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# The Advent of the 2023 “BBNJ” Agreement: A Preliminary Legal Analysis

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## Perspectives of Women Scholars

**Abstract.** On 4 March 2023, the Member States of the United Nations agreed in New York on the text of a new treaty on biodiversity in areas beyond the national jurisdiction (BBNJ or ABNJ) – in international maritime areas. It took marathon process spread over more than ten years of informal discussions, four years of formal negotiations and the final session of almost 36 hours. Rena Lee, the President of the intergovernmental conference, announced to the applause of the delegates that the ship had finally “reached the shore”. This new BBNJ Agreement, now signed by more than 80 countries, is a historic step for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. It is also in consonance with the objectives of the global Kunming-Montreal Biodiversity Framework adopted at CBD COP15 in December 2022. This article aims to provide a preliminary analysis of the environmental (preamble, principles and approaches, area-based management tools and environmental impact assessments) and economic (marine genetic resources, capacity building and transfer of marine technologies) content of the 2023 BBNJ Agreement, which are both the result of important compromises. It also seeks to underline the numerous remaining uncertainties and potential difficulties it raises, especially in terms of implementation and articulation with existing instruments and frameworks.

**Keywords:** BBNJ, international negotiations, marine biodiversity, conservation, sustainable use, marine genetic resources, marine protected areas, environmental impact assessments, regimes articulation

At 9.25 pm on Saturday 4 March 2023, the Member States of the United Nations agreed in New York on the text of a new treaty on biodiversity in international maritime areas, after more than ten years of premises and informal discussions plus four years of formal negotiations and a final marathon of almost 36 hours of finalization. The President of the Intergovernmental Conference, Rena Lee, announced to the applause of the delegates that the ship had finally “reached the shore”. This article will attempt to answer a series of questions, in the wake of the adoption of the treaty: what are the main issues surrounding this new agreement? What is its content? Why has this news been unanimously welcomed in the media as a “historic” and “decisive” achievement, and what are the next steps? UN Secretary General Antonio Guterres

reacted indeed immediately to the conclusion of the text by mentioning “a victory for multilateralism and for global efforts to counter the destructive trends facing ocean health, now and for generations to come”<sup>1</sup>.

States began to question the need to supplement the provisions of UNCLOS in the early 2000s, in the United Nations General Assembly (UNGA), in a context where massive biodiversity loss was already being denounced. The question preliminary raised was the following: is the inadequate protection of biodiversity on the high seas solely the result of insufficient implementation of their obligations by States, or are there “gaps” that can be filled by international law? An Informal Working Group, established in 2004 to consider the various options available to States<sup>2</sup>, issued its conclusions in 2015, calling for the adoption of a new implementing agreement to UNCLOS. The process accelerated when the idea of adopting a “legally binding implementing agreement” was endorsed by the UNGA after this 2015 session<sup>3</sup>. The UNGA therefore convened a Preparatory Committee, which met between 2016 and 2017<sup>4</sup> to prepare for the Intergovernmental Conference, a formal negotiating forum between States, which was to meet four times between 2018 and 2021. However, the coronavirus pandemic delayed the process somewhat and an additional session was finally necessary, as the fourth session failed to reach consensus.

At the fifth session of the International Governmental Conference, held in August 2022, many points still crystallized disagreements between States, in particular concerning the status and modalities of the exploitation of marine genetic resources (MGR) - used for the development of pharmaceutical, cosmetic or other products - which was one of the thorniest issues until the end of the discussions. The positions of developed and developing States appeared, for a long time, hardly reconcilable. While the former defended a regime of free access and exploitation, the latter, not yet having the necessary technologies, demanded a stricter framework and a sharing of the benefits received from their exploitation similar to the “common heritage of mankind” regime that characterizes currently the Area and its mineral resources. At the end of August, the IGC President took the initiative not to close but to adjourn this session, thus facilitating the resumption of discussions in February and their eventual success. The new treaty will make it possible to regulate access to these resources and to ensure that the benefits derived from their exploitation are shared, being used to support the implementation of the Agreement. The fact that States finally agreed on this point is remarkable: for some, it is almost a miracle!

The new “BBNJ” treaty was formally adopted on 19-20 June 2023<sup>5</sup>, after a review by the UN legal service, and is already signed by 82 States and the European Union<sup>6</sup>. It now has to be ratified by 60 Parties in order to enter into force (in principle 120 days after the deposit of the 60<sup>th</sup> instrument of ratification). Some States, such as the United States and Russia, were initially unconvinced of the need for a new treaty, so their participation remains particularly uncertain. This process could take from one to several years, depending on the context surrounding this ratification process. The Paris Agreement, for instance, entered into force less than one year after its adoption. Other challenges will appear: “assessing the capacities and needs of States; building up the institutional framework; and advancing the scientific knowledge needed to

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<sup>1</sup> United Nations, “UN delegates reach historic agreement on protecting marine biodiversity in international waters”, *UN News*, 5 March 2023.

<sup>2</sup> United Nations General Assembly Resolution 59/24 of 17 November 2004.

