the operationalisation of the UNCLOS provisions through “processes, thresholds and other requirements for conducting and reporting assessments by Parties” (United Nations; 2023). Ultimately, the principal aim is to provide better common management of human activities that could damage biodiversity and ecosystems in ABNJs, being these activities conducted either in national or international waters (IUCN, 2023). The broadening of the scope also to activities conducted under national jurisdiction whenever they potentially have negative repercussions on the high seas, which animated a core debate during the negotiations, is counterbalanced by a lack of exclusivity of the Agreement with regards to EIAs. Parties are allowed, indeed, to prefer a national or a different international process (Articles 28 and 29), provided that the impact assessments are kept publicly available through the Clearing-House Mechanism and that the activity remains monitored. The main aim is ultimately to grant transparency, international scrutiny and environmental integrity (Bodansky, 2024).

A second hugely debated issue regarded the minimum threshold for an Environmental Impact Assessment to be triggered. Recalling what is stated in the UNCLOS, States should conduct or require an assessment only when they find “reasonable grounds” to do that (UNCLOS, 1982). This represents a pretty high threshold, which allows for a wide degree of freedom of choice. Obviously, this model was supported by the more developed countries, including the United States. On the other hand, developing countries and groups, such as The Pacific Small Island Developing States, fought to lower that threshold, hence imposing EIAs on a larger number of activities, from which they could be more negatively affected (Bodansky, 2024). The first paragraph of Article 30 codifies the compromise eventually reached, which imposes a screening of the activity by the responsible State whenever such an activity “may have more than a

minor or transitory effect on the marine environment, or the effects of the activity are unknown or poorly understood” (United Nations, 2023).

Finally, the Agreement includes in its objectives, although without giving them a mandatory nature, the Strategic Environmental Assessments (Article 27(d)) (InforMEA, 2023; IUCN, 2023). The latter, codified in Article 39, concerns the broader category of policies, plans and programmes (Ahmed et al., 2005), instead of specific activities, and the assessment of their “potential impact on the marine environment” (United Nations, 2023).

### 3.4 Capacity Building and Transfer of Marine Technology (CBTMT) - Part V

Equity represents one of the core principles of the BBNJ Agreement, codified in Article 7(d) (United Nations, 2023). This last major pillar of capacity building and transfer of marine technology is what most serves the realisation of this principle (IUCN, 2023). The general achievement of the Treaty’s objectives by all Parties is the central aim of this section, which is consequentially addressed as basic operational means in all the other three thematic parts (Bodansky, 2024). For this purpose, the support towards those developing states lacking the necessary means is undoubtedly fundamental, a *conditio sine qua non* (InforMEA, 2023; IUCN, 2023). Given that this urge was overly recognised, this has been the first part to be agreed upon (Bodansky, 2024).

Given that the UNCLOS does not define capacity building or TBT, it has been worth recalling the respective definitions from other legal instruments for further understanding (InforMEA, 2023). On the one hand, the first instrument includes measures such as information sharing, training or research programs, technological cooperation, as well as practical provision of tools and services needed. According, on the other hand, to the Intergovernmental Oceanographic Commission, marine technology should include, among others, sampling, research and observation equipment, software, scientific data, etcetera<sup>22</sup> (IOC, 2005; InforMEA, 2023).

The most debated issues during negotiations included the nature (mandatory or voluntary) of CBTMT and financial contributions, as well as the eligibility of both providers and receivers of CBTMT, and the terms of technology transfer (Bodansky, 2024). The final text once again is the fruit of compromises. The degree of obligation is

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<sup>22</sup> Article 44 of the BBNJ Agreement presents the types of capacity-building and transfer of marine technology eventually agreed upon.

kept variegated, with a stricter approach with regards to capacity building, as in the interests of developing countries, and a softer one for technology transfer, as sought by more developed Parties<sup>23</sup>. Furthermore, Article 42, does not circumscribe the duty of providing CBTMT only to developed countries, but to all Parties, “within their capabilities” (United Nations, 2023). Likewise, the range of countries eligible as receivers (listed in Article 40(e)) is kept very wide (Bodansky, 2024).

## **Conclusion**

This chapter provided an overview of the historical development of the BBNJ Agreement, as well as the main contents that have been eventually included in the latter. From the first realisation by countries that a new Treaty covering the high seas was needed, and the steps that were taken for this purpose, to the final approval almost two decades later. Analysing the dynamics of the several negotiations, and of the five main sessions held by the Intergovernmental Conference, served as a preliminary necessity to fully understand the Agreement in all its main parts and themes. Each provision is indeed the fruit of several compromises, arising in a context in which the urgency for environmental action has to be combined with the huge disparities between developed and developing countries.

The freedom of the high seas, although it is widely recognised that it must be overcome, still played a crucial role for the more developed countries, together with freedom of scientific research and focus on non-monetary benefits, low obligation for providing capacity building and technology transfer, and higher thresholds for environmental impacts assessment. On the other hand, developing countries and the major groups representing them fought for the opposite interests, and mainly for the Common Heritage of Mankind principle.

