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The principle of common heritage of humankind and the BBNJ agreement*

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Abstract

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 (New York, 2023) it addresses marine biodiversity under the perspective of four subject-matters: marine genetic resources, area-based management tools, environmental impact assessment and transfer of marine technologies. This article takes in consideration only the first subject, which involves two fundamental principles of international law of the sea, one having a consolidated tradition (the freedom of the sea) and the other having an innovating character (the common heritage of humankind).

Keywords: common heritage of humankind, BBNJ agreement, Agreement on Marine Biological Diversity of Areas beyond National Jurisdiction

El principio del patrimonio común de la humanidad y el acuerdo BBNJ

Resumen

El Acuerdo sobre la Conservación y el Uso Sostenible de la Diversidad Biológica Marina de las Zonas Fuera de la Jurisdicción Nacional (Nueva York, 2023) aborda la biodiversidad marina desde la perspectiva de cuatro temas: recursos genéticos marinos, herramientas de gestión basadas en áreas, evaluación del impacto ambiental y transferencia de tecnologías marinas

* This article recaptures and updates what was written in Scovazzi, 2007, p. 11.

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Este artículo se centra únicamente en el primer tema, que abarca dos principios fundamentales del derecho internacional del mar: uno con una tradición consolidada (la libertad del mar) y el otro con un carácter innovador (el patrimonio común de la humanidad).

Palabras clave: Patrimonio común de la humanidad, BBNJ Agreement, Acuerdo sobre la Diversidad Biológica Marina de las Zonas Fuera de la Jurisdicción Nacional

1. A Recent Treaty Relevant for two General Principles

It has been remarked that the recent 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 (New York, 2023)[1] constitutes four treaties in one (Bondansky, 2024, p. 299), as it addresses marine biodiversity under the perspective of four subject-matters, each with its own objectives and obligations, namely: marine genetic resources, area-based management tools, environmental impact assessment and transfer of marine technologies.

This article will take in consideration only the first subject, which involves two fundamental principles of international law of the sea, one having a consolidated tradition (the freedom of the sea) (Anonymous [GROTIUS], 1609) and the other having an innovating character (the common heritage of humankind). The latter appears as the second most revolutionary principle to be found in international law – the first obviously being the prohibition of the use of force embodied in the Charter of the United Nations (San Francisco, 1945). In fact, and for different reasons, it seems that to put in place a regime according to which developed States should share with developing States some of the profits arising from an economic activity taking place in areas beyond national jurisdiction proves to be an endeavour as difficult as maintaining international peace and security.

2. The Principle of Common Heritage of Humankind

Under the United Nations Convention on the Law of the Sea (Montego Bay, 1982)[2], the Area, that is the seabed and ocean floor and subsoil thereof beyond the limits

[1] Hereinafter: BBNJ Agreement.
[2] Hereinafter: UNCLOS.

of national jurisdiction, is the common heritage of mankind[3], together with its resources[4].

The principle of common heritage of humankind is the most remarkable new element in the UNCLOS. While other elements in this treaty of codification, for instance the exclusive economic zone, can be considered as the natural evolution of international law of the sea in the direction of the progressive reduction of marine spaces subject to the regime of freedom, the concept of common heritage of humankind marks a qualitative change. It implies a third regime, which is completely different from the two previous and opposing regimes of sovereignty, applicable within the territorial sea, and of freedom, applicable on the high seas.

The concept of common heritage of humankind was proposed for the first time in a memorable speech made on 1st November 1967 before the United Nations General Assembly by the representative of Malta, Arvid Pardo5. The opportunity for a new regime was given by the technological developments that would have allowed within a relatively short time the exploitation of the polymetallic nodules that lie on the deep seabed and contain economically valuable minerals, such as manganese, nickel, cobalt and copper. The application of the regime of sovereignty would have led to a series of competitive extensions by coastal States of the limits of national jurisdiction. The application of the regime of freedom would have led to a race towards the appropriation of resources to be enjoyed under a first-come-first-served approach. As explained by Pardo, the consequences of both scenarios would have been equally undesirable, involving political friction, economic injustice and risks of pollution. In short, the strong States would get stronger and the rich richer:

> The known resources of the seabed and of the ocean floor are far greater than the resources known to exist on dry land. The seabed and ocean floor are also of vital and increasing strategic importance. Present and clearly foreseeable technology also permits their effective exploration for military or economic purposes. Some countries may therefore be tempted to use their technical competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor. This, even more than the search for wealth, will impel countries with the requisite technical competence competitively to extend their jurisdiction over selected areas of the ocean floor. The process has already started and will lead to a

[3] The subsequent trend, followed also by the BBNJ Agreement, has been to use the synonymous "humankind" (for example, "common concern of humankind", in the preamble of the 1992 Convention on Biological Diversity), to avoid a gender-discriminating language. However, things do not change very much, as "mankind" comes from the English word "man" and "humankind" comes from the word "homo", equally meaning "man" in Latin.