<sup>3</sup> United Nations General Assembly Resolution 69/292 of 19 June 2015.

<sup>4</sup> United Nations General Assembly Resolution 72/249 of 24 December 2017.

<sup>5</sup> General Assembly, Resolution 77/556 of 18 April 2023. See also Resolution 77/L.82 of 1<sup>st</sup> August 2023.

<sup>6</sup> See the United Nations Treaty Series database.

support effective decision-making”<sup>7</sup>. Its provisions will then be progressively refined by the Conference of the Parties (COP) established according to the agreement, and its implementation will depend on the goodwill of States. Some are pleading for the creation of a special Preparatory Commission (PrepCom) to advance preparations for the first COP and establish interim working groups to develop the institutional and financial mechanisms<sup>8</sup>.

The main objectives of the BBNJ Agreement are “to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and long term” (Article 2), with the overall aim of achieving sustainable development (Preamble). Therefore, the treaty is not only focused on the protection of the marine environment, but also has an important economic dimension. The present contribution will study the modalities provided by the text for both objectives, conservation and sustainable use, which are the two corollary aspects of the compromise reached, and therefore at the heart of the nonetheless ambitious text. The numerous challenges and potential difficulties for reaching these objectives and for the effective implementation of the Agreement will be the focus of the third part.

## **I. The environmental dimension of the Treaty: marine biodiversity conservation in areas beyond national jurisdiction**

The compromise that has been reached seems *a priori* ambitious in the context of the current ecological emergency. In particular, after a substantial preamble and the consecration of structuring principles and approaches, two important tools for biodiversity protection are developed: marine protected areas (MPAs) and environmental impact assessments (EIAs).

### ***Preamble and general principles and approaches***

First of all, the preamble consecrates the inherent value of biological diversity in areas beyond national jurisdiction and the need to maintain the integrity of marine ecosystems. Then, it recalls that States already have a general obligation under UNCLOS to protect and preserve the marine environment and that they must be held accountable for any breach of their obligations in this regard. As the IDDRI notes, “by imposing a legal obligation to ensure conservation and sustainable use, recognizing the inherent value of biodiversity, and calling for Parties to ‘act as stewards of the ocean’ the Agreement provides a strong basis and renewed impetus for the protection of high seas biodiversity”<sup>9</sup>. The preamble also refers directly to the impacts of climate change on marine biodiversity and allows for a systemic interpretation of the agreement, with the overall objective of working to limit the erosion of biodiversity in these areas for the benefit of future generations. It is the first time that an international instrument explicitly draws the link between marine biodiversity conservation and the effects of climate changes, the two elements being traditionally apprehended separately either by the law of the sea or by climate change law. The preamble of the BBNJ Agreement is, therefore, “an integral component of the

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<sup>7</sup> Glen Wright, Arne Langlet, Ina Tessnow-Von Wysocki, “‘The ship has reached the shore’: why the historic Agreement to protect the High Seas matters and what happens next”, *IDDRI, Blog post*, March 9<sup>th</sup> 2023.

<sup>8</sup> Kristina M. Gjerde et al., “Initial reflections to support rapid, effective and equitable implementation of the BBNJ Agreement”, *IDDRI, Policy Brief*, February 2023.

<sup>9</sup> Glen Wright, Arne Langlet, Ina Tessnow-Von Wysocki, “‘The ship has reached the shore’: why the historic Agreement to protect the High Seas matters and what happens next”, *IDDRI, Blog post*, March 9<sup>th</sup> 2023.

instrument that encapsulates its motivations, purpose and objectives”<sup>10</sup> and will surely be a useful interpretative tool for the instrument.

Article 7, in addition, sets the general principles and approaches that shall “guide” Parties to the Treaty. The principles and approaches are very broad and inclusive and refer to the main general principles of international environmental law (polluter pays principles, use of the best available science and scientific information...). Some principles and approaches of the list (or their absence) deserve specific comments:

- Important to note is the “precautionary principle or precautionary approach, as appropriate”, traducing the fact that the precautionary principle is not unanimously recognized in international law, leaving open both interpretations. If, for some, both expressions are equivalent, for others, the precautionary principle is stricter<sup>11</sup>.
- Moreover, although one can note the importance of the “ecosystem approach”, it appears however redundant with the “integrated approach” as well as an “approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate”. This impression of redundancy is amplified by the absence of definition of those approaches.
- Besides, the interpretation of the “principle of the common heritage of humankind which is set out in the Convention” (UNCLOS) appears quite ambiguous. Indeed, this “principle”, which is not consecrated as such in the UNCLOS, concerns explicitly only the deep seabed and its resources, defined as the mineral resources of the Area. However, developing States “attached great importance to reiterating the Common Heritage principle to guide negotiations and future interpretation of the BBNJ Agreement”<sup>12</sup>. Some commentators have had, therefore, an open interpretation of the inclusion of the “common heritage principle” in Article 7, stating that the principle applies now to the marine genetic resources of areas beyond national jurisdiction<sup>13</sup>. This interpretation seems too audacious for us, as the explicit mention and application of the common heritage principle has been the subject of strong disagreements between the different groups of States, and was voluntarily abandoned. Even if the exploitation of marine genetic resources and digital sequence information on marine genetic resources are now under a regime of declaration of activities and benefit-sharing mechanism, which corresponds to the spirit of the common heritage regime, the explicit qualification - or not - of common heritage of mankind has a symbolic nature.
- In response to the inclusion of the “common heritage principle”, developed States obtained the reiteration of the customary freedom of the high seas principle as well as the freedom of marine scientific research.
- Finally, strangely missing are an explicit reaffirmation of the principle of prevention, which is certainly implicitly present in some parts of the text and fully integrated to the UNCLOS but could have been formally added to the list as it remains the cornerstone