As a result, the Agreement seeks in all its parts to ensure the principle of equity, as to enable every country to similarly achieve the main objectives, fulfil the necessary duties and gain the arising benefits. Ultimately, giving “voice to developing countries” makes this Treaty a unique international legislative measure (Deasy, 2023).

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<sup>23</sup> This difference can be recognised in Article 42 (1), which uses respectively the terms “ensure” with regards to capacity building, and “cooperate” for technology transfer (United Nations, 2023).

In conclusion, it is no longer realistic to think of living in a regime of complete freedom. At the same time, however, the solution cannot be the overriding of national sovereignty, which would further exacerbate the already existing inequalities between countries. With this regard, the High Seas Treaty is innovative not only with respect to the sustainable management of the ABNJ, but also for the importance it places on the sharing of tools and benefits, as well as respect and support for all Parties, including Indigenous Communities (Deasy, 2023). This is indeed the only path to follow in order to achieve the global objectives at the basis of this Agreement.

### CHAPTER III

#### CRITICAL ANALYSIS OF THE BBNJ AGREEMENT

The two previous chapters aimed to provide a general understanding of the environmental, historical, and legal context in which the BBNJ Agreement operates, as well as an overview of its key elements, objectives, and provisions, emphasising the importance of such a multilateral success in a time of great need. However, the third and final chapter of this dissertation seeks to offer a more critical perspective and analysis of this Treaty. It will therefore delve into the main weaknesses, ambiguities, and critical points in the text, with the goal not to undermine the significance of this Agreement, but rather to foster a deeper understanding and acknowledge what needs improvement in the years to come.

The first paragraph provides a general overview of the loopholes and ambiguities in the treaty text. Drawing from Marta Abegón-Novella's study on negotiation facilitation formulas, this section explores the use of soft law within the Treaty's provisions through the analysis of specific articles. In particular, Articles 43 and 53 serve as the basis for recognising the use of exhortative language. Article 14 is then taken into consideration for the broad space it leaves for interpretation, through a discretionary use of the term "may". Following the same reasoning, the use of the adjective "reasonable", mainly in the Preamble and in Article 30, suggests a certain level of ambiguity that may hinder effective and homogeneous implementation.

In the second paragraph, the chapter investigates the relationship between the Common Heritage of Mankind principle (CHM), widely discussed in the previous chapters, and Marine Genetic Resources (MGRs). In particular, through an examination of how Article 7 links this principle to the UN Convention on the Law of the Sea some crucial ambiguities are highlighted. Uncertainties surrounding the equitable sharing of benefits and the *sui generis* regime of MGRs within the BBNJ framework are additionally addressed.

Accountability and violation assessment are explored in a third paragraph, underlining the absence of a robust international liability regime and limited International Law regulations addressing harms and damages on the High Seas. The discussion encompasses issues such as the problem of the flag of convenience and illegal activities,

particularly in high-seas fisheries, and the lack of responsibility and liability provisions in the BBNJ Agreement. This section also examines *erga omnes* obligations and the question of invoking international responsibility, considering the unique spatial context and subject matter of the Treaty. Additionally, it delves into concerns regarding the distribution of damages and the possible establishment of a common fund, as outlined in Article 52, and evaluates the efficacy of the Compliance Committee as per Article 55. Finally, the Chapter addresses the challenges associated with the entry into force and implementation of the BBNJ Treaty, considering the urgency of reducing ratification times as much as possible. The cases of dissociation by Venezuela and the Russian Federation are mentioned as indicative of the fact that this process will be far from a foregone conclusion for all signatory countries. Recalling the 30x30 Target and the establishment of Marine Protected Areas (MPAs), swift ratification and adaptability to scientific advancements are eventually underscored as essential for long-term effectiveness and sustainable ocean governance.

A last paragraph provides the concluding remarks of the Chapter.

## **1. LOOPHOLES AND PROVISIONAL AMBIGUITIES**

If we consider the BBNJ Agreement from a broad perspective with a more critical view, various points of inaccuracy or ambiguity can be noticed. They are likely stemming from lengthy negotiations where certain aspects had to be relinquished to reach a common agreement. However, it is interesting to observe these criticisms to better understand the potential weaknesses of this Agreement and for a preliminary analysis of what will need to be enhanced over time.

A study by Marta Abegón-Novella published in February 2024 highlighted five main “formulas to facilitate negotiations”, which were necessary, as just mentioned, to align the expectations, interests, and possibilities of all participants. These formulas could now be considered minor weaknesses of the final Treaty text, but it is worth discussing at least a few of them. To recall Abegón-Novella’s words, they included “avoiding to explicitly mention the legal status of Marine Genetic Resources; the incorporation of differential and contextual norms; the introduction of due diligence obligations; the embedding of internal soft law; and the reduction of the scope of the treaty” (Abegón-Novella, 2024).



The question of Marine Genetic Resources will be further discussed in the following sub-paragraph, in relation to the delicate debate on the Common Heritage of Mankind Principle due to which a precise legal status of MGRs is missing (Abegón-Novella, 2024).

