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My Experience as an Intern with the Ocean Governance Project and an Evaluation of Liability within the BBNJ Agreement

Internship report to obtain a Master's Degree in
Law, in the speciality of Law and Economics of
the Sea - Ocean Governance

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I declare that this internship report is my own original work. Where other people's work has been used (either from a printed source, internet or any other source), this has been properly acknowledged and referenced.

Declaro que este relatório de estágio é o meu trabalho original. Nos casos em que foi utilizado trabalho de outras pessoas (seja de uma fonte impressa, da Internet ou de qualquer outra fonte), este foi devidamente reconhecido e referenciado.

Abstract

The first part of the internship report expands on the author's experience as an intern on the Ocean Governance Project, an EU-funded project implemented by a consortium of partners comprising GOPA Worldwide Consultants, B&S and WWF. The Ocean Governance Project aims to connect MPA managers around the world, strengthen networks and transboundary conservation initiatives, and thereby improve global ocean governance. The second part of the internship report explores the newest piece of legislation in the realm of ocean governance: the BBNJ treaty, the adoption of which marked a significant milestone in biodiversity protection. With over 90 percent of the Earth's habitable space located in the ocean, the urgent need for a robust legal framework to safeguard marine biodiversity in ABNJ became evident. However, the vast and secluded nature of the high seas presents challenges in monitoring and enforcing this treaty. This paper delves into the critical issue of liability and responsibility within the context of the BBNJ treaty's implementation. Environmental liability mechanisms are examined as essential tools to ensure the effective execution of treaty provisions. Inspired by the observations of Mendenhall and Hassanali (2023), who identified the absence of a strong liability provision in the emerging draft treaty, this study evaluates the extent to which environmental liability is integrated into the BBNJ treaty. The findings offer insights into the treaty's effectiveness and its ability to address emerging challenges in ABNJ conservation. The exploration of environmental liability within the context of the BBNJ agreement has also generated potential avenues for future research, including deeper analysis of negotiation dynamics, designing a liability annex, and assessing state practice in environmental liability enforcement.

Key words: Ocean Governance Project - BBNJ Treaty - Environmental Liability - Global Ocean Governance - ABNJ Conservation

Resumo

A primeira parte do relatório de estágio expande a experiência do autor como estagiário no Projeto de Governança dos Oceanos, um projeto financiado pela UE implementado por um consórcio de parceiros que inclui a GOPA Worldwide Consultants, a B&S e a WWF. O Projeto de Governança dos Oceanos visa ligar os gestores de AMP em todo o mundo, reforçar as redes e as iniciativas de conservação transfronteiriças, melhorando assim a governação global dos oceanos. A segunda parte do relatório de estágio explora a mais recente peça de legislação no domínio da governação dos oceanos: o tratado BBNJ, cuja adoção constituiu um marco significativo na proteção da biodiversidade. Com mais de 90 por cento do espaço habitável da Terra localizado no oceano, tornou-se evidente a necessidade urgente de um quadro jurídico sólido para salvaguardar a biodiversidade marinha em ABNJ. No entanto, a natureza vasta e isolada do alto mar apresenta desafios à monitorização e aplicação deste tratado. O presente trabalho analisa a questão crítica da responsabilidade no contexto da aplicação do Tratado BBNJ. Os mecanismos de responsabilidade ambiental são examinados como ferramentas essenciais para garantir a execução efectiva das disposições do tratado. Inspirado pelas observações de Mendenhall e Hassanali (2023), que identificaram a ausência de uma forte disposição sobre responsabilidade no projeto de tratado emergente, este estudo avalia até que ponto a responsabilidade ambiental está integrada no tratado BBNJ. Os resultados oferecem uma visão sobre a eficácia do tratado e a sua capacidade para enfrentar os desafios emergentes na conservação da ABNJ. A exploração da responsabilidade ambiental no contexto do acordo BBNJ também gerou potenciais vias para investigação futura, incluindo uma análise mais profunda da dinâmica de negociação, a concepção de um anexo de responsabilidade e a avaliação da prática estatal na aplicação da responsabilidade ambiental.

Palavras chave: Projeto de Governança dos Oceanos - Tratado BBNJ - Responsabilidade Ambiental - Governança Global dos Oceanos - Conservação do ABNJ

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Table of Abbreviations

ABMTs	Area-based Management Tools
ABNJ	Areas Beyond National Jurisdiction
ATCM	Antarctic Treaty Consultative Meetings
ATN	Aid to Negotiations
BBNJ	Biodiversity Beyond National Jurisdiction
CAMLR Convention	Convention on the Conservation of Antarctic Marine Living Resources
CARICOM	Caribbean Community
CBD	Convention on Biological Diversity
CBTMT	Capacity Building and Transfer of Marine Technology
CCAS	Convention for the Conservation of Antarctic Seals
CHM	Common Heritage of Mankind
CLC Convention	Convention on Civil Liability for Oil Pollution Damage
CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities
CTI-CFF	Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security
EC	European Commission
EIAs	Environmental Impact Assessments
ELD	European Liability Directive
EU	European Union
G77	Group of 77
GBF	Global Biodiversity Framework
HNS	Hazardous and Noxious Substances
ICJ	International Court of Justice
IGC	Intergovernmental Conference

ILC	International Law Commission
IMO	International Maritime Organisation
IMPAC5	Fifth International Marine Protected Areas Congress
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUU	Illegal, Unregulated, and Unreported fishing
LOS Convention	Law of the Sea Convention
LTC	Legal and Technical Commission
MEPC	Marine Environment Protection Committee
MGRs	Marine Genetic Resources
MPA	Marine Protected Area
NOAA	National Oceanic and Atmospheric Administration
OECD	Organisation for Economic Co-Operation and Development
PrepCom	Preparatory Committee
RDE	Rural Development and Environment
SDC	Seabed Disputes Chamber
STOPIA	Small Tanker Oil Pollution Indemnification Agreement
TOPIA	Tanker Oil Pollution Indemnification Agreement
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNFSA	United Nations Fish Stocks Agreement

UNGA	United Nations General Assembly

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Annex

Internship Certificate from GOPA Worldwide Consultants

Part I

1. Internship Position

The internship was carried out in the EU-funded project 'Ocean Governance' of the Rural Development and Environment (RDE) department of the consulting company GOPA Worldwide Consultants from 1st September 2022 to 31st January 2023 (five months total) on a full-time basis. The company is based in Bad Homburg, Germany, but the Ocean Governance Project team works on a remote basis. Henceforth, I was able to complete the internship from Lisbon, Portugal. The project is being implemented by a consortium of partners including GOPA Worldwide Consultants, B&S Europe and WWF Indonesia.

1.1. The Project

The Ocean Governance project was originally intended to be a three-year initiative (January 2020–December 2022) funded by the Partnership Instrument of the European Union (EU). Due to the Covid pandemic, a significant portion of the planned activities for 2020 and part of 2021 were delayed and the team needed to modify their approach and design due to pandemic restrictions in the implementation areas. Following these restrictions and the consequent delay, the project was prolonged by one year and is expected to end in December 2023.¹

The initiative, which was commissioned by the Service for Foreign Policy Instruments of the European Commission (EC), is a reaction to both the Global Strategy for the European Union's Foreign and Security Policy and the EU Joint Communication on International Ocean Governance. It seeks to position the EU as a major player in global ocean governance and builds on the EU Transatlantic MPA Network Project (2016–2019).² The project uses regional and interregional collaboration to restore and conserve marine and coastal ecosystems by working in two focus areas - South East Asia and the Atlantic Basin

¹ 'About the project' (Ocean Governance Project) accessed 9 September 2022 <<https://oceangovernance4mpas.eu/the-project/about-the-project/>>.

² *ibid.*

- and using an integrated and cross-sectoral strategy. Furthermore, the leitmotiv of the project is to promote networking among MPA managers and strengthen existing MPA manager networks in both regions.³

1.1.1. Policy Background

The project was created to fulfil the goals of the European Union's strategy for foreign and security policy as well as its policy on ocean governance. It supports both the ambition of the EU Biodiversity Strategy for 2030 to promote protected areas, restore damaged ecosystems, and lead efforts to address the global biodiversity crisis, as well as the goals of the European Green Deal to address climate change and environmental degradation.⁴

The EU outlined 50 actions in the 2016 Joint Communication on global ocean governance in order to achieve safe, secure, clean, and sustainably managed seas. To forward the agenda, it promised to collaborate with national, regional, and third-world organisations. The need to lessen pressure on the oceans and seas, establish the prerequisites for a sustainable blue economy, come to an agreement on coordinated efforts to safeguard and restore marine and coastal ecosystems, and establish global public-private partnerships were also mentioned. This entails identifying and overseeing marine zones that are shielded from the detrimental effects of human activity.⁵

The EU wants to encourage the growth of marine reserves around the world through twinning projects, research funding, and the exchange of best practices. 2019 saw the release of a Joint Communication Progress Report (with accompanying Joint Staff Working Document). The outcomes of a 2020 consultation on the ocean governance agenda were announced by the European Commission in the beginning of 2021.⁶

The goal of supporting peace and human security through an integrated strategy is acknowledged in the Global Strategy for the European Union's Foreign and Security

³ *ibid.*

⁴ 'Policy background' (Ocean Governance Project) accessed 10 September 2022 <<https://oceangovernance4mpas.eu/the-project/policy-background/>>.

