The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas Beyond National Jurisdiction: No End in Sight?

*Vito De Lucia**

The third substantive session of the intergovernmental conference (IGC–3) sought to adopt a new implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. IGC–3 concluded in August 2019, but the progress made has not met expectations, hopes and necessities, especially given the fact that the process was supposed to end at the next session of the IGC in March 2020. At the same time, however, IGC–3 has also marked an undeniable shift in focus. One central point of contention is whether marine genetic resources should be encompassed by the regime of the common heritage of (hu)mankind. This paper will offer a critical assessment on the state of play in relation to this central point of divergence in the negotiations- one that has proved difficult since the start of the process on the conservation of marine biodiversity in areas beyond national jurisdiction (BBNJ). The article is organized as follows: Section I offers a brief introduction. Section II provides a useful background on the BBNJ process and its current status as of April 2020. Following this background discussion, Section III of the article digs deeper into the historical background concerning the question of marine genetic resources by discussing its relevance during the preparatory committee (PREPCOM) and the first two IGCs. Section IV discusses the state of affairs over the course of IGC–3. As the question of marine genetic resources poses a threat to the successful completion of the negotiations, the paper offers views on possible ways forward.

La troisième session substantive de la conférence intergouvernementale (CIG-3) a cherché à adopter un nouvel accord de mise en œuvre dans le cadre de la Convention des Nations unies sur le droit de la mer (UNCLOS) sur la conservation et l'utilisation durable de la biodiversité des zones ne relevant pas de la juridiction nationale. La CIG-3 s'est terminée en août 2019, mais les progrès réalisés n'ont pas répondu aux attentes, aux espoirs et aux nécessités, surtout si on tient compte du fait que le processus était censé se terminer à la prochaine session de la CIG en mars 2020. Cependant, en même temps, la CIG-3 a également marqué un changement de focalisation indéniable. Un point de discorde central est la question de savoir si les ressources génétiques marines doivent être englobées dans le régime du patrimoine commun de l'humanité. Ce document propose une évaluation critique de cette divergence centrale dans les négociations, qui s'est avérée difficile depuis le début du processus de conservation de la biodiversité marine dans des zones ne relevant pas de la juridiction nationale (BBNJ). L'article est organisé de la manière suivante : La première section offre une brève introduction. La deuxième section fournit un contexte utile sur le processus BBNJ et son état actuel en avril 2020. Suite à cette discussion contextuelle, la section III de l'article approfondit le contexte historique concernant la question des ressources génétiques marines en discutant de sa pertinence lors du comité préparatoire (PREPCOM) et des deux premières CIG. La section IV examine l'état des choses au cours de la CIG-3. Comme la question des ressources génétiques marines constitue une menace pour la réussite des négociations, le document offre des points de vue sur les voies possibles à suivre.

Titre en français: *Traité mondial sur la biodiversité marine dans les zones ne relevant pas des juridictions nationales : Pas de fin en vue ?*

* Vito De Lucia is an Associate Professor at the Norwegian Centre for the Law of the Sea (NCLOS), UiT The Arctic University of Norway. His most immediate research interests are the intersection of critical theory, law and ecology. His current research focusses on the concept of commons in international law, on the BBNJ negotiations, and on Arctic governance. He is the author of *The Ecosystem Approach in International Environmental Law: Genealogy and Biopolitics* (Routledge, 2019). The author wishes to thank Kristine Dalaker Kraabel, Christian Prip and Philipp Nickels for their insightful comments on an early version of this paper and Mana Tugend for her research assistance. Part of the research for this paper was funded by Norsk Polarinstitutt Grant nr 66005.

1. INTRODUCTION

A process towards the adoption of a global treaty on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction has been ongoing under the aegis of the UN for the last few years.[1] The anticipated treaty under negotiation has been described as "the most important environmental treaty that most people have never heard of",[2] as the conservation and sustainable use of the ocean is arguably "one of the world's most pressing global sustainability challenges".[3] In this respect, a treaty protecting marine biodiversity would be instrumental towards the achievement of Sustainable Development Goal 14 (Life Below Water).[4] The treaty, which would cover within its geographical scope 50% of the planet's surface[5] with enormous biodiversity value,[6] would address old and new threats to marine biodiversity through a coherent, global framework. It would thus fill existing gaps to ocean governance, which remains sectoral, fragmented and ultimately inadequate today. This new treaty would allow for the establishment of marine protected areas in regions beyond national jurisdiction and would set global rules for carrying out environmental impact assessments. Additionally, the treaty would address another important topic: marine genetic resources. This last topic is of particular importance to developing countries in ways that mirror the history of the Convention on Biological Diversity, and is a crucial part of the negotiations. This topic also stirs the history of the law of the sea, as it has prompted renewed discussions on the question of the principle of common heritage of mankind (the CHM) that mirror those held during the negotiations of UNCLOS in relation to the mineral resources of the Area. In the context of the BBNJ negotiations, the question raised is whether or not the principle of the CHM is, or

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1 See Section II for a summary of the process to date.

2 Stewart M Patrick, "Why the U.N. Pact on High Seas Biodiversity Is Too Important to Fail" *World Politics Review* (8 July 2019), online: <www.worldpoliticsreview.com/articles/28011/why-the-u-n-pact-on-high-seas-biodiversity-is-too-important-to-fail> [Patrick].

3 Glen Wright et al, "The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction" (2018) at 10, online (pdf): *IDDRI* <www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Etude/20180830-The%20long%20and%20winding%20road.pdf> [Wright].

4 *Ibid*.

5 Patrick, *supra* note 2.

6 Wright, *supra* note 3 at 14.

should be, applicable, to marine genetic resources, and with what consequences. In this respect the outcome of the negotiations on this topic may have far reaching implications for the future of the law of the sea.

In December 2017, The United Nations General Assembly (UNGA) launched an intergovernmental conference (IGC) to formally negotiate a new treaty under UNCLOS on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. The resolution scheduled one organization meeting and four substantive sessions. The third substantive session (IGC–3) concluded in August 2019. While the progresses fell well short of expectations, hopes and necessities – given there is only one session left for negotiators to find agreement on all elements of the new treaty, IGC-3 has also marked an undeniable shift in focus. This article will assess the state of play in relation to one of the central points of divergence in the negotiations, and indeed ever since the start of the process on the conservation of marine biodiversity in areas beyond national jurisdiction (BBNJ): whether marine genetic resources should be encompassed by the regime of the common heritage of (hu)mankind. The article is structured as follows. Section II provides background information on the BBNJ process and its current status. Section III discusses the historical emergence and background for what has been defined as the "polemical debate"[7] on the CHM, and outlines its trajectory during the preparatory committee (PREPCOM) and the first two IGCs. Section IV discusses IGC–3 specifically. Section V offers concluding remarks and views on possible ways forward.