Focusing instead on the fourth formula, despite the final draft of the Agreement presenting significantly stronger and more uncompromising language and nature compared to the texts produced in the early negotiation sessions, the introduction of internal soft law provisions was inevitable in certain parts of the text (Abegón-Novella, 2024). This does not necessarily constitute a point of criticism, as obligations and constraints may deter certain states from promptly ratifying the Treaty, as will be discussed in the final paragraph of this chapter. However, simply reasoning in terms of the Agreement's effectiveness regarding its core objectives, it cannot be denied that soft law allows for a wide margin of interpretation and non-compliance, which can compromise the achievement of certain goals. This is due to the fact that these soft obligations do not possess a mandatory nature but rather an exhortative one. Their purpose is to encourage member states and their individuals to advance the Agreement's objectives and adhere to certain conduct accordingly, without, however, specifying any form of liability or punishment if such actions fail to materialise. This encouraging nature can be recognised in the following provisions (Abegón-Novella, 2024). Paragraph three of Article 43 on Additional modalities for the transfer of marine technology, states that “Parties shall *promote and encourage* economic and legal conditions for the transfer of marine technology to developing States Parties, [...], which may include providing incentives to enterprises and institutions” (United Nations, 2023). These words reflect the trust placed in states, particularly the more developed ones, to champion the crucial objective of equality at the heart of the Treaty. However, this trust cannot morph into an obligation. The same reasoning can be applied to Article 53(13) on Funds. According to the latter, “[...] Parties shall *encourage* international organisations to grant preferential treatment to, and consider the specific needs and special requirements of developing States Parties, [...] in the allocation of appropriate funds and technical assistance [...]” (United Nations, 2023).

In parallel, through brief research on when the term “may” appears in the text instead of the more imperative “shall”, references to soft law could be extrapolated as follows. In

particular, the fourth paragraph of Article 14 on fair and equitable sharing of benefits deriving from MGRs provides that “Access to marine genetic resources and digital sequence information on marine genetic resources of ABNJs in the repositories and databases under a Party’s jurisdiction *may* be subject to reasonable conditions” (United Nations, 2023). In this case, using the term *may* necessarily involves a certain degree of discretion and ambiguity. It is indeed not specified when such conditions, embraced in a non-exhaustive list afterwards, should be considered, or when the access to MGRs (as provided in the present provision) should instead be unconditioned. Furthermore, letter d) of the listed conditions entails “other reasonable conditions in line with the objectives of this Agreement”. In this case, even the use of the adjective *reasonable* leaves room for much interpretation. Who is entitled to decide whether a condition is reasonable or not? The paragraph is then concluded with another sentence in which the term *may* includes certain freedom of understanding: “Opportunities for such access on fair and most favourable terms, including on concessional and preferential terms, *may* be provided to researchers and research institutions from developing States”. These kinds of “soft” provisions embrace the risk of mis-compliance and incorrect or ineffective interpretation (Abegón-Novella, 2024).

The term *reasonable* is also used several times in the treaty text, and in some provisions it could be once again misleading. In particular, both in the Preamble of the Agreement and in Article 30, paragraph 1(a) concerning thresholds and factors for conducting environmental impact assessments, an interesting formula is used, which is worth considering for this argument on softness and ambiguities. Recalling Article 30(1)(a): “The screening [provided for in paragraph 1] shall be sufficiently detailed for the Party to assess whether it has *reasonable grounds* for believing that the planned activity may cause *substantial pollution* of or *significant and harmful changes* to the marine environment [...]”. The lack of clear guidelines and specifications for what constitutes “reasonable guidelines” might raise many doubts when implementing the provision. Once again, who is entitled to state when a specific ground is reasonable? The same argument could be applied to the “sufficiently detailed” clause: how much corresponds to sufficiently? Likewise, which level of pollution can be considered “substantial”? And which changes to the marine environment are “significant”?

The purpose of this highly focused, personal, and concise analysis is simply to highlight where potential cracks can be identified in the treaty text<sup>24</sup>. These weaknesses may hinder a comprehensive understanding and could lead to possible imbalances and inequalities in implementation, thereby compromising the core objectives and values of the Treaty.

## **2. THE COMMON HERITAGE OF MANKIND PRINCIPLE AND MARINE GENETIC RESOURCES**

In the previous chapter of this dissertation, the principle of the Common Heritage of Mankind has been widely discussed, highlighting the importance of its inclusion in the BBNJ Agreement and its contraposition to the freedom of the seas principle. However, in this third chapter, a critical analysis of this principle is necessary to fully understand to what extent it is actually effective.

The use of this specific principle in the treaty text is indeed ambiguous and leaves much discretion to interpretation, in particular in relation to Marine Genetic Resources (Mendenhall & Bateh, 2024). Recalling what was already mentioned above, after the huge debates during the negotiations, the CHM Principle was eventually inserted in the list of general principles guiding the objectives of the Treaty and codified in Article 7, but with a peculiar specification. Paragraph b of this provision states: “The principle of the common heritage of humankind *which is set out in the Convention*<sup>25</sup>” (United Nations, 2023). All the ambiguity is enshrined in that second part of the sentence linking the principle specifically to the UN Convention on the Law of the Sea (Samata, 2023).