[4] Art. 136 UNCLOS.

[5] On the origin of the principle see: Taylor & Stroud, 2013.

> competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and in its implications last century's colonial scramble for territory in Asia and Africa. The consequences will be very grave: at the very least a dramatic escalation of the arms race and sharply increasing world tensions, also caused by the intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations. The strong would get stronger, the rich richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder. Between the very few dominant powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed and, at the same time, the world would face the growing danger of permanent damage to the marine environment through radioactive and other pollution: this is a virtually inevitable consequence of the present situation. (Pardo, 1975, p. 31)

The basic elements of the principle of common heritage of humankind are the interdiction of national appropriation, the destination of the Area for peaceful purposes, the use of the Area of its resources for the benefit of humankind as a whole, with special consideration for the interests and needs of developing countries and the establishment of an international organization (the International Seabed Authority)[6].

The proposal of Malta was the source of inspiration for Resolution 2749 (XXV), adopted on 17 December 1970, by which the United Nations General Assembly declared that "the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction […], as well as the resources of the area, are the common heritage of mankind"[7].

All the basic elements of the principle of common heritage of humankind can be found in UNCLOS Part XI. No State can claim or exercise sovereignty over parts of the Area[8]. The Area can be used exclusively for peaceful purposes[9]. All rights over its resources are granted to humankind as a whole, for which the ISBA acts[10]. Activities in the Area are carried out for the benefit of humankind as a whole, irrespective of the geographical situation of States, being they coastal or land-locked, and taking into particular consideration the interests and needs of developing States[11]. The ISBA takes into account the equitable sharing of financial or other kinds of benefits granted by activities in the Area through an appropriate mechanism[12].

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[6] Hereinafter: ISBA. Another element, which however is common to all marine spaces, is the protection and preservation of the marine environment.

[7] Para. 1.

[8] Art. 137, para. 1, UNCLOS.

[9] Art. 141 UNCLOS.

[10] Art. 137, para. 2, UNCLOS.

[11] Art. 140, para. 1, UNCLOS.

[12] Art. 140, para. 2, UNCLOS.

For the first time in the historical development of international law a multilateral treaty established a world-scale regime based on the management of natural resources by an international organization. The common heritage of humankind is a third option that is applicable to a particular kind of resources (mineral resources) located in a particular marine space (the seabed of the high seas). It does not totally replace the traditional regimes of sovereignty or freedom that remain applicable to other marine spaces and other resources. However, it introduces a third regime of resource management that is much more equitable than the previous two regimes.

As it is well-known, the UNCLOS text was not adopted by *consensus*, but was submitted to voting. It received 130 votes in favour, four against and seventeen abstentions. Several developed States were among those that voted against or abstained. The main criticisms to the UNCLOS related to the regime of the Area. According to some developed States, it would have discouraged mining activities by individual States or private groups, it would have unduly favoured a monopoly by ISBA of mining activities, it would have put on contractors excessive financial and other burdens, in particular those relating to the transfer of technology, and it would have penalized developed countries in the process of decision-taking by the Council, the main ISBA organ.

In 1994, it became clear that the UNCLOS would have entered into force without the participation of developed States, the only that had the technological and financial capability of exploiting the mineral resources located at great submarine depths. To avoid that the common heritage of humankind remained written on paper, the United Nations promoted a new negotiation relating to deep seabed regime. It resulted in the Agreement relating to the Implementation of Part XI of the UNCLOS, which was annexed to Resolution N° 48/263 and adopted by the General Assembly on 17 August 1994. While reaffirming that the Area and its resources are the common heritage of humankind, Resolution N° 48/263 remarks that "political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources".