2. A BRIEF OVERVIEW OF THE BBNJ PROCESS TO DATE

The existence of a series of important legal and governance gaps related to marine biodiversity began to be recognized almost two decades ago. In 2003, the Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) underlined the urgency of developing norms and mechanisms aimed at protecting vulnerable marine ecosystems, especially in areas beyond national jurisdiction.[8] In 2004, the General Assembly of the United Nations established an ad hoc open-ended informal working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ WG, or the BBNJ Working Group).[9] In its 2011 report, the BBNJ WG recommended that a "process be initiated" by the UNGA that could include, among other options, the development of a multilateral agreement under UNCLOS on marine biodiversity in areas beyond national jurisdiction.[10] The report also identified four substantive areas that would need to be most urgently addressed, "together and as a whole"[11] by one such process: marine genetic resources (MGRs), including questions on the sharing of benefits,

7 See Christopher Joyner, "Legal Implications of the Concept of the Common Heritage of Mankind" (1986) 35 ICLQ at 190.

8 See *Report of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea,* 26 June 2003, UN Doc A/58/95 at para 98.

9 *Resolution adopted by the General Assembly on 17 November 2004*, GA, 59th Sess, UN Doc A/RES/59/24 at para 73.

10 Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc A/66/119, Annex, Section I "Recommendations" at para 1(a).

11 This expression indicates the goal of pursuing the negotiating agenda as a package deal—that is, either there is agreement on all the elements or no agreement at all.

measures such as area-based management tools (ABMTs), including marine protected areas (MPAs) and environmental impact assessments (EIAs), capacity-building and the transfer of marine technology.[12] The BBNJ WG submitted its final report in 2015,[13] and on the basis of the recommendations contained therein,[14] the UNGA decided to convene a process to "develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."[15] Prior to initiating an intergovernmental conference (IGC), the UNGA launched a preparatory committee (PREPCOM) to "make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument."[16] After four sessions, the PREPCOM submitted its report to the UNGA in July 2017.[17] The report had two sections, and neither reflected consensus among the delegations.[18] Section A indicated "non-exclusive"[19] elements of a text where significant, though not full, convergence existed.[20] Section B indicated, by contrast, some of the elements where divergences remained unbridged.[21] Finally, the UNGA launched the IGC on 24 December 2017,[22] scheduling four substantive sessions and a preliminary organizational meeting. It is important to mention that the outcome postponement of IGC–4 (due to the COVID-19 pandemics),[23] the agreement will be an implementing agreement of UNCLOS, and the negotiating mandate contains a specific requirement that the new agreement be consistent with UNCLOS.[24] Some of the debates that will be reviewed in the rest of this paper hinge

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12 *Ibid* at para 1(b).

13 See *Resolution adopted by the General Assembly on 9 December 2013*, UN Doc A/RES/68/70 at paras 198–200.

14 See Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Annex, Section I "Recommendations", UN Doc A/69/780, para 1(e) [BBNJ WG Recommendations].

15 *Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, 2015, UNGA, 69th Sess, UN Doc Res A/69/292.

16 *Ibid.*

17 See *Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, UNGA, 72nd Sess, UN Doc A/AC.287/2017/PC.4/2 [PREPCOM Report].

18 *Ibid* at para 38(a).

19 An expression which indicates that the listed elements do not exhaust the possible list of elements to be included in a future treaty.

20 PREPCOM Report, *supra* note 17 at § A.

21 *Ibid* at § B.

22 *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,* UNGA, 72nd Sess, 2017, UN Doc Res A/RES/72/249.

23 See UNGA Res 74/543 on 9 March 2020 (provisionally available as A/74/L.41). The new dates are yet to be defined.

24 See e.g. UNGA, UN Doc Res A/RES/72/249, noting the "work and results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea" at para 6.

to a significant extent on whether the different interpretations are indeed consistent with UNCLOS.

At the time of writing, the IGC already held the organizational meeting and three of the four scheduled substantive sessions. The fourth and final session, which was originally scheduled for March 2020,[25] has been postponed due to the COVID-19 pandemic. It is unlikely, however, in the opinion of the present writer,[26] that the negotiators will find agreement on all elements of the package by the end of IGC–4, even if there will be more time for intersessional and informal discussions.

3. COMMON HERITAGE THEN AND NOW

In broad and general terms, the common heritage of mankind is a principle that sets out that certain global common resources should be owned collectively by mankind, and the benefits arising from their utilization should be shared.[27] There exists a number of articulations of the principle,[28] both in moral and legal terms, but what we are concerned with here is its inclusion in the UNCLOS, and, more directly, its role in the ongoing BBNJ negotiations.

The question of common heritage of mankind (CHM) and its role, if any, in relation to marine genetic resources (MGRs) in areas beyond national jurisdiction represents a long-standing issue that has characterized the BBNJ process from very early on. This is interesting, as well as problematic, as the overall aim of the BBNJ process is to adopt an agreement on the conservation of marine biodiversity, while the topic of MGR hinges primarily on resource extraction and benefit-sharing. Yet, during the BBNJ WG, it appeared inevitable to construct the package in such a way so as to cater the different interests of the various group of countries, and thus allow the process to move forward.[29] While the question of the CHM was raised during the work of the BBNJ WG,[30] no agreement was reached then as to whether it was a relevant and applicable principle for regulating access to and benefit-sharing from the

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25 For some general overviews of the progress, see also Elizabeth Mendenhall et al, "A Soft Treaty, Hard to Reach: The Second Inter-governmental Conference for Biodiversity Beyond National Jurisdiction" (2018) 108 Marine Pol'y 108; see also Rachel Tiller et al, "The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction" (2019) 99 Marine Pol'y 239.

26 This viewpoint is also driven by the sentiment of the room that the present writer could register during IGC–3 (personal observation).

27 See Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Netherlands: Kluwer Law, 1998) [Baslar].

28 Such as in the field of law of the sea, space law, and in relation to Antarctica and plant genetic resources. For details, see *ibid*. See also Vito De Lucia, "The Concept of Commons and Marine Genetic Resources in Areas Beyond National Jurisdiction" (2018) 5 Maritime Safety & Security LJ 1 [De Lucia, 2018].

29 See Yao Huang & Changshun Hu, "The Principle of the Common Heritage of Mankind Can be Applied to Marine Genetic Resources" in Keyuan Zou, ed, *Global Commons and the Law of the Sea* (Leiden: Brill Nijhoff, 2018) at 53 [Huang & Hu].