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<sup>10</sup> Sarah Lothian, “The BBNJ preamble: More than just window dressing”, *Marine Policy*, vol. 153, July 2023, p. 105642.

<sup>11</sup> See for more details Rosemary Rayfuse, “Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction”, *The International Journal of Marine and Coastal Law*, vol. 27, 2012, pp. 773-781.

<sup>12</sup> Daniel Kachelriess, *The High Seas Biodiversity Treaty. An Introduction to the 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*. IUCN, November 2023, p. 8.

<sup>13</sup> See for instance Loic Peyen, « Les ressources génétiques marines hors juridiction, enfin patrimoine commun de l'Humanité? », *Journal du Droit International, Clunet*, LexisNexis, n°4/2023; Nayomi Goonesekere, “International Treaty Negotiations and the Status of the ‘Principle of the Common Heritage of Mankind’: The 2023 BBNJ Treaty Text”, *Havard International Law Journal, Online Scholarship, Perspectives*.

of international environmental law, as well as the information, participation and access to justice principle, which is also fully part of the “modern” international environmental law principles and appears nevertheless as a watermark in the rest of the text.

### ***Area-based management tools, including marine protected areas (MPAs)***

With regard to MPAs, it establishes a global mechanism that will allow States to propose to the Secretariat, individually or collectively, their designation (Article 19(1)) and make them enforceable against all States Parties - in line with the 30×30 target established few months before at the COP15 on biodiversity<sup>14</sup>. The text does not define what is an MPA or other measures such as area-based management tools, but specifies the details of the content of the proposals, the associated conservation measures and the monitoring of their implementation (Article 19(4)). Indicative criteria for their designation are listed in Annex 1. States are invited to consult and collaborate with all relevant stakeholders, including civil society, the “scientific community”, indigenous peoples and local communities (Article 19(3)). After an open and transparent consultation process (Article 21), the Scientific and Technical body will assess the proposals and the Conference of the Parties to the treaty will decide to adopt or not the proposal, by consensus or by a ¾ majority vote (Articles 22 and 23)<sup>15</sup>. The obligation to ensure that actors under their jurisdiction comply with the ABMTs and their management plans falls to Parties, as does the requirement to monitor implementation, individually or collectively.

An “opt-out” possibility has however been included in the process, meaning that States can refuse, at the very end, to be linked to the conservation measures defined for the protected area - in strict and specific conditions<sup>16</sup>. The Party making an objection under paragraph 4 above shall, to the extent practicable, adopt alternative measures or approaches that are equivalent in effect to the decision to which it has objected and shall not adopt measures nor take actions that would undermine the effectiveness of the decision to which it has objected unless such measures or actions are essential for the exercise of rights and duties of the objecting Party in accordance with the Convention (Article 23(6)). This objection has been, according to the IUCN, a “difficult, but necessary, compromise”<sup>17</sup> that was added in order to take into consideration, notably, the rights of the coastal State having sovereign rights in the continental shelf situated below the area of an MPA proposal, or adjacent to it, in case it has the project to exploit the mineral resources of its continental shelf, which was a point highly controversial during the negotiations<sup>18</sup>. The State making an objection has to ask for the authorization of renewing it every five years and must justify each time the reasons for such an opting out, as well as propose alternative measures (Article 23(8)).

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<sup>14</sup> Kunming-Montreal Global Biodiversity Framework, Decision CDB/COP/15/4, 19 December 2022.

<sup>15</sup> This will ensure that one State cannot oppose systematically to the adoption of a proposal of MPA, as it is the case in the Antarctic Treaty system. This was an important point for many States participating to the discussions.

<sup>16</sup> Article 23(4-9): 5. “A Party making an objection under paragraph 4 above shall provide to the secretariat, in writing, at the time of making its objection, the explanation of the grounds for its objection, which shall be based on one or more of the following grounds: (a) The decision is inconsistent with this Agreement or the rights and duties of the objecting Party in accordance with the Convention; (b) The decision unjustifiably discriminates in form or in fact against the objecting Party; (c) The Party cannot practicably comply with the decision at the time of the objection after making all reasonable efforts to do so”. 7. “The objecting Party shall report to the next ordinary meeting of the Conference of the Parties following its notification under paragraph 4 above, and periodically thereafter, on its implementation of paragraph 6 above, to inform the monitoring and review under article 26”.

<sup>17</sup> Daniel Kachelriess, *The High Seas Biodiversity Treaty. An Introduction...*, préc., UICN, p. 18.