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<sup>24</sup> This analysis could be deepened by following the contextual, teleological or systemic criteria for interpreting treaties specified in Article 31 of the Vienna Convention on the Law of Treaties. Focusing a brief comment on the last two criteria, both the general purpose and objectives of the BBNJ Agreement and other relevant International Law instruments can provide a valuable framework for understanding the ambiguities I have referred to. For example, the reasonableness criterion that I have called ambiguous and misleading can be better interpreted by considering the Agreement's core elements of equality and sustainability. “Reasonable conditions/grounds” should therefore include some environmental and social protection, so as to level out inequalities and promote sustainable development. Furthermore, remaining within the realm of access to MGRs, both the 1992 Convention on Biological Diversity and the 2010 Nagoya Protocol can be revealing (systemic interpretation). In particular, their respective Articles 6 and 15 suggest proportionality, transparency and timeliness as criteria of reasonableness (CBD, 1992; Nagoya Protocol, 2010).

<sup>25</sup> Meaning the 1982 UN Convention on the Law of the Sea.

The latter is indeed the only operational regime currently active, after the first regime envisaged by the 1979 Moon Agreement failed to be created (Samata, 2023). Although not properly binding on every state, due to this lack of an alternative regime also by the major opposers as the United States, a sort of customary nature is generally attributed to the provisions of the UNCLOS regarding the CHM Principle (Dingwall, 2020; Noyes, 2011).

The Convention includes the present principle both in the Preamble and in its Part XI concerning the Area. In the text, indeed, it is codified as common heritage only the “ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources”<sup>26</sup> (United Nations, 1982). The “resources” therein mentioned are defined in Article 133(a) as “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules” (United Nations, 1982). Finally, Article 136 confirms once again that “Area and its resources are the common heritage of mankind” (United Nations, 1982). These provisions do not leave space for a broader scope or interpretation, and as such they were recalled as the main argument of developed countries when opposing the inclusion of other Marine Genetic Resources into the CHM principle. In contrast, developing states strenuously promoted a full inclusion recalling the customary nature of the principle in all areas beyond national jurisdiction. Eventually, however, a more pragmatic approach and the need to find an agreement prevailed on this sensitive issue, leading to a vague and omissive final draft text (Abegón-Novella, 2024). The latter, indeed, surprisingly included the CHM in the list of the general principles, which should suggest that it embraces all treaty objectives and provisions, hence including Marine Genetic Resources as defined in Part II. Nevertheless, the reference to the Convention might be interpreted as limiting the scope to the Area, as in the UNCLOS (Samata, 2023).

Furthermore, the completely different nature of MGRs compared to the resources embraced by the UNCLOS regime cannot be ignored. Unlike the latter, more stationary by definition as exclusively mineral, Article 8 of the BBNJ Agreement includes any “material of marine plant, animal, microbial or other origin” in the definition of MGRs (United Nations, 2023). As such, the boundary between the Area (referred to by the Convention) and the water column above (encompassed in the scope of the High Seas

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<sup>26</sup> Preamble of the UN Convention of the Law of the Sea.

Treaty) cannot be considered when dealing with “living and movable resources” (Samata, 2023). Linking the CHM Principle to the UNCLOS raises an important understanding question which remains unsolved throughout the text, given that no further reference to the principle is made (Samata, 2023; United Nations, 2023). Rather, only “Activities with respect to marine genetic resources and digital sequence information on marine genetic resources” are defined as “for the benefit of all humanity” in Article 11 Paragraph 6 (United Nations, 2023). However, the acceptance of considering activities related to MGRs as common heritage is far from including in the principle the resources *per se*<sup>27</sup>.

Ultimately, the legal status of MGRs is left to the interpretation of whether they are enshrined in the CHM principle, especially as outlined in the UNCLOS (Samata, 2023). What this analysis suggests is that upon initial examination, the general inclusion of the CHM principle might seem cause for celebration. However, upon closer scrutiny of the subtle nuances in meaning, it becomes apparent how significantly this accomplishment has been compromised by the conflicting intentions of states hesitant to assume extensive *erga omnes*<sup>28</sup> obligations (Fasoli, 2024)<sup>29</sup>.

Strictly related to Marine Genetic Resources and equally included in Part II of the BBNJ Agreement is the question of “fair and equitable sharing of benefits” (United Nations, 2023) deriving from these resources. And this is not without weaknesses and criticalities. The issue of benefit sharing has indeed emerged as a complex challenge, particularly raising concerns regarding the concentration of patents among a small number of states and companies, which lead to inequitable distribution of wealth and benefits derived from MGR research and development (Kaushal, 2023; Samata, 2023).

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<sup>27</sup>This reflection is drawn from Professor Elena Fasoli’s speech during the conference “Biodiversity and the Sea”, held on the 21st of March, 2024, at the University of Bologna *Alma Mater Studiorum*.

<sup>28</sup> Recalling Article 1 of the 2005 Resolution of the Institut De Droit International, it defines obligations *erga omnes* and *erga omnes partes* (the latter deriving from specific treaties or agreements) as follows: “(a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or (b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action”.

<sup>29</sup> See note 3.

In the past twenty years, around 13,000 patents have been issued for “genetic sequences from 862 marine species” (Blasiak et al., 2018). Of this important number, more than 70% are owned by only three countries, Germany, The United States, and Japan. Furthermore, the application of the BBNJ Agreement to these patents retroactively remains uncertain (Blasiak et al., 2018).