30 See "Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly" (23 January 2015), online (pdf): *UN* <www.un.org/Depts/los/biodiversityworkinggroup/documents/AHWG_9_recommendations.pdf> [2015 BBNJ WG Report]; see also Dire Tladi, "Marine Genetic Resources on the Deep Seabed: The Continuing Search for a Legally Sound Interpretation of UNCLOS" (2008) 8 Int Env L & Diplomacy Rev 65.

utilization of MGRs. Developing countries, in particular, held the view that "free access and exclusive exploitation of these resources by a few have serious global economic and social consequences",[31] and that MGRs are *already* encompassed by the CHM[32] as enshrined in UNCLOS and in UNGA resolution 2749 (XXV). Developed countries, by contrast, considered MGRs to already be encompassed by the regime of the freedom of the high seas[33] and that, in parallel, the CHM is only applicable to mineral resources of the area.[34] Importantly, developed countries consider that opening a discussion on the CHM and its applicability to MGRs would amount to a renegotiation of UNCLOS, something that they consider unacceptable.[35] Additionally, bioprospecting (the activity of collecting marine genetic material with the view of commercial development)[36] is understood by most developed countries to fall within the meaning of marine scientific research, and thus to be subject to a regime of freedom.[37] From a legal perspective, much of the discussion hinges on the interpretation of Articles 133 and 136 of UNCLOS, respectively defining the key term "resources"[38] and setting out the material scope of applicability of the CHM.[39]

These same questions were debated without arriving at any agreement during the preparatory committee meetings (PREPCOM). Indeed, the CHM was included in Section B of the PREPCOM report, which highlighted areas where views among delegations diverged, albeit the document neutrally states that "[w]ith regard to the common heritage of mankind and the freedom of the high seas, further discussions are required."[40] As one commentator observed, indeed the issue of common heritage has "dominated debates surrounding MGRs

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31 See Huang & Hu, *supra* note 29.

32 The document referred to both UNCLOS and UNGA resolution 2479 (XXV), see "The Statement on Behalf of the Group of 77 and China at the General Assembly 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" (20 January 2015), online (pdf): *UN* <www.un.org/esa/ffd/wp-content/uploads/2017/04/G77-and-China-statment-IIGIF-22-April-2017.pdf>. See *ibid* [Huang & Hu] for a more detailed discussion on these points.

33 See *Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 397 (entered into force on 1 November 1994), art 87, which offers a non-exhaustive list of such freedoms [UNCLOS].

34 *Ibid*, arts 133, 136 & 137, in combination.

35 Personal observations made throughout the IGC & PREPCOM III.

36 There is no accepted definition of bioprospecting in international law. For a discussion, see e.g. Joanna Mossop, "Marine Bioprospecting" in Donald R Rothwell et al, eds, *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) at 825–842.

37 See UNCLOS, *supra* note 33, art 87, only subject to the limitations stipulated in the relevant provisions of Part VI and Part XIII of UNCLOS.

38 And to whether or not the term resources should be interpreted in a restrictive or liberal manner, see Huang & Hu, *supra* note 29.

39 To the Area as such, and not only to the resources as defined in art 133, thus opening the question of whether the CHM is applicable to the Area encompasses also MGRs, see e.g. Petra Drankier et al, "Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing" (2012) 27 Intl J Mar & Coast L 375 at 399–400 [Drankier et al].

40 *Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, 31 July 2018, UN Doc A/AC.287/2017/PC.4/2 (2018) at 17.

from the very beginning,"[41] from both a *de lege lata* and *de lege ferenda* perspective.[42] Common heritage, additionally, is not only relevant as a matter of principle, but is also, and perhaps more importantly,[43] bound up with the very concrete questions of the geographical and material scope of the new international legally binding instrument (ILBI) in relation to MGRs, of access[44] and, especially, of fair and equitable benefit-sharing.[45]

The point of origin of the arguments for common heritage as the appropriate and equitable regime to regulate the utilization of MGRs has a long history. As will be seen, it goes all the way back to the classic argument Arvid Pardo put forward to the UNGA in the late 1960's, and that later became one of the central questions during the Third Conference on the Law of the Sea.[46] It will be thus useful, prior to explore the current state of play, to recall in brief the historical antecedents of the CHM.

Historically, the idea of the CHM entered institutional discourse in 1967, when Arvid Pardo, submitted a *note verbale* to the Secretary-General of the UNGA on behalf of the Permanent Mission of Malta to the United Nations.[47] The *note verbale* requested the inclusion in the agenda of the 22nd session of the UNGA of a new item, the "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[48] Pardo appended an explanatory memorandum to the request, where he laid out his case. The central ideas were that the seabed and the ocean floor should not be capable of appropriation; that their exploration should only take place

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41 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" (2019) 99 Marine Policy 21 at 23–24 [Leary].

42 The debates indeed consider both the question of the current legal status of MGRs in the Area and the normative question about what the legal status of MGRs in both the high seas and the Area should be. On this, see e.g. Dire Tladi, "The Common Heritage of Mankind in the Proposed Implementing Agreement" in Myron Nordquist, John Norton Moore & Ronan Long, eds, *Legal Order in the World's Oceans: UN Convention on the Law of the Sea*, (Leidan: Brill, 2017) at 73.

43 Some commentators have indeed been concerned from early on that insistent focus on the question of principle could prevent reaching practical and just solution in relation to the more urgent question of what benefits to share and how; see e.g. Leary, *supra* note 41 at 24.

44 Which is not actually included explicitly in the mandate of the IGC, as the USA pointed out in one of their interventions during IGC–1, 12 September 2018 (personal notes). Note that all personal notes referenced in this article are on file with the author.

45 See 2015 BBNJ WG Report*, supra* note 30. It is perhaps useful to note in this respect how the expression "fair and equitable" remains bracketed in the IGC–3 draft text.

46 Arvid Pardo's quote can be found in the first page of this document, see *UN 67th General Assembly, 49th plenary meeting,* 10 December 2012, UN Doc A/67/PV.49 at 1 [available online: undocs.org/pdf?symbol=en/A/67/PV.49 UN Doc A/67/PV.49].

47 *Note verbale* dated 17 August 1967 from the Permanent Mission of Malta to the United Nations addressed to the Secretary-General in *Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session,* 17 August 1967, UN Doc A/669. For a detailed account of the principle of common heritage in international law, see Baslar, *supra* note 27. For a more recent general overview, see John Noyes, "The Common Heritage of Mankind: Past, Present, and Future" (2011) 20 Denv J Intl L & Pol'y 447.

48 *Note verbal, cit.*

for peaceful purposes; and that their exploitation should safeguard the interest of mankind and especially with poor countries, including through the sharing of any benefits arising from the utilization of the resources of the seabed.[49] In the words of one commentator privy to the events,[50] this proposal generated an "explosion" in chancelleries around the world, and represents arguably a "landmark moment"[51] for the law of the sea. The UNGA subsequently adopted, in December 1970, a Declaration of Principles,[52] whereby "[t]he sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."[53] Additionally, the Declaration sets out the key elements of the CHM, that is: the area and its resources shall not be subject to appropriation or to the exercise of sovereignty or sovereign rights;[54] they shall be only used for peaceful purposes;[55] and their exploration and exploitation shall be carried out for the benefit of mankind, while giving particular consideration to the interests and needs of the developing countries.[56] These key principles were "simply repeated"[57] in Part XI of UNCLOS.