The provisions of the 1994 Agreement and those of UNCLOS Part XI are "interpreted and applied together as a single instrument". However, in the event of any inconsistency between the Agreement and Part XI, the provisions of the former prevail[13]. In fact, the label of "implementation agreement" is only a diplomatic device to cover

[13] See Art. 2, para. 1, UNCLOS.

the evident reality that in 1994 the UNCLOS was amended[14] and several aspects of the original concept of common heritage of humankind were changed in their form and substance. To meet the hope for universal participation in the UNCLOS[15], many provisions were adapted to a climate of growing reliance on market principles.

Even if adapted (or, under a less optimistic perspective, diluted) in 1994, the principle of common heritage of humankind remains in the UNCLOS and is one of its cornerstones. With the passing of time, the ISBA has approved in 2000 the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (amended in 2013)[16], in 2010 the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area[17] and in 2012 the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area[18]. Several contracts for exploration have been concluded.

Draft regulations on exploitation of mineral resources in the Area are in an advanced stage of negotiation[19]. As it can be seen, even if slowly, mining activities are progressing towards the phase of commercial exploitation.

3. The Conflict between Two Principles

Resources different from minerals can also be found in the high seas and its seabed, as these spaces are not a desert, notwithstanding the extreme conditions of temperature, pressure and obscurity.

For instance, a relatively recent discovery is that the remote environment of the deep seabed supports biological communities that present unique genetic characteristics. Some communities live in the complete absence of sunlight in the seabed where

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[14] "The 1994 Implementation Agreement is a curious creature. The 1982 LOSC does not permit reservations (arts. 309, 310) and the procedures for its amendment are both protracted and open only to State parties (arts. 311-17). Neither route was suitable for modifications of the Convention sought by the industrialised States that remained outside the Convention. Instead, the 1994 Implementation Agreement was made, its title disingenuously implying that it was concerned to put into effect the 1982 provisions rather than to change them. In fact, it stipulates that several provisions of Part XI of the LOSC 'shall not apply' and modifies the effect of others" (Churchill & Lowe, 1999, p. 20).

[15] Today 169 States and one international organization (the European Union) are parties to the UNCLOS.

[16] Doc. ISBA/19/C/17 of 22 July 2013.

[17] Doc. ISBA/16/A/12/Rev. 1 of 15 November 2010.

[18] Doc. ISBA/18/A/11 of 22 October 2012.

[19] See doc. ISBA/29/C/CRP.1 of 16 February 2024.

warm water springs from tectonically active areas (so called hydrothermal vents)[20]. Several species of microorganisms, fish, crustaceans, polychaetes, echinoderms, coelenterates and molluscs have been found in such areas. Many of them were new to science. These communities, which do not depend on plant photosynthesis for their survival, rely on specially adapted micro-organisms able to synthesize organic compounds from the hydrothermal fluid of the vents (chemosyntesis). The ability of some deep seabed organisms to survive extreme temperatures (thermophiles and hyperthermofiles) and other extreme conditions (extremophiles) makes their genes of great interest to science and industry (Arrieta, Arnaud-Haond & Duarte, 2011). The prospects for the commercial exploitation of the so-called marine genetic resources are promising, also considering that every year several marine species are discovered that were previously unknown[21].

Neither the UNCLOS nor the Convention on Biological Diversity (Rio de Janeiro, 1992) or its Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010) provide any specific legal framework for the exploitation of marine genetic resources beyond the limits of national jurisdiction[22].

Starting in 2006, the question of the regime of marine genetic resources was discussed at the intergovernmental level within the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, established under United Nations General Assembly Resolution 59/24 of 17 November 2004. Opposite views were put forward by the States involved in the discussion.

Some States, belonging to the group of developing countries, took the position that the principle of common heritage of humankind covered also marine genetic resources:

> Several delegations reiterated their understanding that the marine genetic resources beyond areas of national jurisdiction constituted the common heritage of mankind and recalled article 140 of the Convention, which provides that the activities in the Area shall be carried out for the benefit of mankind and that particular consideration should be given to the interest and needs of developing States, including the need for these resources to be used for the benefit of present generations and to be preserved for future generations. (*Report of the Ad Hoc Open-ended Working Group to Study Issues*

[20] Hydrothermal vents may be found both in the Area and on the seabed falling within the limits of national jurisdiction, according to the definition of continental shelf given by Art. 76 UNCLOS.

[21] An average of 2000 new marine species are discovered every year: see Bodansky, 2024, p. 301.

[22] According to Art. 15, para. 1, the Nagoya Protocol applies to genetic resources utilized within the jurisdiction of a party.