⁵ *ibid.*

⁶ *ibid.*

Policy. Conflict avoidance and root causes like resource stress and climate change, which can compound risks and cause water and food scarcity, pandemics, and displacement, are priorities.⁷

Recognising that resource depletion, stress, and environmental degradation are global issues, the EU encourages reciprocal, cooperative connections between regions and within the EU for mutual learning and benefit. The European Green Deal was put forth as a plan to make Europe into a modern, resource-efficient, and competitive economy at the end of 2019. It seeks to make the transition fair and inclusive for everyone while transforming environmental and climate constraints into possibilities. One of numerous new policy initiatives introduced under the Green Deal is the EU Biodiversity Strategy for 2030, which aims to put Europe on the path to ecological recovery, unlock additional funds for biodiversity, and establish the EU as a global leader in solving the global biodiversity issue. The Ocean Governance Project further aims to contribute to several of the EU's global commitments, including the UN 2030 Agenda for Sustainable Development (in particular SDG 14), the Paris Agreement on Climate Change, the Convention on Biological Diversity (CBD), and the newly adopted Kunming-Montreal Global Biodiversity Framework (GBF).⁸

1.1.2. Project Components and Activities

Activities in the project are divided into four components:

Component I. Increased knowledge and practice of protecting and restoring marine and coastal ecosystems in three selected areas of Marine Protected Areas (MPAs) in the South East Asian region. The aim of this component is to improve biodiversity protection through the restoration of (often degraded) marine ecosystems while including national and local communities. The project brings together partners from different countries to enable the exchange of experience and best practices. A special effort is made

⁷ *ibid.*

⁸ 'Policy background' (Ocean Governance Project) accessed 10 September 2022 <<https://oceangovernance4mpas.eu/the-project/policy-background/>>.

to engage various stakeholders and local communities in order to communicate the importance of effectively managed marine and coastal ecosystems for local economies. The three restoration sites of the project are located in the Coral Triangle and more specifically in the Sulu-Sulawesi seascape (see 1.1.3. Project focus areas). Restoration sites and techniques adhere to current international norms and expertise, and operations build on regional and global lessons learnt. Activities include planting mangrove trees and seagrass, maintaining important nursery habitats like coral reefs, salt marshes, and seagrass meadows, and creating artificial habitats (like artificial reefs).⁹

Component II. Improved management of Marine Protected Areas around the Atlantic using the concept of shared environmental protection. Through the project, MPA managers and other partners collaborate (creating ‘twinning’) on issues of mutual interest. By further fostering MPA networking across the Atlantic, deepening understanding of the ecological and socio-economic needs (and pressures) of spatial protection measures, and fostering the effectiveness and coherence of MPAs and marine conservation measures at a broad international level, this builds on the earlier EU-funded initiative on MPAs in the Atlantic. The topics for the three twinning partnerships are:

- Cooperation and common strategy between MPA networks of managers in the Atlantic region
- MPAs and coastal resilience, coping with rapid changes
- Marine mammal protection, a way to enhance transatlantic cooperation between MPAs

Component III. Strengthened knowledge exchange between Atlantic and South East Asian marine and coastal regions. Despite being separated by thousands of kilometres, MPA managers and ocean conservationists face many of the same challenges and problems all over the world. The project therefore decided not to keep its two focus areas - South-East Asia and the Atlantic - separated, but rather to exploit this combination for learning opportunities. This knowledge exchange is implemented through specific events aimed at enabling partnerships between MPA managers and other ocean professionals from the two different regions. One of the project’s biggest events to date were the Learning Exchanges

⁹ n1.

in Kota Kinabalu, Malaysia, which brought together more than 60 ocean professionals from the Americas, Africa, Europe and Asia. Furthermore, this event was the catalyst for the twinning partnerships of Component II to open up to new partners beyond the Atlantic basin.¹⁰

Component IV. Improved basis for dialogue among marine and coastal stakeholders in the South East Asian region.

The Ocean Governance project connects marine and coastal stakeholders to facilitate conversations on peace, prosperity, and community building, with an emphasis on the Coral Triangle nations of Indonesia, Malaysia, and the Philippines. In order to educate political decision-making and promote cooperation amongst important players and stakeholders involved in marine and coastal conservation in the area, the project closely collaborates with EU Delegations in Indonesia, the Philippines, and Malaysia. Information sharing, consultation, and coordination between various parties, whether they are from the public or commercial sector, inside the same nation or across international borders, constitute collaboration. The ASEAN Centre for Biodiversity and the Coral Triangle Initiative (CTI-CFF) are the project's main partners.¹¹

1.1.3. Project Focus Areas

The EU Ocean Governance focuses on two geographical areas, namely South-East Asia and the Atlantic Basin. While South-East Asia is home to one of the most diverse ecosystems in the world, it is unfortunately also one of the most threatened. However, growing awareness can be observed in this region and numerous MPAs are set up in order to face threats like coastal development, sedimentation and overexploitation. The effective management of these MPAs needs to be ensured for them to fulfil their full potential to protect the marine and coastal environment. Countries in the region are highly dependent on ocean resources, particularly fisheries, which means that the conservation of biodiversity is also crucial for economic and social stability.¹²

¹⁰ *ibid.*

¹¹ *ibid.*

¹² 'Focus areas: South-East Asia and the Atlantic Basin' (Ocean Governance Project) accessed 9 September 2022 <<https://oceangovernance4mpas.eu/focus-areas/>>.

In the South-East Asia region, the project carries out site restoration activities, focused on the Sulu-Sulawesi seascape, which located in the northern part of the Coral Triangle. This is an area that contains the most marine species in the world, such as reef fish and sharks, sea turtles and manta rays. Its ecosystems are made up of coral reefs, seagrass meadows and mangrove forests. The Sulu-Sulawesi Seascape is home to more than 22 species of marine animals, including sperm whales and dugongs, as well as more than 500 kinds of reef-building corals, 2,500 species of marine fish, and five species of sea turtles (green, hawksbill, olive ridley, loggerhead, and leatherback).¹³

It is about 900,000 square metres large and spans across the waters of Indonesia, Malaysia and the Philippines. Coastal vulnerability is rather high in these countries. The Philippines, for instance, suffered from the consequences of Typhoon Haiyan which hit the country hard in November 2013. Protecting the natural ecosystems thus contributes significantly to coastal resilience. The livelihood and diet of almost 40 million residents of the Sulu-Sulawesi Seascape coasts is dependent on marine resources, with fish serving as their primary source of protein. However, due to fast population increase, unfavourable development, and growing risks from climate change, coastal ecosystems and the way of life they support are under tremendous pressure.¹⁴

The Atlantic Basin is the second focus area of the project. This happens mainly through the three Twinings, in which partners from Atlantic Rim countries come together to improve the management of MPAs in the Atlantic. Partners (MPA managers, networks of managers, and institutions) come from various countries including Bermuda, Brazil, Cape Verde, France, the French Antilles, Gabon, Iceland, Mexico, Portugal, Spain, and the United States of America. In the Atlantic Basin, there are more than 14,000 Marine and Coastal Protected Areas.¹⁵

¹³ 'EU project on ocean governance to restore reefs in Sulu Sulawesi' (MedPAN) accessed 9 September 2022 <<https://medpan.org/eu-project-on-ocean-governance-to-restore-reefs-in-sulu-sulawesi/>>.

¹⁴ 'Sulu-Sulawesi Seascape' (Conservation) accessed 9 September 2022 <<https://www.conservation.org/places/sulu-sulawesi-seascape>>.

¹⁵ n12.

These areas are very diverse and vary depending on the continent and country. In total, however, the protected areas make up only about ten per cent of the Atlantic which is therefore still far away from the goal of thirty percent that has been agreed upon in the new Global Biodiversity Framework.¹⁶

1.2. Internship Experience

During my internship, I worked with the core team under the leadership and guidance of Arnaud Gotanegre (Senior Project Manager) and Dr. Puri Canals (Technical Director), and in close collaboration with Mrs. Barbara Casado (Senior Communications and Event Manager). Specific tasks were agreed on an ad hoc basis with team members, and much of my work consisted of developing, contributing to and reviewing documents, concept notes and reports related to the project. My support was particularly needed with communications, and I was responsible for the updating of the project's website and social media throughout the whole internship. I wrote numerous articles about the project's activities, which were published on the website, and also contributed to the annual report for 2022. Through my work, the project significantly grew its outreach as the social media channels and website had been neglected before my arrival and their potential had previously not been used to its fullest extent. Furthermore, I was the designated minute taker at various meetings and assisted with the preparation of event reports.

The highlight of my internship was the opportunity to help facilitate the project's biggest event of the year in person in Kota Kinabalu, Malaysia, from 12th to 14th October 2022. The 'Learning Exchanges between South-East Asia and the Atlantic' brought together MPA managers and ocean professionals from over 60 countries and included 16 workshop sessions covering topics such as the financial sustainability of MPAs, management effectiveness, protection of marine mammals, marine turtles, restoration of corals and mangroves, as well as coastal resilience. In my intern role I had the chance to act as the rapporteur for some of these sessions, taking minutes during the presentations and giving a short summary about them at the closing conference, as well as writing a workshop

¹⁶ 'Census of Environment: Protected and conserved ocean and coastal ecosystems' (Statistics Canada) accessed 12 January 2023 <<https://www150.statcan.gc.ca/n1/daily-quotidien/221107/dq221107b-eng.htm>>.

summary for each attended session. The event ended with a field visit to Manukan Island, part of Tunku Abdul Rahman Park, a state-managed marine park located 3 km offshore from Kota Kinabalu. The last weeks of my internship were filled with preparatory work for the Fifth International Marine Protected Areas Congress (IMPAC5) in Vancouver, at which the Ocean Governance Project was strongly represented in the official event programme.