It is important to note that the CHM concept emerged within the historic context of the movement towards a New International Economic Order (NIEO), which provided an important backdrop for the Third Conference on the Law of the Sea, especially in relation to the seabed negotiations.[58] This history, which also functions as a latent backdrop to the IGC, was explicitly recalled at IGC–2. Indeed, again in ways mirroring debates carried out in the 1970s, several delegations[59] raised the question of an equitable international economic order. The draft treaty text prepared by the President ahead of IGC–3, captured this idea with

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49 *Ibid* at 2.

50 J Henry Glazer, "The Maltese Initiatives Within the United Nations -- A Blue Planet Blueprint for Transnational Space" (1974) 4 Ecology LQ 279 at 280.

51 Don Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 11.

52 "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction", contained in UNGA Resolution 2749 (XXV), 17 December 1970.

53 *Ibid* at para 1.

54 *Ibid* at para 2.

55 *Ibid* at para 5.

56 *Ibid* at para 7.

57 Michael Lodge, "The Deep Seabed" in Donald Rothwell et al, eds, *The Oxford Handbook of the Law of the Sea*, (Oxford: Oxford University Press, 2017) at 229.

58 The New International Economic Order (NIEO) was an agenda promoted in the late 1960's and 1970's by developing countries after the decolonization process led to the formation of many new independent States. The agenda aimed primarily at constructing a more equitable international economic order through a series of principles, including permanent sovereignty over natural resources, equitable terms of trade, sovereign equality, development assistance etc., see *Declaration on the Establishment of a New International Economic Order* (1 May 1974), UN Doc A/RES/S-6/3201. For the role of the NIEO in the context of the law of the sea see e.g. L Juda, "UNCLOS III and the New International Economic Order" (1979) 7:3–4 Ocean Dev & Int L 22; Boleslaw Boczek, "Ideology and the Law of the Sea: The Challenge of the New International Economic Order" (1984) 7:1 Boston College Intl & Comp L Rev 1; see also Baslar, *supra* note 28 at 210 where Baslar describes indeed Part XI an "ideological background of the NIEO".

59 See e.g. Mauritius, Papa New Guinea, Iran, Eritrea, IGC–2, 26 March 2019 (personal notes).

language included in Article 7, which addressed the objectives of Part II of the ILBI, dedicated to MGRs.[60] Therein, the language in letter E, albeit in full brackets and therefore still only a textual suggestion, states that one of the objectives of Part II shall be to "contribute to the realization of a just and equitable international economic order."[61] Additionally, references were also made to the preamble of UNCLOS, where it expresses the aim to "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries."[62] This reference aligns with the intervention of some delegations which raised the question of whether the more appropriate location for such language would be the preamble of the ILBI.[63] However, its inclusion was promptly and altogether rejected by some developed countries' delegations.[64]

The long shadow of the NIEO – and of its ideological underpinning, as well as political alignments – continues thus to play a role in the development of the law of the sea, and remains an important underpinning of the CHM, the deepest disagreement among delegations. Indeed, the arguments related to the CHM in the BBNJ negotiations stir the histories of the law of the sea, including past "polemical debate[s]"[65] and unresolved tensions. Then, as now, there remains a "North-South cleavage."[66] Brazil captured these sentiments during IGC–1 when it observed how only a few countries have the capacity and the capability to exploit MGRs.[67] Without an appropriate common heritage regime, Brazil continued, these countries may do so to the detriment of others, especially developing countries.[68] The key concern, now as then, is the equitable distribution of the benefits that may arise from the utilization of a global common resource. This key concern, which also includes the question of what *sort* of benefits, has been clearly and decisively underlined by Algeria on behalf of the African Group and further stressed by Argentina during IGC–1, noting that the common heritage principle should underpin the entire BBNJ regime.[69] The principle of common heritage should be indeed

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60 See *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*, UN Doc A/CONF.232/2019/6, art 7(e) [Draft Text].

61 *Ibid.*

62 See UNCLOS, *supra* note 33 at recital 5.

63 Such as G77/China, *Marine genetic resources, including questions on the sharing of benefits,* 2019, UN Doc A/CONF.232/2019/MGR/CRP.3 at 2. CRPs (Conference Room Papers) are the document where submissions from parties and observes were collated during IGC–3 on a day by day and topic by topic basis; the full list of CRPs available at "Conference Room Papers" online: *UN* <www.un.org/bbnj/content/conference_room_papers>.

64 E.g. USA's submission, *Marine genetic resources, including questions on the sharing of benefits,* 2019, UN Doc CRP A/CONF.232/2019/MGR/CRP.1 at 11; see also Canada's submission, *Marine genetic resources, including questions on the sharing of benefits,* 2019, UN Doc CRP A/CONF.232/2019/MGR/CRP.5 at 3.

65 See Joyner, *supra* note 7 at 190.

66 See B Larschan & Bonnie Brennan, "The Common Heritage of Mankind Principle in International Law" (1983) 21 Columbia J Transnat L 305.

67 Brazil, IGC–1, 11 September 2018 (personal notes).

68 *Ibid.*

69 Algeria and Argentina, IGC–1, 11 September 2018 (personal notes). These views were expressed by all major groups of developing countries, such as G77/China, African Group, PSIDS, AOSIS and

applicable to all questions related to the sharing of benefits arising from the utilization of MGRs, and several delegations emphasized also how the common heritage principle provides the legal foundation for the equitable use of biodiversity, including but, importantly, exceeding the question of MGRs, in areas beyond national jurisdiction.[70] As South Africa noted, this argument is based on the principle of solidarity[71] and allows the integration of intra- and inter-generational equity.[72] Indeed, the CHM is considered by many delegations to be the glue that binds together the entire 2011 package, as Algeria observed in IGC–1,[73] reiterating what some commentators have expressed for some time now.[74]

At IGC–1, some delegations also referred to Article 311(6) of UNCLOS,[75] which allows no derogation to the CHM and sets out that state parties "shall not be party to any agreement in derogation thereof".[76] Accordingly, no derogation to the CHM could be lawfully included in the ILBI. This view, however, assumes that the CHM is *already* the applicable regime to MGRs in the Area, a point over which there is certainly no agreement in the negotiating room (nor in the literature).[77] The original Maltese proposal, presented in 1971, which contained a draft ocean space treaty, did indeed intend to include living and non-living resources under the CHM regime, under the supervision of International Ocean Space Institutions.[78] That

CARICOM.

70 Egypt, on behalf of G77/China, IGC–1, 12 September 2018 (personal notes).

71 South Africa, IGC–1, 12 September 2018 (personal notes).

72 South Africa, IGC–1, 12 September 2018 (personal notes).

73 Algeria, IGC–1, 12 September 2018 (personal notes).

74 See e.g. Dire Tladi, "Pursuing a Brave new World for the Oceans: The Place of Common Heritage in a Proposed Law of the Sea Treaty" in Tiyanjana Maluwa, Max du Plessis & Dire Tladi, *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Leiden: BRILL, 2017) at 112.