<sup>18</sup> See for instance Erik J. Molenaar, “Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations”, *The International Journal of Marine and Coastal Law*, vol 36, issue 1, 2021, pp. 5-58.

Finally, another compromise decided in the last days concerns the context of disputed areas: Article 18 provides that “the establishment of area-based management tools, including marine protected areas, shall not include any areas within national jurisdiction and shall not be relied upon as a basis for asserting or denying any claims to sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto”, in order to avoid as much as possible conservation measures being misused or exploited to assert or challenge sovereignty.

### ***Environmental impact assessment (EIA)***

In order to operationalize Article 206 of the UNCLOS, as well as the customary obligation of conducting environmental impact assessment for every project potentially risky for the environment, the treaty sets out the modalities for the implementation of EIAs for activities that take place in, or - interestingly - that are likely to cause harm to, international maritime spaces<sup>19</sup>. A doubled threshold is settled (Article 30):

- First, a screening must be conducted when a planned 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, with the specific requirements provided by Articles 30 and 31. This screening must be conducted on the basis of the best available science and scientific information and, when relevant and possible, traditional knowledge.
- Second, if it is determined on the basis of the screening that the Party has reasonable grounds for believing that the activity may cause *substantial pollution of or significant and harmful changes to the marine environment*, an environmental impact assessment shall be conducted under the requirements of the same articles. One can note that in the end, the threshold above which EIA are required is quite high and will depend on the appreciation of the Parties.

Indication is also given as regards transparency (through the Clearing House Mechanism), the content of EIA and the well-developed public notification and consultation process (Article 32). Potentially affected States (coastal States and States already conducting activities in the area) are to be taken into consideration. The Scientific and Technical body will be involved in the process, but the State initiating the project remains exclusively competent to decide whether or not to carry it out, recalling that the regime remains clearly states-centered (Article 34(1))<sup>20</sup>. This was a controversial issue as some States and organizations asked for an international decision making. However, “A decision to authorize the planned activity under the jurisdiction or control of a Party shall only be made when, taking into account mitigation or management measures, the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment” (Article 34(2)), which obliges, *in fine*, Parties to take into consideration the result of the EIA.

Last, but not least, it is relevant to note that EIA must take into account the cumulative impact of activities (Article 31(1)c)), and that Strategic Environmental Assessment (SEA) are also provided by the text (Article 39). The latter tool, SEA, which is not focused on a specific activity but rather on a broader programme, plan or policy at the regional scale, is not very developed yet in the international practice but could be an interesting instrument of planification of

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<sup>19</sup> Article 28. In this case, the State has the choice of using its own national process for conducting an EIA, or to use the process created for areas beyond national jurisdiction. It has to publish, in any case, the relevant information available through the Clearing-House mechanism.

<sup>20</sup> As advocated by developed countries; developing countries defended a more internationalized procedure.

activities and of systematization of the best available information for a region<sup>21</sup>. Monitoring, reporting and review are also part of the process (Articles 35-37) and specific guidelines are to be developed by the Scientific and Technical Body, including, if States are considering it necessary, a list of activities requiring or not the conducting of an EIA (Article 38).

## **II. The economic dimension of the Treaty: sustainable use of marine biological diversity in areas beyond national jurisdiction and equity**

Although the general objective of the BBNJ Treaty is “conservation and sustainable use of marine biological diversity”, Article 7 on general principles and approaches goes further on the definition of “sustainable use” by consecrating the fundamental “principle of equity and the fair and equitable sharing of benefits” (§d). Part II of the Agreement deals, therefore, with “Marine genetic resources, including the fair and equitable sharing of benefits”. Article 9 details the objectives of Part II, which are not only the fair and equitable benefit sharing, but also the building of capacities, especially for countries in special situations (least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries). Marine scientific research and marine technology transfer are fully integrated to this Part as well as Part IV, which is also focused on “sustainable use”.

Moreover, according to Article 11(6), “activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction are in the interest of all States and for the benefit of all humanity, particularly for the benefit of advancing the scientific knowledge of humanity”, which shows that even if the “Common heritage of humankind” is not consecrated as regards marine genetic resources, the concept of humanity and of common interest and responsibilities are clearly enshrined in the text.

### ***The new regime for marine genetic resources and associated digital sequences information***

The definition of marine genetic resources (MGR) is given by Article 1(8): “any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value”. Noteworthy, the activities covered by the Convention are not only activities with respect to MGR themselves, but also activities related to digital sequences information (DSI) on MGR of areas beyond national jurisdiction, which is much broader. The preamble contains a paragraph acknowledging the importance of digital sequence information (DSI) of MGRs for research and innovation, “that was added on the penultimate day of the text negotiations, adding emphasis to the importance of this consideration in other parts of the text”<sup>22</sup>. Those definitions are consistent with the CBD and Nagoya Protocol definitions. As regards the inclusion of DSI, the Agreement is, moreover in line with Decision 15/9<sup>23</sup>, adopted by the CBD COP in December 2022, which provides for the future creation of a multilateral benefit sharing system for DSI within national jurisdiction, in order to complete the system of the Nagoya Protocol that only applies to *in situ* access to genetic resources – in areas within

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<sup>21</sup> Daniel Kachelriess, *The High Seas Biodiversity Treaty. An Introduction...*, préc., UICN, pp. 21 and 24; Neil Craik, Kristine Gu, “Strategic Environmental Assessment in Marine Areas beyond National Jurisdiction: Implementing Integration”, *The International Journal of Marine and Coastal Law*, vol. 37, Issue 2, 2022, pp. 189-216.