> *Relating to their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, 2006, para. 71)*

Other States, belonging to the group of developed countries, supported the application of the principle of freedom of the sea, which entails also freedom of access to marine genetic resources and of their exploitation:

> Other delegations reiterated that any measures that may be taken in relation to genetic resources in areas beyond national jurisdiction must be consistent with international law, including freedom of navigation. In their view, these resources were covered by the regime of the high seas, which provided the legal framework for all activities relating to them, in particular marine scientific research. These delegations did not agree that there was a need for a new regime to address the exploitation of marine genetic resources in areas beyond national jurisdiction […]. (*Report of the Ad Hoc Open-ended Working Group to Study Issues Relating to their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, 2006, para. 72)*

The difference in positions went on, in an explicit or latent form, during the whole course of negotiations for the BBNJ Agreement. It is interesting to remark that both the opposing positions moved from the same starting point that the UNCLOS is the instrument regulating all activities that take place into the sea:

> The United Nations Convention on the Law of the Sea was recognized as the legal framework for all activities in the oceans and seas, including in respect of genetic resources beyond areas of national jurisdiction[23]. (*Joint Statement of the Co-Chairpersons of the Working Group, 2008, para. 36).*

The question may be asked why, moving from the same assumption, two different groups of State took two opposing conclusions. The better answer seems that the very assumption should be put in question.

There is no doubt that the UNCLOS is a cornerstone in the codification of international law. It has been qualified as a "constitution for the oceans", "a monument to international co-operation in the treaty-making process", "a comprehensive framework for the regulation of all ocean space" as well as "an attempt to establish true universality in the effort to achieve a just and equitable international economic order governing ocean space" (Koh, 1983, p. xix).

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[23] This assumption is constantly repeated in the resolution on oceans and the law of the sea that is yearly adopted by the General Assembly: "Emphasizing the universal and unified character of the Convention, and reaffirming that the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out" (preamble of Resolution 79/144 of 16 December 2024, the most recent one).

Nevertheless, the UNCLOS, like any legal instrument, is linked to the period when it was negotiated and adopted (from 1973 to 1982, in the specific case). From this consideration the consequence can be drawn – perhaps it is a banality, but, as such, it does have the great force of banalities – that, being itself a product of time, the UNCLOS cannot stop the passing of time. While offering a solid basis for the regulation of many matters, it would be illusory to think that the UNCLOS is the end of any regulation. International law of the sea is subject to a process of natural evolution and progressive development that is linked to new activities and needs and to the consequent changes in States' practice. It involves also the UNCLOS.

Because of space constraints, it is not possible to develop here a digression on cases where changes with respect to the UNCLOS scheme have been included in the UNCLOS context through so-called implementation agreements (evolution by integration)[24], where a certain interpretation of UNCLOS provisions has prevailed over another plausible interpretation (evolution by interpretation), where the regime can only be drawn from customary international law, as the UNCLOS does not take any position on the relevant question (evolution in another context) and where, being the UNCLOS regime clearly inadequate – it happens very seldom, but it may happen – another instrument has been adopted at the multilateral level (evolution through further codification) (Scovazzi, 2001, p. 123).

At the time when the UNCLOS was being negotiated, very little was known about marine genetic resources. The UNCLOS drafters had no precise information about the genetic characteristics of marine species and the prospects for their exploitation. For evident chronological reasons, the potential economic value of units of heredity of certain marine organisms was not taken into consideration in the UNCLOS elaboration. The very words "marine genetic resources" do not appear anywhere in the UNCLOS text. Where the UNCLOS provisions regulate marine resources, they are intended to address only mineral or living resources.

"Activities in the Area" are defined in the UNCLOS as "all activities of exploration for, and exploitation of, the resources of the Area"[25] and such resources are defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules"[26]. It clearly results that the UNCLOS regime of common heritage of humankind does not apply to non-mineral resources, such as the genetic resources that are found in the Area or in the super-jacent waters.

[24] The above mentioned (*supra*, para. 2) 1994 Implementation Agreement is an evident instance in this regard.
[25] Art. 1, para. 1 (3), UNCLOS.
[26] Art. 133 (a) UNCLOS

Nor can it be said that genetic resources are to be included among the "marine living resources"[27] to which several UNCLOS provisions refer, in particular those relating to the exclusive economic zone[28], the continental shelf[29] or the high seas[30]. If these provisions are read in the light of their object and purpose, it is clear that the expression "marine living resources" is linked, in the UNCLOS context, to fishing activities, that is to activities different from those of "utilization of marine genetic resources", meaning "[…] to conduct research and development on the genetic and/or biochemical composition of marine genetic resources, including through the application of biotechnology […]"[31].