Consequently, developing states advocate for treating MGRs as the Common Heritage of Mankind, to ensure fair benefit sharing among all parties involved. However, the application of the CHM principle to MGRs has sparked debates, as it entails both benefit sharing and environmental protection, which can be conflicting objectives. Stricter limits to avoid exploitation together with the obligation of foregoing part of the benefits for the gain of all could undermine the interest in conducting research, hindering important discoveries for further sustainable development (Samata, 2023).

It is also interesting to note the MGR “*sui generis*” regime established under the new BBNJ Agreement, which stands as a distinct framework for resource management, separate from the Common Heritage regime outlined in the UNCLOS. The latter is indeed regulated through the International Seabed Authority, whose scope is, however, confined to the Area (Mendenhall & Bateh, 2024). Consequently, this poses challenges in regulating benefit distribution and resource protection for MGRs, as the current CHM regime is not directly applicable to living resources crossing maritime boundaries. Once again, the reference to the Convention in Article 7 enshrines ambiguities (Samata, 2023).

### **3. ACCOUNTABILITY AND VIOLATION ASSESSMENT**

#### ***3.1 International Law Framework***

Establishing a robust system for accountability in case of violations and breaches is crucial for ensuring the effectiveness and integrity of any International Agreement or Treaty. It is fundamental to provide a framework for monitoring compliance, investigating alleged violations, and imposing appropriate consequences for non-compliance.

In the areas beyond national jurisdiction, as can be deduced from the analyses made in this dissertation, the question of who is responsible for certain activities and for possible

harm to the environment has always been particularly delicate. This is certainly due to the past lack of regulations and requirements, which led to the pollution issues widely discussed in the first chapters (Mendenhall & Hassanali, 2023). Indeed, the regime provided by the UNCLOS in Part XII regarding the Protection and Preservation of the Marine Environment includes scarce provisions on liability and responsibility (mainly Article 235). At the same time, international ocean law designed by the International Maritime Organisation addresses liability and compensation for vessel-source marine pollution mainly within coastal waters and Exclusive Economic Zones (Gaskell, 2018; Mendenhall & Hassanali, 2023).

The High Seas, however, cannot be considered a reality in its own right, enclosed and protected by precise boundaries. It is in fact inextricably linked also to the outcomes of activities carried out both in coastal and territorial areas, whose waste, for instance, is often discharged into rivers and seas, and then inevitably crosses into ABNJs. At this point, it is almost impossible to reconstruct the original source and cause (Kaushal, 2023). Not to mention the boundless number of non-registered and illegal activities currently carried out on the high seas (Srivastava, 2023). Furthermore, the flag state regime poses further hurdles due to the widespread use of “flags of convenience”, which exacerbates monitoring difficulties for flag states, especially given their distance from shore, leading to less effective oversight by coastal states and a lack of robust linkages between states and the private entities under their authority. (Mendenhall & Hassanali, 2023; Pascale, 2024).

Additionally, liability can occur only for environmental harms directly attributable to a State, rather than to private actors. As a result, the chances of allocating state responsibility are significantly reduced in international waters (Mendenhall & Hassanali, 2023).

Stronger rules of procedure are therefore urgently needed. The BBNJ Agreement would have represented a perfect opportunity for that purpose. Recalling the third paragraph of Article 235 of the UNCLOS on Responsibility and Liability, indeed, states should not only “cooperate in the implementation of existing international law”, but also further develop “international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where

appropriate, development of criteria and procedures for payment of adequate compensation” (United Nations, 1982).

### *3.2 Loopholes in the BBNJ Agreement*

Nevertheless, when dealing with accountability assessment, the Agreement presents some important weaknesses that cannot be ignored. First of all, it does not address the current ongoing activities and environmental violations, as those abovementioned (Kaushal, 2023). An important example concerns high-seas fisheries, which represent “the main threat to biodiversity in areas beyond national jurisdiction” (Qu & Liu, 2022). Globally, the current legal frameworks governing high-seas fisheries are deemed inadequate. For instance, the UNCLOS outlines general obligations regarding fisheries but lacks specific regulations for non-commercial fishery resources. Similarly, the United Nations Fish Stocks Agreement does not mandate Regional Fisheries Organizations (RFOs) to adhere to its provisions and has limited applicability, primarily focusing on commercially valuable fish stocks (United Nations, 1995). Despite the existence of global guidelines such as the Code on Responsible Fisheries, these guidelines lack enforceability. Moreover, Regional Fisheries Organizations have limited geographical and jurisdictional scopes, leaving significant gaps in coverage and effectiveness, particularly in addressing issues like incidental catch. These organisations also face challenges in decision-making and often lack modern environmental protection regimes. The overall effectiveness of these mechanisms is further hindered by inadequate financial resources, technological capacity, and coordination among RFOs. Thus, significant challenges persist in developing effective legal frameworks for high-seas fisheries (Qu & Liu, 2022).