During my internship experience with the Ocean Governance Project, I was able to develop my writing and communications skills, while expanding my knowledge about Marine Protected Areas, as well as coral and mangrove restoration. I also developed project management skills by assisting the team with various ad-hoc activities, which certainly also increased my adaptability, time-management and team work skills. Due to the internship I also had to stay informed about global ocean policy developments, such as the negotiations and subsequent adoption of the High Seas Treaty. Moreover, it was most interesting to get an insight into how an EU-funded project is implemented by an international development consultancy company. For instance, I was introduced to OPSYS, the information system used by the European Commission (EC) for External Actions to evaluate project results, through an official online course. Before starting my internship, I had not been aware of the fact that the EU collaborates with consultancy companies such as GOPA to implement numerous projects worldwide. Having gained this insight has opened up a new potential work environment to me that I find highly interesting.

Lastly, it has been a unique experience to be able to join the team for the Learning Exchanges in Malaysia, where I got to listen to many informative presentations and also got to speak to professionals from very diverse backgrounds, for example the Director of the National Oceanic and Atmospheric Administration (NOAA) National Marine Protected Areas Center, the Director of Community Marine Protected Areas Senegal, and an MPA manager from the Dominican Republic. It was a great opportunity to learn from and connect with people on the ground working with MPAs and other ocean protection measures, and also to meet my team members in person. I was also able to expand my professional network and connect with a number of people working for international organisations, NGOs and governments. It has given me a unique insight into how global

ocean commitments, such as the 30x30 goal, are decided at the high political level, but have to be dealt with at the lowest level of MPA management and local communities. Moving forward into my career in ocean policy, I believe that this close contact to the ground level of MPA management and marine conservation will certainly stick with me and remind me to always keep an effective connection between the different levels in mind. Another takeaway I had is that while ecological connectivity is a given, and there is a scientific justification for transboundary marine conservation initiatives, the creation and sustaining of human connections and networks is just as important for successful ocean protection.

I am very pleased to say that my time at the Ocean Governance Project did not end with the internship, as I was offered a position as Junior Communications and Outreach Expert and continue to work on the project until its planned ending in December 2023. As regards my future career aspirations, I am hoping to be able to start at another ocean-related project at GOPA Worldwide Consultants as of next year.

1.3. Reasoning for my Research Question

During my internship experience, I developed a strong interest in Marine Protected Areas and ocean conservation policy. Part II of my internship report provides an opportunity to explore this topic further. Interestingly, during my time at the Ocean Governance Project, the international community reached an agreement on the new international instrument for marine biological diversity beyond national jurisdiction, known as the BBNJ treaty. This milestone represents a significant step towards global ocean governance and sustainable marine practices. While the primary focus of the EU Ocean Governance Project was the 30x30 target of the Global Biodiversity Framework, I chose to examine the BBNJ treaty, with a specific focus on the topic of liability and compensation. This decision was motivated by two key reasons:

Firstly, the BBNJ treaty is a recent and pioneering piece of legislation that has received limited research attention. By analysing this treaty, I aim to contribute to the existing knowledge on the subject and understand its potential implications for marine conservation

efforts. Secondly, exploring the BBNJ treaty aligns with the forward-thinking approach of GOPA Worldwide Consultants, the international development consultancy company associated with the Ocean Governance Project. As global ocean governance evolves, new EU-funded projects or initiatives funded by other donors may emerge, and understanding the BBNJ treaty can be valuable for the company's future engagement in such projects. By deepening my knowledge of the BBNJ treaty, I hope to enhance my employability within the company and contribute effectively to future projects related to marine conservation challenges.

In conclusion, Part II of my internship report presents an opportunity to explore the BBNJ treaty's implications, particularly in terms of liability and compensation. I am eager to delve into this analysis, driven by my passion for ocean conservation and the potential impact of the BBNJ treaty on marine biodiversity and sustainable practices. My research aims to contribute to the collective efforts towards safeguarding our oceans' ecosystems.

Part II

1. Introduction

“The ship has reached the shore” - those were the words of Rena Lee, President of the Intergovernmental Conference (IGC), in March earlier this year when governments agreed on the final draft of a new treaty on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ).¹⁷

After a decade and a half of work, the adoption of a finalised BBNJ treaty was considered an important victory for ocean governance and protection of biodiversity. The ocean encompasses over 90 per cent of the earth’s habitable space and contains around 250.000 identified species. Approximately two-thirds of the ocean lies in areas beyond national jurisdiction, where fragmented legal frameworks have left the biodiversity vulnerable to escalating threats, including climate change, pollution, overfishing, habitat destruction, ocean acidification, and underwater noise.¹⁸ The BBNJ treaty is therefore a critical step towards the conservation of biodiversity in ABNJ, but a detailed analysis of this new instrument is necessary to evaluate its effectiveness and see if and how it will improve and build on the existing law of the sea regime.

One unique trait of the high seas lies in their vast and secluded nature, which makes it especially challenging to monitor activities taking place there. This is why liability and responsibility are crucial for the effective implementation of the treaty, especially as new activities in ABNJ are emerging rapidly. An effectively implemented environmental liability mechanism could ensure that the critical provisions on Environmental Impact Assessments (EIAs), Area-based Management Tools (ABMTs), and Marine Genetic Resources (MGRs) in the BBNJ treaty are actually put into practice under a certain level of control and accountability. Before the agreement on the final draft, Mendenhall and Hassanali already published a short communication that “identifies a crucial missing

¹⁷ ‘Countries Reach Agreement to Conserve and Sustainably Use High Seas’ (IISD) accessed 8 August 2023 <<https://sdg.iisd.org/news/countries-reach-agreement-to-conserve-and-sustainably-use-high-seas/>>.

¹⁸ *ibid.*

element in the emerging draft treaty: a strong liability provision”¹⁹ and have inspired the focus on the topic of liability in this paper, aiming to go into more depth and explore it in a more contextualised manner. Apart from Mendenhall and Hassanali, little research has so far focused specifically on how the issue of liability is incorporated into the agreement. Even though the final draft agreement has been agreed on, the interpretation of the text can develop over time and with emerging jurisdiction, and possibly the treaty can even be expanded on through the addition of annexes. The second part of this internship report therefore aims to answer the following question: To what extent is environmental liability integrated within the BBNJ treaty?

The structure of this paper is designed to provide a systematic exploration of the topic and research questions under consideration. It begins with a comprehensive literature review, which delves into the relevant literature forming the backdrop of the paper. This section unfolds in several sub-topics, including the historical development of the BBNJ agreement, an exploration of the concept of legal liability for environmental harm, and an in-depth analysis of liability and compensation under international marine environmental law. This includes UNCLOS, the liability regime of the International Maritime Organisation (IMO), the liability regime concerning deep seabed mining (DSM), the liability regime under the Protocol on Environmental Protection to the Antarctic Treaty, and the EU Environmental Liability Directive (ELD). Additionally, the literature review includes the pertinent legal case of *Costa Rica v Nicaragua* and its potential influence on the BBNJ negotiations. The subsequent methodology section outlines the research approach. The heart of the paper lies in the analysis of liability in the BBNJ treaty, where the extent to which environmental liability is integrated into the treaty shall be critically evaluated. Lastly, the paper conclusion synthesises the findings, discusses their implications, and suggests potential areas for further research and policy development, aiming to provide valuable insights for policymakers, legal scholars, and environmental advocates.

¹⁹ Elizabeth Mendenhall and Kahlil Hassanali, ‘The BBNJ agreement and liability’ (2023) 150 Mar Policy 105549 1.

2. Literature Review

2.1. Development of the BBNJ Agreement

The international focus on the conservation and sustainable use of marine biological diversity beyond national jurisdiction has heightened due to scientific findings highlighting the richness and vulnerability of these areas. Concerns have arisen regarding the growing anthropogenic pressures from activities like fishing, mining, marine pollution, and bioprospecting in deep-sea environments. UNCLOS, which became effective on 16 November 1994, outlines the rights and responsibilities of nations concerning ocean utilisation, resource utilisation, and the preservation of the marine and coastal environment.²⁰

While not explicitly addressing marine biodiversity, UNCLOS is widely recognised as the legal framework governing all ocean activities. The Convention on Biological Diversity, which became effective on 29 December 1993, provides a definition of biodiversity and strives to foster the conservation of biodiversity, the sustainable utilisation of its components, and the just and equitable distribution of benefits derived from genetic resources' utilisation. Within ABNJ, the Convention applies to processes and activities conducted under the jurisdiction or control of the participating parties.²¹

Beginning in 2004 through the enactment of United Nations General Assembly resolution 59/24, the Ad Hoc Open-ended Informal Working Group was established. Its purpose was to explore matters pertaining to the conservation and sustainable use of BBNJ (Biodiversity Beyond National Jurisdiction). Throughout its three sessions held between 2006 and 2010, the working group facilitated discussions concerning institutional coordination, the necessity for short-term measures addressing illegal, unregulated, and unreported (IUU) fishing and destructive fishing practices, Marine Genetic Resources, marine scientific research on marine biodiversity, Marine Protected Areas, and

²⁰ IISD, 'Summary of the Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 15-26 August 2022' (2022) 25 ENB, accessed 10 October 2022.