75 Iran, IGC–1, 12 September 2018 (personal note). See also "Statement by Ali Nasimfar, Representative of Islamic Republic of Iran, Intergovernmental conference on an international legally binding instrument on the conservation and sustainable use of BBNJ" (5 September 2018), online (pdf): *UN* <en.newyork.mfa.ir/index.aspx?fkeyid=&siteid=227&pageid=5451&newsview=533584>.

76 See UNCLOS, *supra* note 33, art 311(6) [UNCLOS]. For a discussion on any further questions, see P Nickels, "Negotiating a Third Implementation Agreement under the LOSC in the light of Art 237 and Art 311 LOSC: A Case Study of the Subject Matters of Environmental Impact Assessment and Marine Genetic Resources" (2018) LLM Thesis Arctic University of Norway.

77 For arguments *for*, or sympathizing with idea of, the inclusion of MGRs under the CHM regime, see e.g. Tulio Treves, "Protection of the Environment on the High Sea and in Antarctica" in Kalliopi Koufa, ed, *Protection of the Environment for the New Millennium* (Athens: Sakkoulas Publications, 2002); Tullio Scovazzi, "The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond the Limits of National Jurisdiction" (2007) 14:25 Agenda Internacional 11; Alex G Oude Elferink, "The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas" (2007) 22:1 Intl J Mar & Coast L 143; Drankier et al, *supra* note 39; De Lucia, 2018, *supra* note 28. For contrary opinions, see e.g. Robin Churchill & Vaughan Lowe, *The Law of the Sea*, 3rd ed, (Manchester: Manchester University Press, 1999) 239; Alexander Proelss, "The Role of the Authority in Ocean Governance" in Harry Scheiber & Jin-Hyun Paik, eds, *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Leiden: Martinus Nijhoff Publishers, 2013) [Proelss]; Doris König, "Genetic Resources of the Deep Sea – How Can They Be Preserved?" in Doris König et al, *International Law Today: New Challenges and the need for Reform?* (New York: Springer, 2008).

78 Arvid Pardo, *The Common Heritage- Selected Papers on Oceans and World Order* (Malta University Press, 1975) at 381.

proposal, however, did not see the light of day. For some, it remains, at best an indication that the inclusion of living resources under the common heritage framework had been discussed prior to the IGC's, if only to be discarded.[79] Such views have also been reiterated during early discussions on the legal status of MGRs.[80] In this respect, one of the arguments put forth to support the inclusion of MGRs under the existing CHM regime is that at the time of negotiations of UNCLOS, there was no knowledge of the value of MGRs,[81] something rebutted by Japan.[82]

The role of the CHM remains unresolved, in its many facets: does the CHM already encompass MGRs? If not, should it? Even if we do seek to define the CHM in the upcoming treaty, should it be narrowly articulated, or should it underpin the entire ILBI and encompass marine biodiversity in ABNJs (as some delegations have repeatedly suggested)? While the answers are unclear, the role to be played by the CHM remains arguably the central principled question that needs to be resolved before any agreement is reached. It is against this context that Section IV examines the CHM debate that took place during IGC–3.

4. COMMON HERITAGE AT IGC–3: OUT THROUGH THE DOOR, BACK THROUGH THE WINDOW?

4.1. Introduction to Common Heritage

Propelled by the draft treaty text prepared by the President of the IGC and circulated in late June 2019, delegates engaged for the first time in text-based negotiations. To that end, they engaged in both the usual format of informal working groups on each of the topics agreed in the "2011 package," and in the new format of "informal informals," smaller and less formal meetings meant to facilitate more focussed and open negotiations to allow for easier bridging of existing gaps. Informal informals also entailed, however, reduced access to observers. NGOs and IGOs were allowed a maximum of five seats each, and there were strict requirements of confidentiality (no use of Twitter or other social media "leakages," no attribution of any of the intervention, no circulation of the notes taken by observers to anyone not present at the BBNJ negotiations).[83] However, the impression was that, while informal informals did help streamline discussion on some topics, they remained quite close to informal working groups

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79 Indeed, some commentators are "astonished" that there can be support of the CHM regime to include marine living resources, given the specific history of the regime and the lack of support for the originally comprehensive Maltese proposal. See e.g. Proelss, *supra* note 77 at 148.

80 See e.g. *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting*, 1 July 2004, UN Doc A/ 59/122 at para 90; *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction*, 20 March 2006, UN Doc A61/65 at paras 29–31.

81 Especially Algeria, see IGC–1, 12 September 2018 (personal notes).

82 Japan, IGC–1, 12 September 2018 (personal notes). Japan, however, referred only to the discussion on sedentary species, and not to all living resources that may reside in the Area, *ibid.*

83 This account relies on the author participation to IGC–3. However, see also ENB, "Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019" (2 September 2019), online (pdf): *IISD* <enb.iisd.org/download/pdf/enb25218e.pdf>.

in terms of the dynamic and modality of the exchanges.[84] This is perhaps, I suggest, one of the reasons why progress was not as forthcoming as many had hoped. Indeed, all the major gaps in negotiating positions seemed to have remained the same as they were at the close of the PREPCOM. Among these, perhaps the key element of divergence among delegations is still the question of the CHM, both as a matter of principle, and in terms of what it entails for the benefit-sharing regime.

Interestingly though, IGC President Rena Lee's draft treaty text had entirely expunged explicit references to the CHM, while maintaining references to some of its substantive elements, as will be discussed in the next sections.[85] This was probably, I suggest, a deliberate choice reflecting Lee's pragmatic strategy aimed at avoiding principled confrontation, and rather, trying to facilitate progress by directing the attention and the focus of the exchanges on the more concrete and practical aspects of the topics under negotiation.[86] In the case of MGRs, this meant focussing on the question of the activities to regulate,[87] the question of access,[88] and the types of benefits to share.[89]

The deletion of an explicit reference to the CHM, however, did not go unnoticed. At the opening of the session, during the general exchange of views, Algeria, speaking on behalf of the African Group, made it very clear that they were not pleased with that deletion: "Adopting a new BBNJ instrument without this principle," declared Algeria, "would be like giving life to a treaty of this importance without a soul, or like putting a ship in the water without a navigational instrument."[90] Moreover, the CHM came up in multiple occasions in relation to MGRs, as well as in the discussion on general principles. The next two sub-sections will discuss each of these points in turn.

4.2. MGRs and the Common Heritage of Mankind

As mentioned, MGRs are one of the four topics of the 2011 package. They are, importantly, the topic where divergences of views have been, and still are, most acute, as evident in the PREPCOM report, as well as in all the various texts prepared by the President during the IGC so far. Article 9 of the draft text, which addresses "[a]ctivities with respect to marine genetic resources of areas beyond national jurisdiction," effectively presented the principle of the CHM broken down in its component parts (in line with the mentioned strategy of the President).[91] Albeit heavily bracketed, Article 9 contains, in fact, text on the principle of non-appropriation

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84 Account based on the author's participation as observer to IGC–3.