Not directly addressing high-seas fisheries, mainly due to the non-undermining clause set out in Article 5 and through the treaty text (United Nations, 2023), the BBNJ Agreement fails to provide a more precise and effective framework to solve crucial threats derived from IUU fishing (illegal, unreported, and unregulated) (Borot, 2021), as well as overfishing and “accidental catching of deep-sea vulnerable fish stocks” (Qu & Liu, 2022).

Recalling the accountability loopholes, the Agreement lacks specific provisions



concerning responsibility and mostly liability<sup>30</sup>. These crucial elements seem to have been sacrificed during the negotiations, favouring the willingness of more developed countries, reluctant to define specific consequences for any violations. On the opposite side, indeed, developing states represented by the G77 particularly emphasised the importance of including liability provisions to deter “reckless behaviour” (Mendenhall & Hassanali, 2023). This derived from the fear that, despite the equality objectives underlying the Treaty (Vierros & Harden-Davies, 2020), a fistful of developed countries would still play a preponderant role in the exploitation of resources (Merrie et alia, 2014). Nevertheless, the progress of the negotiations and probably the emergence of more concerns have taken the general focus off the liability issue, to the extent that no formal proposal has been made in this regard (Mendenhall & Hassanali, 2023).

Addressing potential violations under the BBNJ provisions, scenarios such as unauthorised activities causing harm, violations of Marine Protected Areas, or exploitation of Marine Genetic Resources and Traditional Knowledge without consent, underscore the necessity for robust liability provisions to deter harmful behaviour and provide compensation in cases of harm or damage (Mendenhall & Hassanali, 2023).

According to international law and as codified in the preamble of the BBNJ Agreement<sup>31</sup>, although precise consequences for violations and breaches of the Treaty provisions are not comprehensively defined, States are nevertheless subject to international liability and international rules. This is especially true for obligations *erga omnes* and *erga omnes partes*<sup>32</sup>. Thus, violations are not automatically overlooked or unpunished. In this regard, however, a more pragmatic reflection arises<sup>33</sup>. Due to the subject matter, i.e. environmental sustainability generally speaking, and the spatial

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<sup>30</sup>Recalling the definition convened during the 25th session of the International Law Conference, the difference between these two concepts, embraced by the single concept of accountability, stands as follow: “[T]he term ‘responsibility’ should be used only in connection with internationally wrongful acts and that, with reference to the possible injurious consequences arising out of the performance of certain lawful activities, the more suitable term ‘liability’ should be used.” (Yearbook of the International Law Commission, 1973). For further information see also Institut De Droit International, Resolution: “Responsibility and Liability under International Law for Environmental Damage”, Session of Strasbourg - 1997.

<sup>31</sup> “*Recalling also* that, as set out in the Convention, States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and may be liable in accordance with international law” (United Nations, 2023).

<sup>32</sup> see note 4

<sup>33</sup> Inspired by Professor Elena Fasoli’s speech (see note 3).

context concerned, i.e. the areas beyond national jurisdiction, a possible violation of the Agreement would not directly affect any national interest specifically. This underscores states' sensitivity to supranational, global issues like biodiversity protection. In general terms, therefore, this could be linked to the importance that states attach to the principle of the heritage of mankind in its deepest sense. As far as *erga omnes* obligations are concerned, in fact, any state can invoke international responsibility for a certain violation, even though it does not directly affect that specific state. The latter would thus promote common global interests, as South Africa recently did vis-à-vis Israel<sup>34</sup>. But in concrete terms, how frequent will this type of activation be to counter violations in the context of environmental sustainability, the High Seas and the BBNJ Agreement?

Reasoning now in terms of liability, which implies the sheltering of damage not attributable to a specific state, the question of who will actually bear the burden of remedying such environmental damage is of crucial importance. Similar to national systems, where funds are set up to compensate victims of road accidents, for instance, liability in the international context could imply voluntary participation in a reparation fund, based on an awareness of the importance of preserving the common good. For example, in the case of an environmental disaster such as an oil spill on the high seas, a reparation fund could be activated to repair the damage caused to the environment (Fasoli, 2024).

In this perspective, Article 52 of the BBNJ Agreement, concerning Funding, should be taken into consideration (Mendenhall & Hassanali, 2023). The fifth paragraph of this provision, indeed, foresees that “The Conference of the Parties may consider the possibility of establishing additional funds, as part of the financial mechanism, to support the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” and, most interesting for our analysis, to finance rehabilitation and ecological restoration of marine biological diversity” (United Nations, 2023). This is not a strong mandatory provision, as can be deduced from the use of the word “may”. In fact, it is not certain that the member states and the conference of the parties will really agree on the creation of additional funds. A lot of national sovereignty

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<sup>34</sup> See International Court of Justice, Press Release of 29.12.2023, 2023/77, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)

and power indeed transpires from that term “may”, and that, together with many other elements left to “States’ good faith” (Pascale, 2024), partially negates the multilateral and common-interest nature underlying the Agreement (Fasoli, 2024; Kaushal, 2023). However, it cannot be denied that this paragraph opens an important door for ecological restoration in the event of environmental damage.

### *3.3 Compliance*

The other side of the coin, encompassing the assessment of violations, is the concept of compliance. The presence of an Implementation and Compliance Committee (established by Article 55) in the BBNJ Agreement is essential for guaranteeing adherence to the provisions of the Agreement.