<sup>22</sup> Daniel Kachelriess, *The High Seas Biodiversity Treaty. An Introduction...*, préc., UICN, p.

<sup>23</sup> Decision 15/9: Digital sequence information on genetic resources. See also the Kunming-Montreal Global Biodiversity Framework (precit.), Objective C, target 13.

national jurisdiction, although the operationalization of this mechanism is still pending<sup>24</sup>. Therefore, the two systems will be, *a priori*, compatible. This definition also covers derivatives of living organisms in ABNJ – since Article 1(3) defines biotechnology as “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use”. The dispositions apply retroactively, unless a Party makes an exception in writing, under article 70, when signing, ratifying, approving, accepting or acceding to the Agreement (Article 10(1)). They do not apply to fishing activities, unless living marine resources collected are later utilized as MGRs, and neither to military activities. One can observe that this part is the only one explicitly excluding fishing activities.

The issue of marine genetic resources has been one of the most difficult parts of the treaty to reach a compromise on, as mentioned in the introduction, and has been the subject of intense negotiations during the 5<sup>th</sup> session in March 2023<sup>25</sup>. The compromise finally reached maintains the balance between freedom of marine scientific research and control of bioprospecting activities. Activities with respect to MGR and digital sequence information on MGR are indeed subject to a notification procedure (Article 12) at each step of the process (pre-cruise, post-cruise, utilization). Parties shall therefore notify to the Clearing House Mechanism any activity of collection of MGR in areas beyond national jurisdiction, as early as possible prior the collection (at least six months before). This notification must include several information, as the nature and objectives under which the collection is carried out, the purpose of the research, the geographical area in which the collection is to be undertaken, a summary of the method and means to be used for collection, the name of the persons in charge and the sponsoring institutions, as well as “a data management plan, prepared according to open and responsible data governance, taking into account current international practice” (§j). Here are some of the following steps:

- Upon notification, the Clearing House Mechanism automatically generates a “BBNJ standardized batch identifier” (Article 12(3));
- As soon as they are available, other information shall be notified to the Clearing House Mechanism, as for instance the database where digital sequence information on MGR will be deposited, detailed geographical information, any update to the elements notified before.
- Parties shall ensure that repositories and database under their jurisdiction, if practicable, prepare every two years an “aggregate report on access to marine genetic resources and digital sequence information linked to their “BBNJ standardized batch identifier”. This report must be available to the access and sharing benefit committee.
- Any information on utilization or commercialization (patent, publications, products developed...) of MGR and DSI is to be notified to the Clearing House Mechanism, “as soon as such information become available” (Article 12(8)).

Parties shall also, more generally, promote cooperation and conduct activities with due regard for the rights and legitimate interests of other States (Article 11). Traditional knowledge of indigenous people and local communities associated with MGR in areas beyond national jurisdiction is to be taken into account and the principle of free, prior and informed consent or approval is recalled (Article 13).

As regards the sharing of benefits, first, some examples of non-monetary benefits are listed in Article 14, as access to samples and sample collections, to digital sequences information, to information contained in the notifications, transfer of marine technology, financing of research

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<sup>24</sup> Ibid. See also Margo Bagley, “‘Just’ Sharing: The Virtues of Digital Sequence Information Benefit-Sharing for the Common Good”, *Harvard International Law Journal*, vol. 63, n°1, Winter 2022, pp. 1-62.

<sup>25</sup> Daniel Kachelriess, *The High Seas Biodiversity Treaty. An Introduction...*, préc., UICN, p. 11.

programmes, scientific cooperation, etc. Publicity and transparency are at the heart of the regime. Secondly, the Agreement provides for a mechanism for the sharing of monetary benefits, including commercialization, through a specific financial mechanism that will serve for the conservation and sustainable use of marine biological diversity (Article 14(5) and Article 52). As the IUCN reports, the question of whether or not to include monetary benefits “was a major contention until the final days of the first part of IGC 5 and even after that, the modalities remained subject to intense discussions”<sup>26</sup>. The compromise, finally, is that the special fund will be filled by the annual contributions of developed Parties (50% of that Party’s assessed contribution to the budget adopted by the Conference of the Parties). The Access and sharing of benefit Committee (Article 15) will also make recommendations to the COP on the modalities for a complementary form of sharing of monetary benefits (milestone payments, contribution related to the commercialization of products, including percentage of the revenue of sales, periodic fee...). As it is also the case for area-based management tools, a very constrained possibility to opt-out of new monetary benefit sharing modalities adopted by the COP has been added, but only for up to four years and these Parties would continue to pay the default payment tied to their assessed contributions (Article 14(8)).