85 See Draft Text, *supra* note 60.

86 Indeed, President Lee observed at the opening of the IGC–2 that focus would be on "the concrete, operational, and practical details of the instrument—the "how" and "who"", (26 March 2019) at 2, online (pdf): *Earth Negotiations Bulletin: "BBNJ IGC–2 #1"* <enb.iisd.org/vol25/enb25186e.html>.

87 See Draft Text, *supra* note 60.

88 *Ibid* art 10.

89 *Ibid* art 11. The expression fair and equitable that should qualify and orient the benefit-sharing regime remains, however, bracketed, and thus reflects the broader principled conflict on the CHM.

90 HE Ambassador Mohammed Bessedik, "Statement on Behalf of the African Group" at 2, online (pdf): *Permanent Mission of Algeria to the United Nations* <statements.unmeetings.org/media2/21996848/algeria-obo-african-group.pdf>.

91 See Draft Text, *supra* note 60, art 9.

(para 3), on the principle that the utilization of MGRs should only be for the benefit of mankind (sic, para 4), and on the principle that activities of bioprospecting should only be carried out for peaceful purposes (para 5).[92] Needless to say, views on each of these paragraphs were very polarized, and tracked precisely the views expressed throughout the BBNJ process, at its various stages, on the CHM and on each issue that touches upon its key constitutive elements. For example, Japan, the Republic of Korea, USA, the Russian Federation, Iceland and Australia all made it very clear that they could not support any reference, implicit or explicit, to the CHM.[93]

By contrast, Algeria speaking on behalf of the African Group, drew attention to a 2003 study on the relationship between the Convention on Biological Diversity and UNCLOS with respect to the conservation and sustainable use of genetic resources of the deep seabed.[94] Algeria read out several key passages to the room. Paragraph 100, for example, suggested that:

> "The sharing of benefits arising from the exploitation of the genetic resources of the deep seabed beyond the limits of national jurisdiction can only be effected if such resources are brought under a regime similar to the one governing the mineral resources of the Area under UNCLOS. The principles embodied in the Convention on Biological Diversity may be useful in any attempt to deal with issues of equity regarding access to and the exploitation of such resources."[95]

The report, presented at the eighth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice held in Montreal in 2003,[96] has a number of quite interesting paragraphs with respect to the CHM. One of these contains in fact the consideration that "[u]sing the common heritage of mankind established under the regime for the Area has certain specific advantages for addressing issues of uncontrolled exploitation and benefit-sharing."[97] These advantages, continues the report, relate on the one hand to the underlying principles of the CHM (non-appropriation, international management, peaceful use and benefit-sharing), and on the other to the fact that all "activities carried out in the Area may interfere with each

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92 *Ibid*.

93 These are observations collected from the combined viewpoints of representatives from Japan, Republic of Korea, USA, Russian Federation, Iceland, and Australia, IGC–3, 28 August 2019 (personal notes). Indeed, all of these countries indicated that any language reproducing or referencing articles of UNCLOS applicable to the Area in Art 9 (especially in para 3 or 4) is unacceptable, as it could lend support to the idea that MGRs are to be considered the CHM.

94 See *Study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed* (22 February 2003) UNEP/CBD/SBSTTA/8/INF/3/Rev.1 [also referenced as: "Decision II/10 of the Conference of the Parties to the Convention on Biological Diversity"].

95 *Ibid* at para 100.

96 A date acknowledged by Algeria as somewhat dated, alongside the consideration, however, that many of its elements remain "valid and relevant for this discussion", Algeria (28 August 2019), IGC–3 (personal notes).

97 *Ibid* at para 115.

other, since mineral and genetic resources may coexist in the same sites."[98] Algeria concluded its intervention by inviting delegations to reflect on this independent study.

Clearly divergent views emerged also in relation to Article 11, on "Fair and equitable sharing of benefits".[99] The G77 for example, submitted a proposal for textual amendment to Article 11 that would place front and center the CHM.[100] The proposal read: "[t]he underlying legal and moral principles, reflecting the rights and obligations of UNCLOS and customary international law, is that MGRs are the *common heritage of mankind* […]."[101] This recognition, continues the G77/China proposal, "has a number of consequences": benefit-sharing must be mandatory; benefits must be equitably shared among all States; benefits to be shared must be both monetary and non-monetary (whereby most developed countries delegations are ready to support only non-monetary benefits); and all activities of exploration or exploitation with respect to MGRs in areas beyond national jurisdiction must be governed by an international regime.[102]

The cleavage between the negotiating positions on the question of the CHM remains thus as significant today as it was at the time when UNCLOS was negotiated.[103] Moreover, it has remained largely unchanged by many years of discussions. It seems destined to remain a crucial fracture. While there may exist ways to bridge the gap and reach a compromise position,[104] any possibility of bridging the gap is arguably contingent on strong leadership and on the capacity to impress clear focus and give direct guidance on the part of the President and of the facilitators.[105] This may translate into the need for "activist" facilitation,[106] or it may mean small working group negotiations, so as to facilitate the bridging of positions, and the articulation of draft language that can then elicit broad agreement. At the close of IGC–3, some interventions did remark that small group negotiations could be an important additional tool (additional to informal informals) for facilitating progress, so this is not an entirely unlikely scenario. The question then remains—what are the substantive moving parts to reshuffle in order to find a bridge?

4.3. General Principles and Common Heritage of Mankind

The other part of the negotiations where the question of the CHM was raised forcefully was the discussion on draft Article 5, on general principles and/or approaches. The discussion was structured in two steps. First, delegations were asked to comment on the principles and/

98 *Ibid* at para 111.

99 See Draft Text, *supra* note 60.

100 *Marine genetic resources, including questions on the sharing of benefits*, 2019, UN Doc CRP A/CONF.232/2019/MGR/CRP.4.

101 *Ibid* at 3.

102 *Ibid*.

103 See Larschan & Brennan, *supra* note 66.

104 For example, a preambular recognition of the CHM, and operational provisions of the benefit-sharing regime focusing on the concrete aspects of the regime.