²¹ *ibid.*

Environmental Impact Assessments. In 2011, during the fourth meeting of the Working Group held in New York from 31 May to 3 June, a set of recommendations were unanimously adopted.²² These recommendations aimed to initiate a process for establishing a legal framework concerning the conservation and sustainable use of BBNJ. The recommendations sought to identify existing gaps and propose a way forward, including the utilisation of current instruments and the potential development of a multilateral agreement under UNCLOS. In 2012, during the UN Conference on Sustainable Development held in Rio de Janeiro, Brazil, from 20 to 22 June, participating states reaffirmed their dedication to promptly addressing the matter of conserving and sustainably utilising BBNJ.²³

Building upon the efforts of the Working Group, the states committed to making a decision on the development of an international instrument under UNCLOS before the conclusion of the 69th session of the General Assembly. From 2014 to 2015, the Working Group conducted in-depth discussions on the scope, parameters, and viability of an international instrument under UNCLOS. During its ninth meeting, the Working Group achieved consensus on recommendations for the 69th session of the UN General Assembly. These recommendations proposed the development of a new legally binding instrument on BBNJ under UNCLOS and advocated for commencing a negotiation process towards that objective.²⁴ The Preparatory Committee (PrepCom) was established in accordance with General Assembly resolution 69/292. Its primary responsibility was to provide substantial recommendations to the General Assembly concerning the components of a draft text for an international legally binding instrument under UNCLOS. These recommendations were to be based on the Working Group's Co-Chairs' reports. Additionally, the PrepCom's mandate included proposing whether an Intergovernmental Conference should be convened to further develop the text, with the final decision to be made during the 72nd session of the General Assembly.²⁵ Throughout its deliberations, the PrepCom examined

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

the scope of the instrument, its relationship with other relevant agreements, guiding principles, approaches, and the elements encompassed within the proposed package. After over ten years of discussions initiated by the United Nations General Assembly, the Assembly, in resolution 72/249 on December 24, 2017, resolved to convene an Intergovernmental Conference. The purpose of the conference was to formulate a legally binding instrument under UNCLOS that focuses on conserving and sustainably utilising BBNJ, with the objective of developing the instrument expeditiously.²⁶ Under the United Nations Convention on the Law of the Sea (UNCLOS), negotiations for a new legally binding instrument commenced in 2018 with the objective of conserving and sustainably utilising marine biodiversity beyond national jurisdiction.²⁷

The Intergovernmental Conference convened for five negotiating sessions, while the fourth one had to be re-scheduled to a later date due to Covid-19. In November 2019, a first draft text of the BBNJ agreement including 70 draft articles and two draft Annexes was released by the President of the Intergovernmental Conference, based on the first two negotiating meetings in September 2018 and March/April 2019.²⁸ The fifth and last negotiation session stretched over several months (August 2022, resumed February/March 2023, resumed June 2023). During the final session at the UN New York Headquarters on 19 and 20 June, the Conference adopted, by consensus and standing ovation, and after a total of 19 years since the enactment of United Nations General Assembly (UNGA) resolution 59/24, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of Areas Beyond National Jurisdiction.²⁹ The President of the Conference, Rena Lee (from Singapore) used her closing remarks to express hope for those present to ratify the agreement in their respective

²⁶ *ibid.*

²⁷ Arne Langlet and Alice B.M. Vadrot, 'Not 'undermining' who? Unpacking the emerging BBNJ regime complex' (2023) 174 Mar Policy 105372.

²⁸ Fran Humphries and Harriet Harden-Davies, 'Practical policy solutions for the final stage of BBNJ treaty negotiations' (2020) 122 Mar Policy 104214.

²⁹ 'Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249)' (United Nations) accessed 2 July 2023 <<https://www.un.org/bbnj/>>.

countries. Before the treaty can enter into force, at least 60 UN Member States need to ratify it.³⁰

2.2 Legal Liability for Environmental Harm

What is environmental liability?

According to Gailhofer et al., liability in its most basic sense is “the obligation of a legal entity, such as a natural person, company or state, to provide compensation for damage caused by an action for which that legal entity is responsible.”³¹ Over the past few years, the focus regarding liability for environmental, transboundary damage has increasingly shifted to private actors, driven by the fact that the private actors, rather than states, actually cause the vast majority of environmental damage. We can observe increased efforts in recent years aiming to address damage to the environment (as well as human rights violations) by private actors, through specific regulations in a growing number of states trying to regulate the negative impact of economic globalisation (e.g. German Supply Chain Due Diligence Act, French Duty of Vigilance Act, Norwegian Transparency Act).³² However, as this thesis focuses on the BBNJ treaty, which forms part of international law addressing only states and not private actors (persons or companies), this thesis will for the most part focus on state liability.

The first thing to note in order to understand the concept of liability is that it entails compensation for transboundary damage even if no international obligation has been breached, as only causation is relevant to determining whether compensation is necessary.³³ The concept of environmental liability has had to develop due to the

³⁰ ‘Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction Concludes Work Following Landmark Adoption of Historic Treaty’ (United Nations) accessed 2 July 2023 <<https://press.un.org/en/2023/sea2182.doc.htm>>.

³¹ Peter Gailhofer ‘Functions and Objectives of Corporate Liability for Transboundary Environmental Harm’ in Peter Gailhofer et al. (eds) *Corporate Liability for Transboundary International Environmental Harm - An International and Transnational Perspective* (Cham Springer Nature 2023) 22.

³² Peter Gailhofer et al., ‘Introduction’ in Peter Gailhofer et al. (eds) *Corporate Liability for Transboundary International Environmental Harm - An International and Transnational Perspective* (Cham Springer Nature 2023).

³³ Julio Barbosa, *The Environment, Risk and Liability in International Law* (Brill 2010).

increasing risk of hazardous activities which are legal due to the social and economic benefits they bring about, such as the transportation of oil by the sea or the launch of objects to outer space. Liability aims to ensure prompt reparation for damages, which is its main function from a legal perspective. From the perspective of an economic theory of law, however, liability is rather seen as an incentive to prevent environmental damage in the first place, as potentially liable parties may consider the consequences and refrain from creating risks to the environment.³⁴ In summary,

“liability is part of a regime seeking to regulate certain socially useful but hazardous activities so that they continue being economically viable in spite of the damages they cause - without imposing undue burdens on victims or deteriorating the environment.”³⁵

The legal basis for justifying compensation for damages to the environment are Principle 21 of the Stockholm Declaration³⁶ and Principle 2 of the Rio Declaration at the United Nations Conference on Environment and Development (UNCED)³⁷. Further, the International Court of Justice stated in its 1996 Advisory Opinion on nuclear tests that states have a general obligation to ensure that activities under their jurisdiction or control respect the environment of other states or of ABNJ.³⁸ According to customary international law, there also exists a pertinent obligation requiring states to prevent significant environmental harm, or to refrain from carrying out or permitting activities that could lead to such harm. States are under the obligation to not inflict damage on or violate the rights

³⁴ *ibid.*

³⁵ Julio Barbosa, *The Environment, Risk and Liability in International Law* (Brill 2010) 3.

³⁶ The 1972 Stockholm Declaration [11 I.L.M. 1416 (1972)] Principle 21 reads: “States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

³⁷ The 1992 Rio Declaration from the UN Conference on Environment and Development (UNCED) [31 I.L.M. 874 (1992)] Principle 2 reads: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

³⁸ International Court of Justice Advisory Opinion for the UN General Assembly on the Legality of the Threat or Use of Nuclear Weapons (1996), para. 29, www.icj-cij.org.

of other states, which has been translated into the obligation to not cause harm to the environment of other states and to areas beyond any jurisdiction ('no-harm rule').³⁹

The terms liability and responsibility can be easily confused. When referring both to the responsibility of states and international organisations for internationally wrongful acts, as well as to their liability to make reparation for harm and damages resulting from their activities, the umbrella term environmental accountability shall be used. State responsibility generally refers to a state's culpability for breaking international law and is predicated on an internationally unlawful action that can be linked to a state. These actions can, for instance, arise from the breach of an international legal obligation, be it treaty or customary law.⁴⁰ The repercussions of a wrongful act are that the wrongdoer must cease that act, offer assurances of non-repetition and make full reparation of injury, which includes compensation for environmental damage. However, the laws governing strict liability for environmental harm brought about by *legal* activity are not as well established and continue to be unique and unusual.⁴¹ Strict liability refers to a situation where damage does not occur as a result of faulty or illegal behaviour, but rather from hazardous activities, as mentioned earlier.

Within the sphere of international law, states may impose international environmental obligations on themselves, but also on domestic public and private actors. The obligation of a state to compensate another state for transboundary environmental harm can only exist on a state-to-state level as the sovereign equality of states prohibits interference in inter-state affairs. However, the obligation to compensation and the establishment of liability by domestic public or private actors can originate directly from international rules, or from

³⁹ Christina Voigt, 'International Environmental Responsibility and Liability' in Lavanya Rajamani and Jacqueline Peel (eds) *The Oxford Handbook of International Environmental Law* (2nd edn) (Oxford Academic 2021).

⁴⁰ n33.

⁴¹ n33.

international rules which impose on states the duty to establish corresponding liability rules in their national legislation.⁴²

Few international environmental regimes impose liability and compensation schemes on states, and states have generally shown little interest in creating a framework for liability for environmental damage.⁴³ Even though there is a significant number of multilateral environmental agreements in force, the topic of liability for environmental damage is only addressed by few. In fact, only the Convention on International Liability for Damage Caused by Space Objects contains a clear provision of objective international liability, while all other treaties deal with liability in a different way.⁴⁴ Further, many of those international agreements that do include liability are not yet in force or the provisions remain unimplemented, even though this does not necessarily weaken their importance in the form of customary international law, especially when they have been adopted by a significant number of states.⁴⁵ Apart from international treaties and customary international law, international environmental law greatly relies on a number of environmental principles, described by Schmalenbach as a “driving force to guide legal development.”⁴⁶ The environmental principle most relevant to the topic of environmental liability is the polluter-pays principle.