Parties will have to report periodically to the Access and benefit sharing Committee on their implementation of MRG’s and DSI’s focused dispositions.

### ***Modalities for transfer of marine technology and capacity building***

Parties are invited, within their capabilities, to ensure capacity-building and transfer of marine technologies for developing States Parties and to collaborate to that end (Article 42). This process is defined as “country-driven, transparent, effective and iterative”, “participatory, cross-cutting and gender-responsive” (Article 42(3)) and shall not duplicate existing processes, in line with the rest of the Treaty. Scientific, technological and monetary capacity building are actually a transversal objective in the Agreement that could lead to a more effective implementation<sup>27</sup>. An evaluation of the needs, in this context, will be an important first step, at national and regional levels<sup>28</sup>.

In addition, according to Article 43(2), the transfer of marine technology “shall take place on fair and most favorable terms, including on concessional and preferential terms, and in accordance with mutually agreed terms and conditions as well as the objectives of this Agreement”; it also “shall take into account all rights over such technologies and be carried out with due regard for all legitimate interests, including, *inter alia*, the rights and duties of holders, suppliers and recipients of marine technology and taking into particular consideration the interests and needs of developing States for the attainment of the objectives of this Agreement”. This submission to existing practices and rules in this area probably reflects the fact that a strict

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<sup>26</sup> *Ibid.* See also David Leary, “Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction”, pp. 21-29, *Marine Policy*, n° 99, 2019, p. 27; Gaute Voigt-Hanssen, “Current ‘Light’ and ‘Heavy’ Options for Benefit-sharing in the Context of the United Nations Convention on the Law of the Sea”, *The International Journal of Marine and Coastal Law*, n°33, 2018, pp. 683-705.

<sup>27</sup> On transfer of technology and capacity building, see for instance Harriet Harden-Davies, Kristina Gjerde, “Building Scientific and Technological Capacity: a Role for Benefit-sharing in the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction”, *Ocean Yearbook*, vol. 33, 2019, pp. 377-400; Jorge Antonio Quindimil Lopez, “Technology transfer, international law and protection of marine biodiversity beyond national jurisdiction: key issues for a new international agreement”, *Journal of International Law and International Relations*, n°8, 2020, pp. 423-449.

<sup>28</sup> Kristina Gjerde et al., “Getting beyond yes: fast-tracking implementation of the United Nations agreement for marine biodiversity beyond national jurisdiction”, *npj Ocean sustainability*, n°6, vol. 1, 2022, p. 6.

obligation of technology transfer might be in contradiction with international economic law and especially investment law. Indeed, the transfer of technology is generally prohibited by bilateral investment treaties. The obligatory or voluntary dimension of transfer of technology was therefore a complex issue and still needs clarification.

Finally, a non-exhaustive list of the types of capacity-building and of the transfer of marine technology is provided (Article 44), including the sharing and use of relevant data, information, knowledge and research results, information dissemination, infrastructure development, development of national regulatory frameworks and mechanisms, scientific and technical programmes or of capacities and technological tools for effective monitoring, control and surveillance of activities. Article 45 provides moreover for a periodical monitoring and review, through a specific committee in charge, for instance, of assessing the needs and priorities of developing countries, mobilizing funds, making recommendations etc., as well as a reporting system.

### **III. Remaining uncertainties and potential difficulties**

Among the main remaining uncertainties and difficulties, one can target, on the one hand, the traditional issue of effectiveness, through implementation, enforcement and responsibility, and on the other hand the tricky articulation and combination with existing instruments, frameworks and regimes, in the context of the “BBNJ regime complex”<sup>29</sup>.

#### ***Implementation and enforcement***

A lot of determining elements remain on States’ good faith and are dependent on their sovereignty as, for instance, the acceptance and surveillance of MPAs or the final decision-making regarding EIAs. However, one can regret that the treaty does not mention one of the main challenges affecting the effectiveness of the law of the sea, as regards the protection of the marine environment nowadays: the flag of convenience’s issue and the persistent difficulty to engage the international responsibility of flag States. This question was not mentioned at all in the process as it is a sensitive issue. Another complex issue remains on the fact that to be effective the agreement needs to be universal: biodiversity erosion and climate change being global problems, a global action is necessary to avoid a unilateralism that could undermine the efforts of the international community.

Next to the upcoming and central COP, a mechanism for the settlement of disputes (Part IX), inspired by the one consecrated in Part XV of UNCLOS, adding specific dispositions regarding the possibility for the COP to request an advisory opinion to the International Tribunal for the Law of the Sea, is provided. The creation of a secretariat as well as an implementation and compliance committee should contribute to organize and ensure, as well, the effective implementation of the new agreement. The monitoring of States by regular reporting is provided by Article 54. According to Article 55(1), the Implementation and Compliance Committee shall be “facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive” in a spirit of incitation more than constraint. The modalities of functioning this institution will be fixed by the first COP, which role will therefore be decisive. The need for strong institutions has been stressed by civil society organizations. As regards the sensitive issue of the financing mechanisms which will allow the Agreement to be effective in

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<sup>29</sup> Arne Langlet, Alice Vadrot, “Not ‘undermining’ who? Unpacking the emerging BBNJ regime complex”, *Marine Policy*, vol. 147, 2023, p. 105372.

practice, the COP will also have to set the rate of contributions to the benefit-sharing fund as well as to determine the role of the Global Environment Facility in providing financial support. Very generally, the preamble recalls 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”. The idea of a special fund for responsibility and compensation of damages was nonetheless abandoned.