While fishing activities are intended to catch, for consumption or sale purposes, the whole body (or a substantial part of it) of the targeted species, activities of utilization of marine genetic resources are intended to extract from the targeted species the functional units of heredity[32] and to modify them through biotechnologies[33], in order to make new products or processes and, if appropriate, patent them. For this kind of activity, there is no need for large quantities of living resources, as quality and difference are much more significant than quantity and similarity. The added value granted by the use of laboratories and the command of sophisticated technologies is conclusive factor and problems of protection of intellectual property can easily arise. It would be completely illogical to apply to activities directed at genetic material the UNCLOS rules relating to conservation and management of the living resources of the high seas[34].

Having clarified that there is an easily explainable gap in the UNCLOS as regards marine genetic resources, it should also be emphasized that the principle of common heritage of humankind, which is proclaimed and applied with specific reference to the mineral resources of the Area (UNCLOS Part XI), is endowed with an expansive character. The regime of the Area already includes subject-matters that are not directly

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[27] Marine biological resources (*ressources biologiques marines*) in the French official text of the UNCLOS.
[28] See Arts. 56, 61, 62, 69, 70 and 73 UNCLOS.
[29] See Art. 77, para. 4, UNCLOS
[30] See Arts. 117, 118 and 119 UNCLOS
[31] Art. 1, para. 14, BBNJ Agreement. "Biotechnology" is defined as "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use" (Art. 1, para. 3).
[32] According to the BBNJ Agreement, "'marine genetic resources' means any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value" (Art. 1, para. 8).
[33] According to the BBNJ Agreement, "'biotechnology" means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use (Art. 1, para. 3).
[34] The BBNJ Agreement does not apply to fishing (Art. 10, para. 2).

linked to the exploitation of marine mineral resources, such as scientific research[35], the preservation of the marine environment[36] and the protection of the archaeological and historical objects[37]. In other words, it is logical to think that the aim of sharing benefits among all States is a basic objective for an instrument designed to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked"[38]. The same objective can stand as a source of inspiration also when the exploitation of new kinds of resources in spaces beyond national jurisdiction becomes feasible.

The application of the principle of freedom of the sea, which results in a "first-come-first-served" approach, would lead to inequitable and hardly acceptable consequences also in the field of genetic resources. Hopefully, cooperative schemes, based on rules on access to resources and sharing of the relevant benefits, could be envisaged in an UNCLOS-related agreement establishing an international regime for marine genetic resources in areas beyond national jurisdiction. This would be also in conformity with the principle of fair and equitable sharing of the benefits arising out of the utilization of genetic resources set forth by Art. 1 of the Convention on Biological Diversity and, subsequently, by Art. 10 of the Nagoya Protocol.

This is the reason why it is important to ascertain how far the BBNJ Agreement goes in the direction of the principle of common heritage of humankind.

4. Sharing of Benefits in the BBNJ Agreement

Being the result of prolonged preparatory meetings and complex negotiations, the text of the BBNJ Agreement seems prudently drafted, in order to avoid as much as possible a quasi-theological conflict between two different principles that would have led to the need of a clearcut choice between one or the other. The provision stating the general principles and approaches of the agreement lists, among others, both the potentially opposing principles:

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[35] "Marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII" (Art. 143 UNCLOS).

[36] "Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities" (Art. 145 UNCLOS).

[37] "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin" (Art. 149 UNCLOS).

[38] 6th preambular paragraph, UNCLOS.

> In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: […]
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> (b) The principle of the common heritage of humankind which is set out in the Convention;
>
> (c) The freedom of marine scientific research, together with other freedoms of the high seas; […][39].

Notably, the same provision also lists "the principle of equity and the fair and equitable sharing of benefits"[40]. It is true that, in this way, the BBNJ Agreement does not directly link the sharing of benefits to the common heritage of humankind, although the former is a substantive component of the latter. However, looking at the substance of the question, it is also true, that, by including the sharing of benefits among the principles and approaches of the instrument, the BBNJ Agreement implicitly transposes into its provisions the most substantive part of the principle of common heritage of humankind[41].