The Polluter-Pays Principle

The polluter-pays principle is an essential element to modern-day environmental protection approaches. It originated in the Council of the Organisation for Economic Co-Operation

⁴² Kirsten Schmalenbach, ‘State Responsibility and Liability for Environmental Harm’ in Peter Gailhofer et al. (eds) *Corporate Liability for Transboundary International Environmental Harm - An International and Transnational Perspective* (Cham Springer Nature 2023).

⁴³ n39.

⁴⁴ *ibid.*

⁴⁵ n42.

⁴⁶ Kirsten Schmalenbach, ‘State Responsibility and Liability for Environmental Harm’ in Peter Gailhofer et al. (eds) *Corporate Liability for Transboundary International Environmental Harm - An International and Transnational Perspective* (Cham Springer Nature 2023) 60.

and Development (OECD) in 1972.⁴⁷ As defined in the OECD Recommendations on Guiding Principles concerning International Economic Aspects on Environmental Policies, the polluter-pays principle is an

*“economic policy and principle used for allocating or internalising ‘economic costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment’ by subsidising the environmental costs.”*⁴⁸

The OECD further recommends that the polluter, who

*“directly or indirectly damages the environment or those who creates conditions leading to such damage should bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state.”*⁴⁹

The financial amount behind these public measures should reflect the price of goods and services relating from the pollution. Right to equal access to national remedies and civil liability are the two components of the polluter-pays principle, the former aiming to “afford equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage, or to those likely to be affected by such a principle.”⁵⁰ This includes

*“access to information, participation in administrative hearings and legal proceedings and the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution.”*⁵¹

⁴⁷ Chen-Ju Chen, ‘The Liability and Compensation Mechanism under International Marine Environmental Law’ (LOSI Conference, Seoul, Korea, May 2012), accessed 15 April 2023 <<https://www.law.berkeley.edu/files/Chen-final.pdf>>.

⁴⁸ UN Doc. A/ CN.4/SER.A/1995/Add.1 (Part 1), Yearbook of the International Law Commission, Volume II, Part One, op. cit., paras. 102-117.

⁴⁹ *ibid.*

⁵⁰ UN Doc. A/ CN.4/SER.A/1995/Add.1 (Part 1), Yearbook of the International Law Commission, Volume II, Part One, op. cit., paras. 102-117, para. 118.

⁵¹ *ibid.*

The polluter-pays principle certainly comes with a number of limitations which are almost all exacerbated when used in the context of the high seas. Limitations include the burden of proof, the compensation of long-term damage, limitations to the adoption of strict liability, and narrow definitions of environmental damage.⁵² The 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention), which had been adopted by the Council of Europe, was rather unique to this regard as it overcame many of those limitations to the principle. In the Convention, liability is not limited to a specific amount, and it would be assured by compulsory insurance or other types of financial security.⁵³ Further, the definition of damage includes persons, property, as well as damage caused by impairment of the environment (and the costs of preventive measures including potential further losses). It can therefore be argued that the Lugano Convention paved the way for compensation of environmental damage. It has, however, not been particularly welcomed by European states and a liability mechanism based on the Lugano Convention has never come into force.⁵⁴

Even though the polluter-pays principle is present in many international (as well as regional and national) instruments, the principle's legal implications are not quite clear, but in the ruling by the arbitral tribunal in the 2004 *Rhine Chloride* case it has not been recognised as being part of customary international law. While it is a guiding principle, it lacks the necessary legal clarity, which confirms the need for the development of solid environmental liability regimes.⁵⁵

⁵² n47.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ n39.

2.3. Liability and Compensation under International Marine Environmental Law

2.3.1. International Law of the Sea

Provisions concerning liability and compensation for environmental damage in the international law of the sea (LOS) can be most prominently found in Part XII (protection and preservation of the marine environment) of the Law of the Sea Convention, which is the most comprehensive legal instrument in the law of the sea regime, as well as in treaties developed under the International Maritime Organisation (see 4.2.). The LOS provides a definition of the pollution of the marine environment, which is:

“the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reductions of amenities.”⁵⁶

This definition is phrased rather open and includes a wide range of types of pollution. Three points are interesting to note here: Firstly, the preemptive approach, coined by the precautionary principle⁵⁷, becomes visible through the wording ‘is likely to result’. Secondly, the Convention establishes a connection between pollution and risks to human health. Thirdly, the open phrasing of the definition includes existing, but also new sources of pollution. Part XII further includes generic provisions which speak about the imperative for states to cooperate on matters relating to marine environmental protection. Depending on the specific sources of pollution the Convention provides more specific articles which must not be discussed further here.⁵⁸ States are required to “adopt international rules and

⁵⁶ Article 1(4) of the LOS Convention.

⁵⁷ Definition: “The PP rejects the claim that uncertainty justifies inaction, and its ambition is to empower policymakers to take anticipatory action even under scientific uncertainty.” From: Christian Collier and Nicolas Treich, ‘Option Value and Precaution’ in Jason F. Shogren (ed) *Encyclopedia of Energy, Natural Resource, and Environmental Economics* (Elsevier 2013).

⁵⁸ n47.

national legislation to prevent, reduce and control marine pollution”⁵⁹. This shows how the LOSC is very much an ‘umbrella convention’ and contains many generic rules which depend on more specific rules in other agreements, such as for instance the agreements decided under the auspices of the IMO. The Convention even encourages states to establish further global and regional rules for more specific purposes, for example in Article 210(4) (concerning pollution by dumping) and Article 211(5) (concerning vessel-source pollution)⁶⁰. The provision most relevant for state liability is Article 235, which states that

*“States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.”*⁶¹

This article places direct environmental responsibility on states.⁶² Article 235(1) is recognised as a means of including the general rule of state responsibility into the Law of the Sea Convention, and it does not create any new liability rule.⁶³ As mentioned earlier, state responsibility is an important part of environment law, and it is fairly well established in customary international law. What is much more likely to arise is state liability from the state’s ‘wrongful act’ in regulating the activities of its citizens and companies. This is where Article 235(2) comes into play, which also addresses the liability of private actors.⁶⁴ According to it, states must have in place legal mechanisms for “compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction”⁶⁵. Lastly, states are also required to enforce existing international law while respecting

⁵⁹ Article 207(1) of the LOS Convention.

⁶⁰ n47.

⁶¹ Article 235(1) of the LOS Convention.

⁶² Nicholas Gaskell, ‘Liability and Compensation Regimes: Pollution of the High Seas’ in Robert C. Beckmann et al. (eds) *High Seas Governance: Gaps and Challenges* (Brill 2018).

⁶³ n42.

⁶⁴ *ibid.*

⁶⁵ Article 235(2) of the LOS Convention.

*“responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.”*⁶⁶

This article incorporates a reminder that the establishment of liability rules is not enough, as the necessary payment, such as through ‘compulsory insurance and compensation funds’ needs to be ensured.⁶⁷ One of these objectives quoted above is the prompt and adequate compensation to persons or entities that have suffered damage from pollution of the marine environment, which is the main purpose of any liability regime. The word ‘prompt’ ensures that the procedures in place are efficient and accessible. To this regard, the International Law Commission (ILC) has noted that specialised, faster procedures should be considered at the national or international level.⁶⁸ The mention of the term ‘adequate’ refers to the requirement that the amount of compensation is in line with the damage suffered. Article 22 of Annex III clarifies this further, stating that “liability in every case shall be for the actual amount of damage.”⁶⁹ A second objective is the protection of the marine environment, which is inextricably linked to the issue of liability. While liability rules remedy damage, they at the same time act as a deterrence by providing incentives for actors to cause no or as little damage as possible. This function of liability to prevent harm is affirmed in Article 145, which addresses ISA and demands it to protect the marine environment. This shall be explored further in 4.3.

Despite all the different types of pollution listed in the Convention, a robust liability regime has only been established for vessel-based pollution, developed under the auspices of the IMO.⁷⁰

⁶⁶ Article 235(3) of the LOS Convention.

⁶⁷ n62.

⁶⁸ *ibid.*

⁶⁹ Article 22 of Annex III of the LOS Convention.

⁷⁰ n62.

2.3.2. The Liability Regime of the International Maritime Organisation

The IMO was founded in 1948 by the Convention on the International Maritime Organisation (Convention on the IMO), as the UN's agency specialised on the safety and security of shipping and the prevention of marine pollution. It is composed of two main bodies, the Assembly and Council, and five main specialised Committees. In 1973, the Marine Environment Protection Committee (MEPC) was established with a special mandate to prevent and control vessel-source pollution. Since its adoption, the IMO has adopted about fifty conventions and protocols and over a thousand recommendations and codes.⁷¹ Among those texts are several conventions concerned with liability and compensation, particularly regarding damage caused by pollution, that are based on the polluter-pays principle.⁷²

Liability and Compensation for Damage from Oil Pollution and Hazardous and Noxious Substances

Four IMO Conventions deal with liability and compensation for damage from oil pollution and hazardous and noxious substances, which actually preceded Articles 235(2) and (3) of the LOS Convention. In order to comply with these treaties, states must work together to uphold the polluter-pays principle in the areas of liability and compensation for loss, damage, and preventative actions. These conventions provide standards and guidelines for the provision of adequate compensation and specifically mention implementation mechanisms, such as required insurance and compensation funds.⁷³

International Convention on Civil Liability for Oil Pollution Damage

Oil pollution is currently one of the greatest causes of environmental damage due to the large amounts of oil spilled, typically caused by shipping accidents, casualties, and vessel cleaning operations. The importance of preventing oil spills came to the world's attention

⁷¹ n30.