### *Articulation with other existing instruments, frameworks and regimes*

While the main aim of the Treaty is to promote cooperation and coordination in the context of marine biodiversity conservation, an important difficulty will be to ensure that it should *not undermine existing global and regional instruments, frameworks and bodies having a mandate on BBNJ* (Article 5(2)), in order to preserve the coherence of the rules applicable to these areas, and for the sake of legal certainty. The agreement aims to positively complement the current legal framework, which is considered insufficient to ensure effective protection of biodiversity, by adding to it without regulating activities that are already regulated elsewhere. The COP will, to that end, conduct consultations and make recommendations with those instruments, frameworks and bodies, and at the same time the Parties will have to promote conservation and sustainable use of BBNJ when participating in the diverse decision-making processes outside the BBNJ bodies. As stated by Arne Langlet and Alice Vadrot, indeed, “the wording ‘does not undermine the effectiveness of their measures’ does not preempt IOs per se but for mulates a positive relationship between IOs – in support of their measures”<sup>30</sup>.

The articulation between the new treaty and deep seabed mining<sup>31</sup>, or fisheries, which could both be considered as implicitly excluded of the text as they are already regulated by other international forum, may however not be so obvious in practice. For instance, as far as EIA are concerned, the need for co-ordination and transparency is further strengthened by the fact that the new treaty also provides for the cumulative impact of different activities<sup>32</sup> to be taken into account. In this context, the Agreement states that if an "equivalent" assessment process has been carried out by other institutions, the State is not obliged to repeat the process for carrying out impact studies provided for in the Treaty (article 29(4)b(i)). The COP will therefore have to establish equivalence criteria. It must also establish mechanisms for cooperation between the future Scientific and Technical Body and the competent organizations (Article 29(2) and (3)) and ensure publication, via the Clearing House, of the assessment report produced by another competent body (Article 29(5)). The COP will also work on the recognition of conservation measures adopted by other international organizations, especially by regional seas organizations such as the North East Atlantic OSPAR Commission. However, this will not be without difficulties. The precedent of the collective arrangement driven by the OSPAR Commission shows the complexity of coordinating several regional or global instruments, frameworks and bodies. Indeed, only two organizations are, so far, part of this collective arrangement: the OSPAR Commission and the North East Fisheries Commission, although other organizations

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<sup>30</sup> Arne Langlet, Alice Vadrot, “Not ‘undermining’ who?...”, precit.

<sup>31</sup> As the BBNJ agreement does not only apply in the high seas, but also in the deep seabed (the “Area”). In this regard, we can add that the question of the Area's mineral resources exploitation, which some consider essential to the energy transition, is also at the heart of the news. The International Seabed Authority is expected to finalize its mining code by the summer, under pressure from the Canadian company The Metal Company, sponsored by Nauru, which has announced that it is ready to start mining polymetallic nodules. More and more NGOs, states (including France, through its President) and even companies are asking the Authority, in this context, to adopt a moratorium or a 'precautionary pause' in order to avoid the potentially devastating effects of a precipitous exploitation of these resources, which could also seem to be in line with the objectives of the BBNJ agreement.

<sup>32</sup> Articles 1(6), 27(c) or 30(1)a)ii).

like the International Maritime Organization or the International Seabed Authority were also invited to participate, in order to articulate their actions with the one of this regional organization in the context of the development of the first network of MPAs in the high seas in the North East Atlantic. Each organization having its own mandate, States Parties, geographical area and scope of application, it turned finally extremely complex and sensitive to achieve such an advanced form of coordination<sup>33</sup>.

In addition, as regards MGRs, it may be difficult to distinguish between bioprospecting activities and *scientific research activities*, which appear to be very similar without having the same purpose<sup>34</sup>. Article 9 of the new Agreement maintains the ambiguity between bioprospecting and scientific research practices: "The objectives of this Part are: (a) The fair and equitable sharing of the benefits arising out of activities relating to marine genetic resources (...) (c) The generation of knowledge, scientific understanding and technological innovation, in particular through the development and conduct of marine scientific research, as essential contributions to the implementation of this Agreement (...)". Article 1(14) defines "utilization of genetic resources" as "the conduct of research and development on the genetic and/or biochemical composition of marine genetic resources, including by means of biotechnology", which does not mention the commercial purpose of bioprospecting. UNCLOS contains numerous provisions relating to marine scientific research, and certain institutions such as the International Seabed Authority are competent in this area. Article 143 of UNCLOS provides that the Authority and member States "may" each conduct research in the Area. The Authority "shall promote and encourage marine scientific research in the Area and shall coordinate and disseminate the results of such research and analysis, when available"; the States "shall promote international cooperation" in this area (Article 143(1) and (2)). In this context, ISA contractors must collect genetic material as part of their exploration activities, in order to document the environmental impact assessment of activities in the Area<sup>35</sup>. The information gathered in this way must be deposited in the DeepData database<sup>36</sup>, which will therefore have to be linked to the Clearing House set up by the new Treaty. The cooperation of this Centre with the IAMF is provided for in Article 51(4), but no further details are given.