To be precise, the regime established by the BBNJ Agreement includes an aspect of the principle of freedom of the sea, in providing those activities relating to marine genetic resources are open to all States parties and their nationals:

> Activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction may be carried out by all Parties, irrespective of their geographical location, and by natural or juridical persons under the jurisdiction of the Parties. Such activities shall be carried out in accordance with this Agreement[42].

However, the same provision points out that, if access to the resources is free, the activities in question must be carried out in the interest of all States and for the benefit of all humanity, implicitly rejecting the most undesirable aspect of freedom of the sea, that is the first-come-first-served approach:

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[39] Art. 7 BBNJ Agreement. The word "principle" is not attached to the "freedoms of the sea". However, this may be only a terminological nuance.

[40] Art. 7 (d) BBNJ Agreement.

[41] A turning point during the preparatory works for the BBNJ Agreement occurred when the European Union, an important participant in the discussion, stated that it agreed on the option of sharing of benefits: "Although […] to date very few products based on MGR [= marine genetic resources] from ABNJ [= areas beyond national jurisdiction] have been commercialized, the EU [= European Union] holds the view that states should seriously discuss options for facilitating access to samples of MGR that have been collected from ABNJ as well as for sharing in a fair and equitable way benefits that may arise in this regard" (intervention by Aleksander Čičerov, on behalf of the European Union, at the meeting of 30 April 2008 of the Ad Hoc Open-ended Working Group to Study Issues Relating to their Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction).

[42] Art. 11, para. 1, BBNJ Agreement.

> Activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction are in the interests of all States and for the benefit of all humanity, particularly for the benefit of advancing the scientific knowledge of humanity and promoting the conservation and sustainable use of marine biological diversity, taking into particular consideration the interests and needs of developing States[43].

The machinery set forth by the BBNJ Agreement is based on the principles of publicity and accessibility. It is provided that the Parties adopt the necessary legislative, administrative or policy measures to ensure that a broad range of information relating to activities on marine genetic resources is notified to the Clearing-House Mechanism established under the BBNJ Agreement[44]. Such information must be provided both before[45] and after[46] the taking place of the activities. It also relates, if this is the case, to the utilization and commercialization of genetic resources, including patents granted and sales of relevant products[47]. Upon notification of

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[43] Art. 11, para. 6, BBNJ Agreement.

[44] See Art. 12 BBNJ Agreement.

[45] "(a) The nature and objectives under which the collection is carried out, including, as appropriate, any programme(s) of which it forms part; (b) The subject matter of the research or, if known, the marine genetic resources to be targeted or collected, and the purposes for which such resources will be collected; (c) The geographical areas in which the collection is to be undertaken; (d) A summary of the method and means to be used for collection, including the name, tonnage, type and class of vessels, scientific equipment and/or study methods employed; (e) Information concerning any other contributions to proposed major programmes; (f) The expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate ; (g) The name(s) of the sponsoring institution(s) and the person in charge of the project; (h) Opportunities for scientists of all States, in particular scientists from developing States, to be involved in or associated with the project; (i) The extent to which it is considered that States that may need and request technical assistance, in particular developing States, should be able to participate or to be represented in the project; (j) A data management plan prepared according to open and responsible data governance, taking into account current international practice" (Art. 12, para. 2, BBNJ Agreement).

[46] "(a) The repository or database where digital sequence information on marine genetic resources is or will be deposited; (b) Where all marine genetic resources collected in situ are or will be deposited or held; (c) A report detailing the geographical area from which marine genetic resources were collected, including information on the latitude, longitude and depth of collection, and, to the extent available, the findings from the activity undertaken; (d) Any necessary updates to the data management plan provided under paragraph (2) (j) above" (Art. 12, para. 5).

[47] "(a) Where the results of the utilization, such as publications, patents granted, if available and to the extent possible, and products developed, can be found; (b) Where available, details of the post-collection notification to the Clearing House Mechanism related to the marine genetic resources that were the subject of utilization; (c) Where the original sample that is the subject of utilization is held; (d) The modalities envisaged for access to marine genetic resources and digital sequence information on marine genetic resources being utilized, and a data management plan for the same; (e) Once marketed, information, if available, on sales of relevant products and any further development" (art. 12, par. 8, BBNJ Agreement).

the information, the Clearing-House Mechanism automatically generates a BBNJ standardized batch identifier[48].