As in the case of funding for restoration, however, procedural rules and other operational details are still lacking at the moment. While the Article describes the Committee's purpose (Art. 55(1)), composition (55(2)), and general operating principles (55(3)), it does not provide guidelines on how the Committee will function in practice. For instance, there are no details on the frequency of meetings, or how conflicts of interest will be addressed. Additionally, and particularly relevant for our analysis, the article does not specify how the committee will handle cases of non-compliance or what mechanisms will be in place to ensure transparency and accountability in its operations. Overall, the absence of specific procedural rules and details raises questions about how the Implementation and Compliance Committee will effectively carry out its mandate within the BBNJ Agreement.

Nevertheless, the establishment of a legal basis for a compliance committee itself is significant. This represents a notable step towards establishing accountability mechanisms, a concept that encompasses both responsibility and legal liability. Accountability, in its broader sense, may also include forms of social sanction or other non-legal measures. Therefore, the presence of a Compliance Committee is a fundamental pillar in ensuring that actions and policies related to marine environment protection are respected and effectively implemented.

#### 4. ENTERING INTO FORCE AND IMPLEMENTATION

Preceding the ambiguities and weaknesses related to potential future violations discussed in the previous paragraph, there are two crucial prerequisites that the BBNJ Agreement must fulfil to reach the coveted effectiveness, which are worth discussing as they are not without challenges either. Namely, ratification by at least 60 countries, which is the prerogative for the Treaty to come into force (Blasiak & Jouffray, 2024), and the correct implementation of the Agreement by these countries within their respective national legal systems (Kaushal, 2023). If the two decades of negotiations leading to the approval of the Agreement are to be considered the result of extensive multilateralism and cooperation, now both of these prerequisites depend entirely on the "goodwill" of individual states, upon which full trust is placed (Abegón-Novella, 2024; Kaushal, 2023; Pascale, 2024).

Focusing on ratification, it is not guaranteed that this process to reach the minimum threshold of sixty ratifications will be without difficulties. As of today, as mentioned in Chapter 2 of this dissertation, only Palau, Chile, Belize, the Seychelles and Monaco have ratified the Treaty<sup>35</sup>. While for certain countries this objective should not be hindered, it cannot be certain that this applies to all signatories. Indeed, at the dawn of adoption, some countries issued reservations or showed scepticism towards a new treaty. These include, among others, the United States, Venezuela, and, as previously mentioned Russia (Abegón-Novella, 2024; Pascale, 2024; Tiller & Mendenhall, 2023). The latter two, in particular, ultimately dissociated themselves from the signatory countries. Venezuela refused to be bound by an Implementing Agreement of the UNCLOS, of which it is not a member. On the other hand, the Russian Federation declared that "this instrument is not acceptable"<sup>36</sup> because it would not have respected the clause of not undermining other existing legal instruments (Tiller & Mendenhall, 2023). It is foreseeable that certain binding provisions requiring a certain level of

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<sup>35</sup> The updated list of participants, signatures and ratifications is available in the United Nations Treaty Collection Depository website.

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-10&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en)

<sup>36</sup> From the 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. Available at <https://digitallibrary.un.org/record/4016005?v=pdf>

economic availability for compliance may be a source of scepticism for ratification among some developing countries (Abegón-Novella, 2024).

A recent study published in April 2024 showed that the average time between the adoption through the signature of a multilateral environmental agreement (MEA) and its entry into force through ratification amounts to approximately four years or more. More specifically, oceanic treaties (considering MARPOL, CCAMLR, UNCLOS, UNFSA, and PSMA<sup>37</sup> as main examples) seem to take almost twice as long (Blasiak & Jouffray, 2024).

The reasons why it is crucial for the BBNJ Agreement to come into force as soon as possible are manifold and can be readily inferred at this juncture of the dissertation. They include, among others, "today's unprecedented expansion of commercial activities into the ocean" (Blasiak & Jouffray, 2024) and the environmental crisis which was extensively discussed previously. To grasp this urgency, it is also important to reconsider the 30x30 Target goal advocated by the Treaty. Among the elements provided by the Treaty that would significantly contribute to the equitable and effective conservation of 30% of the Earth, the establishment of Marine Protected Areas stands out (Blasiak & Jouffray, 2024; Grorud-Colvert et alia, 2021). However, once entry into force is achieved, which marks merely the initial step, the process to establish these MPAs as outlined in Part V of the Agreement is far from brief. Considering the aforementioned average ratification timelines and adding them to the time required to fulfil all the preliminary steps for the MPAs, it seems unlikely to meet the 2030 deadline. It would require, and it is hoped, that states truly understand the urgency of the situation and significantly expedite the ratification process (Blasiak & Jouffray, 2024; United Nations, 2023).

Furthermore, it is imperative to account for the rapidity with which new scientific discoveries are made and substantial technological advancements are achieved. Consequently, the Agreement must remain abreast of these developments, particularly concerning those core elements that will most probably be developed through time, such

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<sup>37</sup> Namely, International Convention for the Prevention of Pollution from Ships, The Convention on the Conservation of Antarctic Marine Living Resources, UN Convention on the Law of the Sea, UN Fish Stocks Agreement, Agreement on Port State Measures.

as the benefit-sharing clause, the exploitation of marine genetic resources, technology transfer and capacity building.