A potential contradiction with international economic law can also be identified in the context of the *intellectual property rights regime*. Non-monetary benefits shared in the context of MGR or the transfer of marine technology could, indeed, be in contradiction with the current property rights regime. In the absence of specific regime, it is the World Trade Organization Agreement on Trade related aspects of intellectual property rights that applies. The draft text made the link with intellectual property rights in an Article 12 specially dedicated to this issue, with a first paragraph providing that "States Parties shall cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of this Agreement, and that no action is taken in the context of intellectual property rights that would undermine benefit-

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<sup>33</sup> Hellen Hey, "The OSPAR NEAFC Collective Arrangement and Ocean Governance: Regional Seas Organisations as the Setters of Conservation Standards in ABNJ?" *The International Journal of Marine and Coastal Law*, vol. 37, Issue 4, 2022, pp. 610–633.

<sup>34</sup> Gemma Andreone, Valentina Rossi, Giovanni Ardito, "Legal Regime of Marine Genetic Resources in Areas Beyond National Jurisdiction", in R. Gordon and J. Seckbach (Eds.), *Diatom Photosynthesis: From high Value Molecules to Primary Production*, Scrivener-Wiley, book series Diatoms: Biology & Applications series, to be publish, p. 8.

<sup>35</sup> *Recommendations for the guidance of contractors for the assessment of the possible environmental impact arising from exploration for marine minerals in the Area*, Legal and Technical Commission, 30 mars 2020, ISBA/25/LTC/6/Rev.1 ; see also the exploration regulations as, for the Regulation on polymetallic nodules, Art 32.

<sup>36</sup> See the ISA website: <https://www.isa.org.jm/deepdata-database/> which precises that the main function of this database "is to host all deep seabed activities-related data, particularly those collected by the Contractors during their exploration activities and other relevant environmental and resources-related data for the Area".

sharing and the traceability of marine genetic resources of areas beyond national jurisdiction” and paragraph 2 that “Marine genetic resources [collected] [accessed] [utilized] in accordance with this Agreement shall not be subject to patents except where such resources are modified by human intervention resulting in a product capable of industrial application”<sup>37</sup>. Many States feared that the various transparency and sharing obligations would run counter to these rights. Other strongly opposed addressing this issue in the new instrument, as it was the case of the European Union, Canada, United States, Russia or Australia, among others, fearing that a regulation on intellectual property would deter research and development activities<sup>38</sup>. All in all, the paragraph was withdrawn, in part because States did not wish to go against future negotiations taking place within the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, on the issue of disclosure of origin: a preparatory session is indeed taking place since September 2023 and a draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources is elaborated, although its future scope is not determined yet<sup>39</sup>.

Finally, *articulation with European Union Law* could also be a complex point. the EU's participation in the future institutions will be accompanied by a declaration of competences, which will specify the matters for which the Member States have transferred competence to the EU, in order to clarify the extent of obligations incumbent on each and, at the same time at the same time, the division of responsibilities between them (Article 67 of the BBNJ Agreement)<sup>40</sup>.

Therefore, important uncertainties remain on how the “not undermine principle” will practically apply. Other areas related to the preservation of biodiversity are not directly taken into account in the new agreement, as they are also already covered by specific bodies of standards. This is the case for climate change, as well as for pollution of the marine environment. This fragmented approach does not make it possible to really take into account the globality, complexity and interweaving of the issues related to the protection of marine biodiversity, as the ocean is, for example, the guarantor of climate stability while being particularly affected by this global change (acidification, warming and rising sea levels, etc.). Despite all the remaining imperfections and uncertainties, the step that has been taken is decisive and constitutes, for sure, a new starting point for biodiversity conservation.

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<sup>37</sup> Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Fourth session, 2020, doc. A/CONF.232/2020/3.

<sup>38</sup> Carla Bengoa Rojas, Pag-Yendu M. Yentcharé, “A sea of possibilities: Intellectual Property Considerations in the BBNJ Negotiations (Part Two)”, *Multilateral Matters #10*, Blog of the University of Cape Town Intellectual Property Unit, 2021.

<sup>39</sup> See the website of the WIPO, and Bart Van Vooren et al., “WIPO proposes new Patent Disclosure obligations on Genetic Resources: What impact for companies?”, *Convington, Inside EU Life Sciences*, 2023.

<sup>40</sup> See Pascale Ricard, « Le nouveau traité sur la biodiversité des espaces maritimes internationaux : quelles implications pour la France et l'Union européenne ? » *Revue Droit de l'Environnement*, n°323, 2023.