⁷² Kiran R. Bhanu Krishna, 'Liability and Compensation for Oil Pollution Damage: An Examination of IMO Conventions' (2010) 3 NUJS L Rev 399.

⁷³ n47.

especially after the Torre Canyon oil spill in 1967 and other well-known oil spills (Amoco Cadiz, Exxon Valdez, Braer, Sea Empress, Erika), as well as more recent ones such as Prestige (2002) and Hebei Spirit (2007). Adequate compensation is crucial as damage from an oil spill can take on a variety of forms and can have catastrophic effects on the fishing or tourism industry, and therefore the overall local economy. The affected state(s) may have to carry several indirect costs to save the economic situation.⁷⁴ The International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) was adopted in 1969 and put into effect in 1975 in order to guarantee that those who suffer oil pollution damage as a result of maritime accidents within the jurisdictions of Member States involving oil-carrying ships, or tankers, are eligible for adequate compensation. Later, the 1992 Protocol—adopted in 1992 and put into effect in 1996—took its place. The CLC Convention imposes strict liability on the owner of the ship for the loss or damage from which the polluting oil escaped or was discharged, as well as the costs of preventive measures and any further loss or damage brought on by those actions, subject to a number of particular exceptions. The burden of proof for each instance when one of the exceptions should apply falls on the owner. However, its liability is restricted unless the occurrence was caused directly by the owner's (gross) negligence. The CLC Convention mandates that ships that are subject to its provisions hold financial security in the form of insurance or some other form of security equal to the owner's total liability for environmental damage. Each contracting state shall guarantee that compensation claims are taken into account by its courts. To secure the payment of compensation for oil pollution damage, the CLC Convention and Protocol provide the liability and compensation process.⁷⁵

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) was adopted in 1971 and came into force in 1978 with the goals of relieving the burden the CLC Convention placed on ship owners and providing additional compensation to pollution victims (damage in

⁷⁴ *ibid.*

⁷⁵ *ibid.*

cases where compensation under the CLC Convention was either inadequate or unobtainable).⁷⁶ Later, the 1992 Protocol, which went into effect in 1996, replaced it. Since 2005, there also is a supplementary fund which makes up the third tier of compensation. The Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 and the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006 are two additional agreements that have been introduced on a voluntary basis by the International Group of P&I Clubs.⁷⁷

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea

In 1996, the HNS Convention—the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea—was adopted. The HNS Convention was not ratified by enough states, so a Protocol was approved in 2010 to solve the practical issues that had kept states from ratifying the initial Convention.⁷⁸ Aiming to ensure adequate, rapid, and effective compensation for loss or damage to individuals, property, and the environment arising from the carriage of HNS by sea, the HNS Convention governs the compensation for harm caused by the transportation of hazardous and noxious substances (HNS) by water. It covers environmental harm brought on by contamination in the territorial sea and EEZ, as well as costs associated with taking preventive action and further loss or damage brought on by such action. It also covers deaths, injuries, and property damage, regardless of where they occur.⁷⁹

International Convention on Civil Liability for Bunker Oil Pollution Damage

The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) was adopted in 2001 and went into effect in 2008 to ensure that those who

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid.*

suffer pollution damage due to spills of oil caused when carried as fuel in ships' bunkers are able to receive adequate, prompt, and effective compensation. It should be made clear that the CLC Convention and Protocol addresses cargo-carried oil spills. The Bunkers Convention broadens this definition to include environmental harm brought on by oil used as fuel by ships.⁸⁰ This contamination of the environment results from the escape or discharge of bunker oil from ships, as well as from the cost of preventive measures and any additional loss or harm that results from them. In addition, the Bunkers Convention extends the definition of the ship's owner from just the registered owner to include the registered owner, bareboat charterer, manager, and operator of the ship. Additionally, the ship's registered owner must keep up with needed insurance or other forms of financial security to cover liabilities under the Bunkers Convention.⁸¹

The IMO Civil Liability Scheme and Restoration

The Claims Manual of the IMO sets out guidance relating to the reinstatement and restoration of the polluted environment. While this manual has limited jurisdictional scope, it does state that “in some circumstances it is possible to enhance the speed of natural recovery after an oil spill through reasonable reinstatement measures”.⁸² It further sets out criteria which the rehabilitation measures need to fulfil in order to be able to claim compensation pursuant under the 1992 Fund Convention and the 2003 Supplementary Fund Protocols.⁸³ The measures should thereby:

- be likely to accelerate significantly the natural process of recovery
- seek to prevent further damage as a result of the incident
- (as far as possible) not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- be technically feasible

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² International Oil Pollution Compensation Funds, 'Claims Manual' (2019) paras 3.6.3-3.6.5.

⁸³ Ronan Long, 'Restoring marine environmental damage: Can the Costa Rica v Nicaragua compensation case influence the BBNJ negotiations?' (2019) 28 RECIEL 244.

- not be disproportionately expensive to the extent and duration of the damage and the benefits likely to be achieved⁸⁴

The IMO mechanisms are all inspired by the polluter-pays principle supported by Rio Declaration's Principle 16 from 1992. This development in international law shows that the liability and compensation system as well as the polluter-pays principle have gained some legal authority.

Reflections on the IMO Liability Regime

The liability regime and mechanisms established by the IMO through intense international cooperation are significant and exceptional within the sphere of international law of the sea. There are nevertheless some limitations to this regime.

More generally, it is often criticised that the IMO liability regime is in itself too fragmented and has created a 'piecemeal series of solutions', some of which are not even in force. The whole system is also dependent on the interpretation and application of national courts, which means that application is most likely not uniform.⁸⁵ Furthermore, despite there being many different sources of pollution and environmental damage, the IMO conventions and protocols mostly deal with vessel-source pollution, as the IMO is limited to vessel-source pollution in its liability regime due to its mandate to ensure the safety and security of shipping and to prevent marine pollution by ships.

An additional weakness of the IMO liability regime is the fact that the acceptance of these provisions ultimately relies on the states' will. States must be willing to give up some of their sovereign rights in exchange for a greater guarantee of protection for their own interests under the control of another state.⁸⁶ Environmentalists also tend to believe that the definition of damage is too restrictive.⁸⁷ Further, it may not be sufficient to adopt a strict non-fault liability, to channel the liability solely to the owner of the ship, and to limit this

⁸⁴ *ibid.*

⁸⁵ n62.

⁸⁶ n47.

⁸⁷ n62.

liability at relatively low levels (the ship owner is usually entitled to limit his liability to an amount which is linked to the tonnage of his ship).⁸⁸ Re-assessing these characteristics may lead to an improved application of the polluter-pays principle. Chen, however, argues that as long as the IMO mechanism can help to enforce environmental standards, to what extent it implements the polluter-pays principle should not be viewed rigorously.⁸⁹

Furthermore, rather than putting the environment at the centre, the CLCL/Fund Convention has its focus more on claims for economic losses, especially in fishing and tourism. This is problematic because it minimises the available funds after big accidents.⁹⁰ Due to the limitations, although the Conventions offer a relatively simple claims procedure, claimants are less likely to receive adequate compensation in the event of a catastrophic oil spill, and there is therefore less pressure on the oil sector to prevent accidents.⁹¹

Overall, it can be said that the IMO liability regime works well, as compensation is actually paid in practice, and this is also done in a timely manner. There is said to be a good balance between the financial concerns of the shipping industry and environmental concerns, and the insurances and the IOPC Funds cover most instances of pollution or environmental damage. Insurers and the IOPC Funds supposedly cooperate well and according to workable principles which have been developed over years.

However, the system was designed for the territorial zone and the EEZ, and it does not apply to the high seas, and there have been a series of tanker pollution accidents where the gap in liability and compensation was demonstrated.⁹² It could be considered to extend the IMO liability regime to the high seas, but jurisdictional issues would almost certainly arise, as some states, such as the United States (not party to UNCLOS but bound by customary rules of the law of the sea) may object this on the basis that UNCLOS limits the extent to which non-flag states (e.g. coastal states) can impose liabilities on foreign-flagged vessels

⁸⁸ n47.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ n83.

⁹² n62.

on the high seas. It would also be difficult to enforce compulsory insurance for vessels on the high sea as this goes against the principle of the freedom of the high seas.⁹³

2.3.3. The Liability regime of Deep Seabed Mining

The raw materials for many modern ‘necessities’, such as cobalt, nickel, and the rare earth metals used in electronics, are produced by mining in the deep sea. In the law of the sea, deep seabed mining, which describes the prospecting, exploration and exploitation of the seabed and subsoil beyond national jurisdiction, is a significant and developing area as nations and businesses increase their mineral production. The area of the seabed and soil that is subject to this form of mining, known as the International Seabed Area (the Area), is considered to be the ‘Common Heritage of Mankind’ and is not under the control of any one State.⁹⁴

The United Nations Convention on the Law of the Sea Part XI mandated independent governance of deep seabed mining by the International Seabed Authority.⁹⁵ The ISA is therefore responsible to regulate activity in the Area, exercise control in the Area and ensure compliance with Part XI.⁹⁶ Deep seabed mining is an industry currently undergoing rapid development, and the development of accompanying international rules that govern in the event of harm to the environment, persons and property is desperately needed for this high-risk activity, the environmental consequences of which have not yet been fully understood. In the beginning of the development of the DSM regime, it was actually thought that liability was an important topic, yet would not cause a lot of controversy, as stated by the chairman of the informal meetings of the third session in 1975. However, it

⁹³ *ibid.*

⁹⁴ Alexander Proelss and Robert Steenkamp, ‘Liability Under Part XI UNCLOS (Deep Seabed Mining)’ in Peter Gailhofer et al. (eds) *Corporate liability for transboundary environmental harm an international and Transnational Perspective* (Springer 2023).