105 And this is not always the case currently.

106 To borrow an expression suggested by Kristine Kraabel, PhD Research Fellow at the Norwegian Centre for the Law of the Sea (NCLOS), UiT The Arctic University of Norway, Tromsø (personal notes).

or approaches that had been included in the draft Article 5. Second, delegations were asked to come with suggestions of principles and/or approaches that were not included, but that should be.[107]

The G77 reiterated on multiple occasions that Article 5 should include additional principles, and especially the CHM.[108] Indeed, Palestine, intervening on behalf of the G77/China during the informal working group on cross-cutting issues, offered a list of principles to add to Article 5. These included (and the order reflects verbatim Palestine's intervention): the CHM, the polluter pays principle, the CHM, the precautionary principle, the CHM, the principle of equity, the CHM, the ecosystem approach, best available scientific evidence, and, finally, again, the CHM. Palestine thus emphasized very clearly their strong support for the inclusion of the CHM as perhaps the central guiding principle of the entire ILBI.[109]

Algeria, on behalf of the African Group aligned entirely with the intervention of the G77/China, and only added that their alignment regarded especially the CHM, whose inclusion in the list of general principles they "strongly support".[110] Similar strong support came from Jamaica on behalf of CARICOM, Nauru on behalf of PSIDS and Colombia on behalf of CLAM.[111]

The basis for these interventions was not only a general reactions against the removal of any explicit mention of the CHM in the draft text prepared ahead of IGC–3, but also, importantly, the idea that the CHM should frame the entire agreement, and as such it should be both articulated as a general principle of the ILBI, and a specific, operational principle of the MGRs part of the package setting the legal regime related access to and the sharing of benefits arising from the utilization of MGRs. These views, of course, were not shared by a number of developed countries which were more than happy that the CHM had been removed from the text, whether as a matter of principle,[112] or as a matter of pragmatism.[113] However, while it went out the door through its deletion from the draft text prepared by the President ahead of IGC–3, the CHM came back in through the window, by way of a strong push from G77/China, as well as other groups, such as the African Group, PSIDS, and CLAM. Ultimately, its

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107 Personal observation based on the author's attendance to IGC–3. For the revised work program of the meeting, see "Revised program of Work" (23 August 2019) UN Doc. A/CONF.232/2019/8/Rev.1 [Revised Work Program]; however, note that the details of how the discussion was structured does not appear.

108 See *Conference Room Paper*, 2019, UN Doc A/CONF.232/2019/CCI/CRP.1 and *Conference Room Paper*, 2019, UN Doc A/CONF.232/2019/CCI/CRP.4 at 2–3.

109 Palestine, IGC–3, 28 August 2019 (personal notes). Palestine, halfway through the listing of principles, also asked rhetorically "did I mention common heritage?", at which point the room laughed. It must be noted however, that China, in its individual intervention, while reiterating support for the CHM, also underlined how it is only relevant for the topic of MGRs, and not, for example in relation to EIAs, China, IGC–3, 28 August 2019 (personal notes).

110 Algeria, IGC–2, 28 August 2019 (personal notes).

111 IGC–3, 28 August 2019 (personal notes).

112 Such as, especially, the US, which has consistently stated that the CHM is unacceptable, for the reasons mentioned above in section 2 with reference to the BBNJ WG.

113 E.g. Norway, which has consistently supported a pragmatic approach to the benefit-sharing discussion, wanting to focus on the practical aspects of a regime rather than on the principled issues linked to the CHM.

inclusion in the revised draft text prepared by the President to form the basis of the discussions at IGC–4, and published on 19 November, 2019

4.4. A Minor History of the Common Heritage of Mankind

Before offering come conclusions, it might be useful to very briefly recall that there is also a "minor history" of the CHM outside of the law of the sea context, and within the context of the Convention on Biological Diversity (CBD). During the negotiations of the CBD, in fact, the question of the CHM was raised in relation to biological diversity. However, positions therein were the mirror opposite of what they were, and still are, in the context of the law of the sea. While the BBNJ treaty will be an implementing agreement of UNCLOS, its subject matter is the conservation and sustainable use of marine biodiversity (and arguably the sharing of benefits arising from the utilization of MGRs, despite its not being indicated in the relevant UNGA resolutions). During the early stages of the negotiations that would eventually lead to the adoption of the CBD, developed countries supported the idea that biodiversity should be considered as part of the CHM, with the view of enabling access to genetic resources on the part of the biotechnology industry across the globe and regardless of sovereign jurisdictions.[114] However, the concept of common heritage was very quickly problematized and was equally quickly rejected. The reason was that developing countries would not accept the potential legal implications of the application of the CHM to biological diversity, that is, the internationalization of domestic resources.[115] This must be, again, understood against the backdrop of the NIEO, and of the crucial international legal principle that emerged during that time, the principle of permanent sovereignty over natural resources.[116] Of course, supporting the CHM in the context of the CBD was instrumental in regards to achieving the same goal- that in the context of the BBNJ negotiations would be served by ensuring MGRs are not encompassed by the CHM regime, namely unhindered access to bioprospecting on the part of commercial actors.

5. CONCLUSION

This article has offered a brief and admittedly limited account of the third substantive negotiating session on marine biodiversity in areas beyond national jurisdiction, which was

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[114] See Michael Grubb et al, *The "Earth Summit" Agreements: A Guide and Assessment* (London: Earthscan Publications Ltd, 1993) at 75.

[115] See R Nayar & David Ong, 'Developing Countries, "Development" and the Conservation of Biological Diversity' in Michael Bowman and Catherine Redgewell, eds, *International Law and the Conservation of Biological Diversity* (London: Kluwer Law International, 1996). Indeed, the first report of the Ad Hoc Working Group of Experts on Biological Diversity, tasked with exploring the possibilities and need for a new treaty on the conservation of biological diversity, stated how "The Working Group did not reach a consensus on the notion of biological diversity as a common resource of mankind, some delegations stressing the principle of the sovereignty of states over their natural resources", *Report of the Ad Hoc Working Group on The Work of its First Session,* 9 November 1989, UNEP/Bio.Div.1/3, para 21. The CHM was finally dropped out of the negotiating text in 1990 (see *Report of the Ad. Hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of its First Session*, UNEP/Bio.Div/WG.2/1/4 28 November 1990, para 30) and was eventually replaced by the concept of common concern.

[116] See "Permanent Sovereignty over Natural Resources", UNGA Resolution 1803 (XVII), 14 December 1962, UN Doc. A/RES/1803(XVII). This principle can also be found in Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 2009).

held in August 2019. More specifically, the article has focussed on what is perhaps the key question hindering successful and swift progress: the question of the CHM. While the CHM was not mentioned explicitly in the draft treaty text prepared by the President of the IGC, it was quickly raised as a central issue during the discussions, and was the focus of many interventions in relation to the topic of MGRs and on the topic of cross-cutting issues. Several delegations also mentioned the CHM in the final day of discussions on the road ahead, where, for example, Sierra Leone expressed their view that the CHM is not a negotiating item and should be reflected in any new text to be produced ahead of IGC–4.[117]

The deletion of explicit mentions of the CHM, while in the view of the present author reflected President Rena Lee's strategy- which has been to actively try to steer the discussions away from principled debates in order to facilitate concrete progress and constructive negotiations- has not, however, prevented a principled debate on the question of the CHM, as illustrated by the preceding sections. In fact, the President acknowledged in her closing statement of IGC–3 that delegations had "stressed that the principle of the common heritage of mankind was a bedrock for achieving the goal of conserving and sustainably using marine biological diversity of areas beyond national jurisdiction."[118]