It is also provided that parties ensure the deposit of marine genetic resources from the areas beyond national jurisdiction and their digital sequence information, together with their BBNJ standardized batch identifiers, in publicly accessible repositories and databases:

> Parties shall take the necessary legislative, administrative or policy measures to ensure that marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction, together with their 'BBNJ' standardized batch identifiers, subject to utilization by natural or juridical persons under their jurisdiction are deposited in publicly accessible repositories and databases, maintained either nationally or internationally, no later than three years from the start of such utilization, or as soon as they become available, taking into account current international practice[49].

Access to repositories and databases under a Party's jurisdiction may be subject to reasonable conditions, namely:

> (a) The need to preserve the physical integrity of marine genetic resources;
>
> (b) The reasonable costs associated with maintaining the relevant gene bank, biorepository or database in which the sample, data or information is held;
>
> (c) The reasonable costs associated with providing access to the marine genetic resource, data or information;
>
> (d) Other reasonable conditions in line with the objectives of this Agreement;
> and 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[50].

Notably, the BBNJ Agreement provides that the confidentiality of information must be protected – and this may be seen as a measure to safeguard intellectual property rights:

> The confidentiality of information provided under this Agreement and rights thereto shall be respected. Nothing under this Agreement shall be interpreted as requiring the sharing of information that is protected from disclosure under the domestic law of a Party or other applicable law[51].

Benefits must be shared "in a fair and equitable manner" and in order to "contribute to the conservation and sustainable use of marine biological diversity of areas beyond

[48] Art. 12, para. 3, BBNJ Agreement
[49] Art. 14, para. 3, BBNJ Agreement.
[50] Art. 14, para. 4, BBNJ Agreement.
[51] Art. 51, para. 6, BBNJ Agreement.

national jurisdiction"[52]. Benefits to be shared include both non-monetary[53] and monetary, that is those that mostly interest developing States. However, as a proof of the difficulties in dealing with the question of monetary benefits, the modalities for their sharing are reserved for a future decision by the Conference of the Parties to the BBNJ Agreement:

> Monetary benefits from the utilization of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction, including commercialization, shall be shared fairly and equitably, through the financial mechanism established under article 52, for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction[54].
>
> The Conference of the Parties shall decide on the modalities for the sharing of monetary benefits from the utilization of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction, taking into account the recommendations of the access and benefit-sharing committee established under article 15. If all efforts to reach consensus have been exhausted, a decision shall be adopted by a three-fourths majority of the Parties present and voting. The payments shall be made through the special fund established under article 52. The modalities may include the following:
>
> (a) Milestone payments;
>
> (b) Payments or contributions related to the commercialization of products, including payment of a percentage of the revenue from sales of products;
>
> (c) A tiered fee, paid on a periodic basis, based on a diversified set of indicators measuring the aggregate level of activities by a Party;
>
> (d) Other forms as decided by the Conference of the Parties, taking into account recommendations of the access and benefit-sharing committee".[55]

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[52] Art. 14, para. 1, BBNJ Agreement.

[53] Non-monetary benefits include, inter alia, the following entries: "(a) Access to samples and sample collections in accordance with current international practice; (b) Access to digital sequence information in accordance with current international practice; (c) Open access to findable, accessible, interoperable and reusable (FAIR) scientific data in accordance with current international practice and open and responsible data governance; (d) Information contained in the notifications, along with 'BBNJ' standardized batch identifiers, provided in accordance with article 12, in publicly searchable and accessible forms; (e) Transfer of marine technology in line with relevant modalities provided under Part V of this Agreement; (f) Capacity-building, including by financing research programmes, and partnership opportunities, particularly directly relevant and substantial ones, for scientists and researchers in research projects, as well as dedicated initiatives, in particular for developing States, taking into account the special circumstances of small island developing States and of least developed countries; (g) Increased technical and scientific cooperation, in particular with scientists from and scientific institutions in developing States; (h) Other forms of benefits as determined by the Conference of the Parties, taking into account recommendations of the access and benefit-sharing committee established under article 15" (Art. 14, para. 2, BBNJ Agreement).

[54] Art. 14, para. 5, BBNJ Agreement.

[55] Art. 14, para. 7, BBNJ Agreement.