⁹⁵ *ibid.*

⁹⁶ Keith MacMaster, ‘Environmental Liability for Deep Seabed Mining in the Area: an Urgent Case for a Robust Strict Liability Regime’ (2019) 33 *Ocean Yearb* 339.

only became clear much later how uncertain the environmental consequences of deep seabed mining really are, and the question of liability came to the forefront.⁹⁷

The basic legal structure of liability for deep-seabed mining and the distribution of liability between the contractors, sponsoring states⁹⁸ and the ISA are already included in UNCLOS.⁹⁹ According to UNCLOS, primary liability for wrongful acts committed during DSM activities fall to the contractor.¹⁰⁰ Article 139 lays out the requirements needed to establish state liability, stating that “damage caused by the failure of a state Party or international organisation to carry out its responsibilities [...] shall entail liability.”¹⁰¹ If, however, a state has fulfilled all its responsibilities according to Article 153(4) and Article 4(4) of Annex II UNCLOS, it will not be held liable.¹⁰² If the state party has put into place laws and regulations and taken administrative measures that are, within the parameters of its legal system, "reasonably appropriate for securing compliance" by people under its jurisdiction, then the sponsoring state shall not be liable for any damage caused by any failure of a contractor, sponsored by the state, to comply with its obligations.¹⁰³ The sponsoring states are therefore merely subject to discharge of respective regulatory or oversight responsibility.¹⁰⁴ States are further obliged to adopt national legislation for compensation or other relief. UNCLOS' language appears to be incoherent, as the sponsoring state at first is only exempt from liability under Article 139(2) if "all necessary and appropriate measures" have been taken. However, Annex iii then only calls for the passage of laws that are "reasonably appropriate for securing compliance.” Therefore, there

⁹⁷ n94.

⁹⁸ Definition: The sponsoring States are States Parties that provide sponsorship for DSM applicants as their nationals or under their effective control. From: Article 153(2) of the LOS Convention.

⁹⁹ Legal Working Group on Liability, ‘Legal Liability for Environmental Harm: Synthesis and Overview’, (Liability Issues for Deep Seabed Mining Series, July 2018), accessed 20 April 2023 <https://www.cigionline.org/static/documents/documents/Deep%20Seabed%20paper%20no.1_3.pdf>.

¹⁰⁰ Xiangxin Xu and Guifang (Julia) Xue, ‘The Environmental Compensation Fund: Bridging Liability Gaps in the Deep Seabed Mining Regime’ (2021) 49 *Coast Manage* 557.

¹⁰¹ Article 139(1) of the LOS Convention.

¹⁰² n94.

¹⁰³ *ibid*.

¹⁰⁴ n100.

appears to be a reduction in sponsoring states' obligation in UNCLOS.¹⁰⁵ Finally, according to Annex iii, Article 22, the contractor would be held accountable for 'wrongful acts' committed while carrying out its operations. The same clause makes it possible for the ISA itself to be held accountable for any harm caused by wrongdoing committed while performing its duties. This would seem to rule out any strict liability, and it is possible that even the due diligence requirement is not relevant. However, there is no guidance as to how this might be understood.¹⁰⁶ Nevertheless, a comprehensive, all-encompassing liability regime specifically applicable to the Area is not yet in place. Therefore, the only legal texts to be examined are the Mining Code and an Advisory Opinion of the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS).¹⁰⁷

The small island state of Nauru requested an Advisory Opinion from the ISA in 2009 to explain the responsibility of sponsoring states, in line with Article 191 of the UNCLOS.¹⁰⁸ On 1 February 2011, the International Tribunal for the Law of the Sea gave an Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. In this Advisory Opinion, the Tribunal sets out the liability rules as stated in Article 139, more specifically rules concerning the liability of state parties, sponsoring state liability, and liability of the contractor and the Authority.¹⁰⁹ The SDC states that in the context of deep-seabed mining and the Area, the activities falling under Article 139 UNCLOS are "all activities of exploration for, and exploration of, the resources of the Area", including "the recovery of minerals from the seabed and their lifting to the water surface".¹¹⁰ This excludes, for instance, processing on land or transportation from the high seas superjacent to the Area.¹¹¹ The SDC also confirmed that

¹⁰⁵ n96.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Kristoffer Svendsen, 'Liability and Compensation for Activities in the Area' in Catherine Banet (ed) *The Law of the Seabed* (Brill 2020).

¹¹⁰ SDC ITLOS Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion), 1 February 2011, *ITLOS Reports* 2011, 10, para. 94.

¹¹¹ n96.

sponsoring states do not have strict liability and their obligation is limited to the “duty to ensure” obligation of the contractor.¹¹² While these are more detailed accounts of the scope of the application of Article 139 UNCLOS in the area than what was previously available, it leaves open the question to what extent flag states of mining or other vessels can be held liable for failures regarding shipping matters in deep-seabed mining locations. The complexity and number of actors involved in an endeavour like deep-seabed mining makes it especially crucial to have a clearly demarcated division of responsibilities.¹¹³ There are still a number of substantive and procedural gaps. This was also acknowledged by the SDC:

*“Considering that the potential for damage, particularly to the marine environment, may increase during the exploitation phase, it is expected that Member States of the ISA will further deal with the issue of liability in future regulations on exploitation.”*¹¹⁴

Therefore, the Legal and Technical Commission (LTC) of the ISA recognised ‘responsibility and liability’ as one of the priority deliverables for the drafting of the Mining Code. It further established a legal working group to support and inform the development of this Mining Code.¹¹⁵

The Mining Code is the collection of regulations adopted by ISA and is supposed to manage and control the Area on behalf of all human beings, as the Area falls under the Common Heritage of Mankind (CHM). It should however not be forgotten that there also exist national instruments next to international ones, especially regarding the national legal structures of sponsoring states. This is due to UNCLOS’ requirements for the sponsoring state to take responsibility for their private actors (contractors) and their compliance with Part XI of UNCLOS. States thus have to adopt laws and regulations with the aim to strengthen their domestic legal framework (Article 139(1)). In fact, the SDC’s Advisory

¹¹² *ibid.*

¹¹³ n94.

¹¹⁴ SDC ITLOS Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, 10, para. 168.

¹¹⁵ n96.

Opinion pushed many sponsoring states to adopt relevant domestic laws, but the development is nevertheless slow.¹¹⁶ In December 2021, 33¹¹⁷ of the 168 state parties to UNCLOS shared information on their national legislation dedicated to ensure compliance with their obligation to ensure responsibility for their contractors' compliance with their obligations.¹¹⁸

A comprehensive liability regime is required due to the speed of technological development and the unknowable amount of environmental damage. Unfortunately, there are still a lot of unknowns in this legal landscape. The topic of liability in the deep sea is very difficult and the situation comparable to the high seas, as it is extremely complicated to establish causality between environmental damage and specific activities, meaning that the polluter cannot be identified.¹¹⁹ As a solution to this uncertainty and for cases in which the polluter cannot be identified, the Environmental Compensation Fund has been suggested in ISA's Draft Regulation on Exploitation of Mineral Resources, which are continuously being revised. According to Xu and Xue, the Environmental Compensation Fund, as an ex post facto remedy for the maritime environmental degradation brought on by activities in the Area, would not only satisfy practical requirements but also have a theoretical foundation. However, its very broad goals and objectives will hinder the system's ability to achieve its main goals. Further, ISA's funding sources are not very dependable when looking at its current financial status. As a result, limiting the Compensation Fund's goals funding sources and payment processes are necessary for the system to run well.¹²⁰ The ISA was compelled by a clause in the Advisory Opinion to finalise the Mining Code by July 9, 2023, but it recently failed to meet this deadline.

¹¹⁶ n100.

¹¹⁷ Belgium, Brazil, China, Cook Islands, Cuba, the Czech Republic, the Dominican Republic, Fiji, France, Georgia, Germany, Guyana, India, Japan, Kiribati, Micronesia (the Federated States of), Mexico, Montenegro, Nauru, Netherlands, New Zealand, Nigeria, Niue, Oman, the Republic of Korea, the Russian Federation, Singapore, Sudan, Tonga, Tuvalu, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Zambia. From Alexander Proelss and Robert Steenkamp, 'Liability Under Part XI UNCLOS (Deep Seabed Mining)' in Peter Gailhofer et al. (eds) *Corporate liability for transboundary environmental harm an international and Transnational Perspective* (Springer 2023).

¹¹⁸ n94.

¹¹⁹ n100.

¹²⁰ n100.