In light of the deep divergence of views on the principled question of the CHM, which is central to the resolution of the topic of MGRs in all its problematic aspects, it is difficult to imagine a successful conclusion of the IGC at its fourth session. This sentiment was perceptible in the negotiating room during the closing plenary session, when delegations discussed the road ahead. Despite the many customary commendations for the progresses achieved during the two weeks of negotiations in fact, the need for additional intersessional meetings, formal or informal, and possibly in the margin of the process of the General Assembly resolution on the law of the sea, was raised by many delegations. Barbados, for example, echoing these views while speaking on behalf of CARICOM, was well received by several delegations, including the Russian Federation and the USA.[119] Algeria, on behalf of the African group, also suggested that "the possibility of an IGC–5 be discussed intersessionally,"[120] an idea supported by the USA.[121] In that respect, there was wide convergence on requesting the President to produce a new streamlined text by the end of October or no later than November 2019.[122]

On the other hand, delegations expressed concern over the need to achieve a high quality, consensual outcome that would allow universal participation. This concern was shared by several delegations in connection with the view that such an objective should not be sacrificed

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117 Sierra Leone, IGC–3, 30 August 2019 (personal notes).

118 Statement by the President of the conference at the closing of the third session (hereinafter IGC–3 Closing Statement), UN Doc. A/CONF.232/2019/10 at 2 [IGC–3 Closing Statement].

119 IGC–3, 30 August 2019, personal observation. See also Revised Work Program, *supra* note 107 at 6 (this discussion took place under the rubric Item 7, "Other Matters")

120 Earth Negotiations Bulletin, "Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019" 25:218 ENB Summaries at 19 [ENB Summary].

121 *Ibid* at 20.

122 In her closing statement, however, there is only a more generic mention of the commitment to "make every effort possible to make the document available to delegations well in advance of the fourth session of the Conference", IGC–3 Closing Statement, *supra* note 118 at 2.

because of haste.[123] The Russian Federation, for example, expressed the view that one should not sacrifice "expedience for swiftness,"[124] while Japan similarly said that no deadline should be imposed that may constraint the quality of an agreement.[125] Thus, it appears clear that not everyone in the room is committed to meeting the deadline of IGC–4.

Much of the future progress will hinge on two important aspects. The first is the type of document the President will produce. Of course, President Lee will need to fully respect the inevitable fact that the BBNJ negotiations are a State-led process, as recalled systematically by several delegations at each IGC. However, within this constraint, President Lee will also need to significantly streamline the text to offer a useful basis for discussion. This would mean taking into account comments made during IGC–3 as well as submissions contained in the Conference Room Papers. But it would also mean proactively crafting a new draft text that facilitates bridging multiple positions without having to necessarily reflect all views. Additionally, facilitators will need to drive the process much more firmly than has been the case up until now or face the risk that there will have to be several additional IGCs before any agreement will be in sight.[126] In this respect, the crucial issue to resolve is precisely the question of the CHM, on which negotiating positions remain significantly polarized and where, consequently, the role of the facilitator is of the utmost importance. It might also be essential to recognize more clearly the distance among delegations, in order to then push the process towards possible points of convergence.[127]

By way of conclusion, it may be useful to remember the minor history of the CHM discussed earlier, as it might prompt some ways to bridge the gap, from either side of the divide, by making visible the strategic positioning of delegations across different negotiating contexts, and thus help deflate the principled stances. This, in turn, may facilitate that shift in focus towards the concrete outcomes of the benefit-sharing regime favored and promoted by the President.[128] However, there remains a risk that by wanting to sideline the debate on the CHM in favor of a pragmatic focus on outcomes without substantive openings to concrete benefits (such as monetary benefits as well as regulation of access), principled positions result in inflexible propositions, making any possible openings for bridging divergent opinions that much more difficult. It may be equally difficult to reach an agreement on a regime that is harmonized across jurisdictional zones, something which is clearly to be preferred.[129]

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123 Thus e.g. the Russian Federation, USA and Japan, IGC–3, 30 August 2019 (personal notes).

124 Russian Federation, IGC–3, 30 August 2019 (the quotation is from interpreter's translation) (personal notes).

125 Japan, IGC–3, 30 August 2019 (personal notes).

126 The EU indeed underlined the need for a "stronger role for facilitators to promote greater interaction between delegations and promote progress on divergent views", ENB Summary, *supra* note 120 at 19.

127 The report of the facilitator on the topic of MGRs is by contrast very cautious, and merely signals that "further discussion if required" on most points under the topic, IGC–3 Closing Statement, *supra* note 118 with specific attention to "Annex: Oral reports of the facilitators of the informal working groups to the plenary on 30 August 2019, Part I". Informal working group on marine genetic resources, including questions on the sharing of benefits).

128 But this preference is shared by at least some of the developed countries' delegations, e.g. Norway.

129 Joanna Mossop, "Towards a Practical Approach to Regulating Marine Genetic Resources" (2019) 8:3 European Soc Int L Ref 1.

Whether the way out of the principled quagmire is to deploy once again the concept of common concern, as some have suggested,[130] or whether other, innovative solutions will suddenly emerge, remains an open question. IGC–3 has shown that what had been identified as a key way out of the impasse (the pragmatic approach, whereby substantive provision would address the key concerns of the different group of states, without a direct mention of the CHM) may no longer be a viable solution. At this point, we can only be certain that the President's strategy of avoiding principled debates, while useful in fostering progress on a number of concrete issues, has not been entirely successful. Indeed, the revised draft text prepared by the President after IGC–3 and in preparation of IGC–4[131] reintroduced explicit mention of the CHM in the list of general principles.[132]

A key risk in this respect, is that the longer the process will be stretched, the more likely it is that the momentum that has supported the IGC thus far will wane. As observers, we can thus wonder whether there is an end in sight, while the only certainty is that there is a lot of work ahead.

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130 See e.g. Chelsea Bowling, Elizabeth Pierson and Stephanie Ratté, "The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas" White Paper presented as a submission to the PREPCOM, online (pdf): *UN* <www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf>; see also De Lucia, 2018, *supra* note 28. The latter, however, recognizes that the principle of common concern could work in relation to the conservation objective, but not as well in relation to the benefit-sharing topic.

131 See R*evised 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*, 27 November 2019, UN Doc A/CONF.232/2020/3 (advanced unedited version), online (pdf): <undocs.org/en/a/conf.232/2020/3>. This revised draft text was published after the article was written, and therefore has not been included in the substantive analysis.

132 For a short commentary on the revised draft text, see Vito De Lucia, "A Very Quick Look at the Revised Draft Text of the new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction" *EJIL Talk* (23 January 2020) online: <www.ejiltalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/>.