As it can be seen, time will tell how this crucial question is addressed. Important is, however, the rule according to which, if the Conference of the Parties is not able to reach consensus on the question, the relevant decisions will be taken by a three-fourths majority of the Parties present and voting. This rule, which plays in favour of developing States, is balanced by an optional clause of temporary self-exclusion:

> A Party may make a declaration at the time the Conference of the Parties adopts the modalities stating that those modalities shall not take effect for that Party for a period of up to four years, in order to allow time for necessary implementation. A Party that makes such a declaration shall continue to make the payment set out in paragraph 6 above until the new modalities take effect".[56]

In any way, developed parties are bound to give contributions to a special fund already from the date of entry into force of the BBNJ Agreement[57].

As the result of a delicate balancing of positions seems also the rule according to which the provisions of the BBNJ Agreement apply – retroactively in a certain sense – to the utilization of marine genetic resources and digital sequence information on such resources collected or generated before the entry into force of the BBN Agreement. However, also in this regard exceptions, having the effect of reservations, are admissible:

> "The provisions of this Agreement shall apply to activities with respect to marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected and generated after the entry into force of this Agreement for the respective Party. The application of the provisions of this Agreement shall extend to the utilization of marine genetic resources and digital sequence information on marine genetic resources of areas beyond national jurisdiction collected or generated before entry into force, unless a Party makes an exception in writing under article 70 when signing, ratifying, approving, accepting or acceding to this Agreement[58].

5. Conclusive Remarks

As far as the regime of genetic resources is concerned, a summary evaluation of the BBNJ Agreement leads to a positive conclusion: the final regime, taken as a whole, seems better than what could have been expected in the light of the prolonged and

[56] Art. 14, para. 8, BBNJ Agreement.

[57] "After the entry into force of this Agreement, developed Parties shall make annual contributions to the special fund referred to in article 52. A Party's rate of contribution shall be 50 per cent of that Party's assessed contribution to the budget adopted by the Conference of the Parties under article 47, paragraph 6 (e). Such payment shall continue until a decision is taken by the Conference of the Parties under paragraph 7 below" (Art. 14, para. 6, BBNJ Agreement).

[58] Art. 10, para. 1, BBNJ Agreement. Art. 70 relates to reservations and exceptions.

complex negotiations that have preceded the adoption of the BBNJ Agreement. In fact, the basic component of the principle of common heritage of humankind, that is the sharing of benefits, is retained. Obviously, this conclusion moves from the assumption – that should appear quite evident in the present writing – that, where referred to marine resources, the word "freedom" has a negative meaning, as equivalent to an uncontrolled appropriation of such resources on the basis of the first-come-first-served criterion and in the consequent prejudice of their equitable and sustainable use.

In practice, all will depend on the future fate of the BBNJ Agreement. In particular, all will depend not only on an evident factor, that is whether the BBNJ Agreement enters into force[59] and whether a substantial number of developed States decide to become parties to it[60], but also on a less evident factor, that is how developed countries will react to the potential attack that it makes to the (supposed) sanctity of the rules on intellectual property rights. Art. 12, para. 5, lett. c[61], of the BBNJ Agreement provides that a Party is bound to notify to the Clearing-House Mechanism the geographical area in which the collection *in situ* of marine genetic resources is to be undertaken and, consequently, to disclose whether it is located within or beyond national jurisdiction. However, it is not clear how Art. 12, para. 5, lett. c, should be coordinated with Art. 5, para. 2[62], and with Art. 51, para. 6[63], of the same Agreement, considering that the domestic legislation of several States does not require that such information is provided[64]. The practice in the application of the BBNJ Agreement will provide an answer to this crucial question.

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[59] So far (March 2025), the BBNJ Agreement has been ratified by 21 States and has not entered into force. Under Art. 68, para. 1, it "shall enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession".

[60] So far, among developed countries, the BBNJ Agreement has been ratified by France, Monaco, Republic of Korea, Singapore and Spain.

[61] Reproduced *supra*, note 53.

[62] "This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies".

[63] Reproduced *supra*, in the text of para. 4.

[64] "Assessing the types and levels of current uses of genetic resources from the deep seabed proves relatively difficult for several reasons. First, patents do not necessarily provide detailed information about practical applications, though they do indicate potential uses. Moreover, information regarding the origin of the samples used is not always included in patent descriptions" (*Status and Trends of, and Threats to, Deep Seabed Genetic Resources beyond National Jurisdiction, and Identification of Technical Options for their Conservation and Sustainable Use*, 2005. para. 22).

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