From this perspective, a delayed entry into force would make the task of the specialised bodies established by the Treaty, including the Access and Benefit-sharing Committee (as provided in Article 15), more challenging and sluggish, as well as jeopardising the long-term effectiveness of the Agreement itself as a whole (Blasiak & Jouffray, 2024).

## **Conclusion**

That the BBNJ Agreement is a victory for multilateralism and for the planet itself is beyond doubt. It embodies significant hopes. Firstly, it demonstrates that states still have an interest in collaborating to address supranational problems and threats, which are increasingly prevalent today. Secondly, it offers hope for combating, to the extent possible, the current climate crisis, whose effects on the sea are increasingly evident. The Treaty represents a turning point, a shift in our understanding of the ocean. It signifies a crucial realisation that solutions do not emerge without radical construction. However, while celebrating the adoption of the Agreement is undoubtedly gratifying after two decades of negotiations, such celebration must not be blind or superficial. Only with full awareness and in-depth knowledge we can discern what truly deserves celebration and what needs criticism and improvement.

Hence, through this final chapter, I have sought to provide a more critical perspective on this Treaty, meticulously examining possible shortcomings, ambiguities, inaccuracies, or weaknesses in its text. This analysis, which also incorporates personal conclusions, reveals that the Agreement is not without flaws. The latter can be found in individual terms of specific provisions, which, albeit sporadically, reveal much ambiguity and room for interpretation. But they also lie in the compromises made during negotiations, where significant elements were sacrificed or dispersed. These fundamental elements, left largely unregulated in other instruments of International Law due to the context of absolute freedom, consequentially remain a concern, underscoring the complexity of translating multilateral aspirations into tangible policy outcomes.

Moreover, reflecting on fundamental principles, particularly the Common Heritage of Mankind extensively discussed in previous chapters with rightful praise, raises further questions which are worth discussing.

Finally, looking to the future does not shield us from uncertainties. Will this pivotal Treaty achieve the effectiveness we hope for? How long will it take to enter into force? Will it be implemented correctly? These are questions whose answers will only be revealed with time, demonstrating whether the multilateralism that led to the drafting of this historic Agreement will truly emerge in practice and address crucial problems, or whether national interests will prevail.

In conclusion, while the BBNJ agreement represents a significant milestone, its journey toward meaningful impact has just begun. Vigilance, critical scrutiny, and proactive engagement will be essential as we navigate the complexities of ocean governance in the decades to come.

## CONCLUSION

In this dissertation, which saw at its centre the 2023 Biodiversity Beyond National Jurisdiction Agreement, the aim was to provide a comprehensive overview of the context in which the Agreement exists, its intrinsic nature, and its unique characteristics. The study explores why this subject holds such historical significance in the realms of International Law and environmental protection.

Starting with a historical and scientific analysis to understand the motivations behind the negotiations leading to the Treaty, the study subsequently outlines its legal background and core content. Consistent reference to the draft text itself allowed for a detailed analysis and discussion of the four most innovative elements, which address the main gaps in UNCLOS.

Alongside the textual analysis, philosophical reflections on the Treaty's key principles and our broader conception of the ocean were included. This comprehensive approach also required a critical examination to truly understand all facets of this legal instrument, including its more contentious aspects. By applying a more Hegelian approach, this analysis aimed to achieve a deeply informed and appreciative synthesis of the BBNJ Agreement.

Multilateral agreements are often perceived as irrelevant and ineffective, considered too weak to address the major injustices and threats on the global geopolitical stage. However, over the past 20 years, numerous diplomats, states, non-governmental and intergovernmental organisations, regional groups, and scientists have vigorously debated at the same table. Not for personal interests or significant national or regional issues, but to safeguard marine biodiversity in the High Seas, beyond national jurisdictions and tangible borders. They have discussed relinquishing absolute freedom of exploration, exploitation, and resource appropriation in favour of a common heritage, driven by an urgency that transcends economic, social, and geographical divisions.

The standing ovation on March 4th embodies the global realisation that the ocean may be our greatest ally in the climate fight, a battle to mitigate our own damages. It signifies the acknowledgement that the ocean, despite seeming intangible, distant, and irrelevant, must be protected. The consequences of this awareness are profound and



far-reaching. Not only does this represent progress in safeguarding the marine environment, but it also embodies equal collaboration among states, promoting values of sharing and mutual support.

Surely, this achievement will only be realised if the efforts made during the negotiations are equally applied in the ratification and implementation phases. The coming years will be crucial in determining whether we can truly speak of a triumph of multilateralism, or if nationalist sentiments will resurface and undermine its effectiveness. But is not this at least worth a smile?

*Every new beginning comes from some other beginning's end*, Seneca said. The arrival of this ship at shore<sup>38</sup> has marked a triumphant conclusion to a journey filled with compromises and sacrifices in the name of international cooperation and environmental awareness. Now, we can only hope that the wind continues to fill the sails.

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<sup>38</sup> To recall President Lee's words.

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