Meanwhile, many governments are requesting that the ISA deny every application until the rules are complete.¹²¹

2.3.4. The Liability Regime under the Protocol on Environmental Protection to the Antarctic Treaty

The management of Antarctica is done jointly by 29 states, each of which has a significant interest in the continent. The Antarctic Treaty System is historically composed of the Antarctic Treaty, the Convention for the Conservation of Antarctic Seals (CCAS), the Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention), and recommendations and actions approved by the Antarctic Treaty Consultative Meetings (ATCM).¹²² The Antarctic Treaty System only has one convention that really specifies liability rules: The CRAMRA of 1988, which is the Convention on the Regulation of Antarctic Mineral Resource Activities. However, this Convention was never ratified by France and Australia and will therefore never enter into force. Additionally, the liability provision (Article 8 CRAMRA) only applies to situations when an operator engages in mineral resource activities in Antarctica.¹²³ However, the Consultative Parties agreed that they "should assume responsibility for the protection of the environment and the wise use of the Treaty area"¹²⁴ in Antarctica in 1970, which marked the beginning of their expansion of their obligations. The Protocol on Environmental Protection to the Antarctic Treaty's inclusion in the Antarctic Treaty System was a significant step in this direction.¹²⁵

¹²¹ Elham Shabahat, 'It's Deadline Day for Deep-Sea Mining' Hakai magazine (7 July 2023) accessed 23 July 2023 <<https://hakaimagazine.com/news/its-deadline-day-for-deep-sea-mining/>>.

¹²² Silja Vöneky, 'The Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty' in Doris König et al. (eds) *International Law Today: New Challenges and the Need for Reform?* (Springer 2008).

¹²³ *ibid.*

¹²⁴ Recommendation VI-4 (Tokyo, 1970) on human interference with the environment in: Alexander Proelss and Robert C. Steenkamp, 'Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty' in Peter Gailhofer et al. (eds) *Corporate liability for transboundary environmental harm an international and Transnational Perspective* (Springer 2023) 538.

¹²⁵ Alexander Proelss and Robert C. Steenkamp, 'Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty' in Peter Gailhofer et al. (eds) *Corporate liability for transboundary environmental harm an international and Transnational Perspective* (Springer 2023).

On October 4, 1991, in Madrid, the Protocol on Environmental Protection to the Antarctic Treaty was signed. It became effective in 1998. Antarctica is designated as a "natural reserve, devoted to peace and science" in Article 2.¹²⁶ The Environment Protocol's Article 3 lays out general guidelines that apply to human activities in Antarctica, while Article 7 forbids all activity involving Antarctic mineral resources, with the exception of scientific study. Only the unanimous consent of all Consultative Parties to the Antarctic Treaty may modify the Protocol for the first fifty years after its entry into effect (1998). After this time (beginning in 2048), any Antarctic Treaty Consultative Party may request a review conference to assess the Protocol's performance (Article 25.2).¹²⁷ It was acknowledged that the absence of liability provisions could undermine otherwise effective environmental protection measures. As a result, the states negotiating the Protocol believed that the adoption of rules and procedures relating to liability for damage to the Antarctic environment would be a desirable complement to the Protocol's provisions. However, the parties chose to defer the procedure through an obligation in Article 16 rather than including liability provisions in the Protocol itself.¹²⁸ Article 16 of the Madrid Protocol obligates Member States to agree on an Annex on Liability:

*"Consistent with the objectives of this Protocol for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems, the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol."*¹²⁹

This provision clearly imposes an obligation on the parties to the Protocol to develop these special rules and procedures regarding liability. Article 16 is, however, an obligation of conduct rather than result. It simply obligates states to cooperate on this matter of developing a special Antarctic environmental liability regime, but does not predetermine a

¹²⁶ 'The Protocol on Environmental Protection to the Antarctic Treaty' (Secretariat of the Antarctic Treaty) accessed 2 May 2023 <<https://www.ats.aq/e/protocol.html>>.

¹²⁷ *ibid.*

¹²⁸ Michael Johnson, 'Liability for Environmental Damage in Antarctica: The Adoption of Annex VI to the Antarctic Environment Protocol' (2006) 19 *Georgetown Environ Law Rev* 33.

¹²⁹ Article 16 of the Antarctic Environment Protocol.

desired end-result. Therefore, this article is already complied with as long as parties to the Protocol cooperate with the aim of implementing such regime.¹³⁰ Another provision of the protocol which has been considered for the drafting of the Liability Annex is Article 15 on emergency response action:

"1. In order to respond to environmental emergencies in the Antarctic Treaty area, each Party agrees to:

(a) provide for prompt and effective response action to such emergencies which might arise in the performance of scientific research programs, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII (5) of the Antarctic Treaty, including associated logistic support activities; and

(b) establish contingency plans for response to incidents with potential adverse effects on the Antarctic environment or dependent and associated ecosystems.

2. To this end, the Parties shall:

(a) co-operate in the formulation and implementation of such contingency plans; and

(b) establish procedures for immediate notification of, and co-operative response to, environmental emergencies. [...]"¹³¹

There are six annexes to the Protocol. The Protocol's Annexes I through IV were adopted in 1991, and they went into effect in 1998, too. The 16th ATCM separately adopted Annex V on Area Protection and Management in 1991, which went into effect in 2002. After being approved by all Consultative Parties, Annex VI on Liability Arising from Environmental Emergencies, which was adopted by the 28th ATCM in Stockholm in 2005, would go into effect. Annex VI is not yet in effect, despite being regarded by some as one of the most cutting-edge environmental liability regimes.¹³² The Protocol does not make the adoption of a liability instrument a requirement for its functioning, in contrast to CRAMRA, and this lack of urgency is part of the reason why Annex VI has not been

¹³⁰ n128.

¹³¹ Article 15 of the Antarctic Environment Protocol.

¹³² n128.

adopted until today.¹³³ It would certainly be appropriate to adopt a uniform system of determining liability as part of the general regime under the Protocol since there are no substantive rules governing liability for harm to the region.¹³⁴ The necessity of a liability mechanism also becomes evident when considering the observations of German researchers about Fildes Peninsula on King George Island in the South Shetland Islands off the northern Antarctic Peninsula:¹³⁵

*“Sadly [Fildes Peninsula] serves as a paradigm for inadequate implementation of these well-intentioned provisions, whether codified in the Madrid Protocol or earlier Antarctic Treaty and subsidiary instruments or practices. The lessons provided by the Fildes Peninsula paradigm are that environmental management measures are inefficient as long as there are no consequences in cases of non-compliance with the existing regulations.”*¹³⁶

Annex VI on liability describes the ‘operator’ as the object of its obligations, which is a person that organises activities to be carried out in the Antarctic Treaty area. These operators can be both private actors as well as government. The treaty parties are urged to take prompt and effective reaction action in the absence of an operator’s actions, and pursuant to the polluter-pays principle, the operator remains strictly accountable for the expenses of any such action. If a party pursuing response action cannot fully recover its costs from the operator, it may be able to recover those costs to a reasonable extent from the Antarctic Treaty Secretariat’s compensation fund.¹³⁷ The operator who did not take response action, however, will be obliged to pay the costs of the response action back into

¹³³ Sam Blay and Julia Green, ‘The Development of a Liability Annex to the Madrid Protocol’ (1995) 25 EPL 24.

¹³⁴ *ibid.*

¹³⁵ Alan D. Hemmings, ‘Liability postponed: the failure to bring Annex VI of the Madrid Protocol into force’ (2018) 8 Polar J 315.

¹³⁶ Christina Braun et. al, ‘Environmental Management: The Fildes Peninsula Paradigm’ in Klaus Doods et al. (eds) *Handbook on the Politics of Antarctica* (Edward Elgar 2017).

¹³⁷ n128.

the fund, which “breaks new ground in international environmental law.”¹³⁸ and therefore proved to be one of the most contentious points of discussion.

The extent of the intended regime was a topic of intense discussion during the negotiations of the Liability Annex. According to certain delegations, all activities covered by the Protocol should be subject to the Annex. Other delegations objected to this expansive strategy on the grounds that the Article 15 of the Protocol's response action commitment is only applicable to operations for which Article VII(5) of the Antarctic Treaty requires notice. In the end, it was decided to keep the citation to Article VII(5) of the Antarctic Treaty, which gives the Liability Annex a more limited scope (excluding, for instance, fishing and whaling).¹³⁹ Further, the Liability Annex does not apply to all types of environmental damage, but only cases of environmental emergencies, meaning that any event that at first glance is not classified as an emergency because it does not have an obvious or significant impact on the environment is not covered under the liability regime. Moreover, only ‘accidental’ events are covered. Another drawback is that the definition of environmental emergency disregards the effects on related and dependent ecosystems. The effect on the actual antarctic ecosystem is the sole factor that counts. This means that the Annex does not address effects that occur outside of Antarctica and the Southern Ocean, such as effects on fish that migrate to subtropical areas.¹⁴⁰ It also needs to be noted that there is very little economic activity in Antarctica, which means there is not much money available to fill the compensation fund.¹⁴¹

The liability regime in Annex VI is quite unique given that it concretely focuses on environmental protection rather than financial loss from hazardous activities.¹⁴² However, the liability regime of the Antarctic Treaty has not yet entered into force as it has not been approved by all states. Further negotiations have repeatedly been postponed. While in

¹³⁸ Michael Johnson, ‘Liability for Environmental Damage in Antarctica: The Adoption of Annex VI to the Antarctic Environment Protocol’ (2006) 19 *Georgetown Environ Law Rev* 33, 41.

¹³⁹ n42.

¹⁴⁰ n122.

¹⁴¹ n128.

¹⁴² *ibid.*

some instances, certain measures and actions were put in place despite the lack of formal entry into force of the corresponding Annex, this is not possible with the topic of liability as it is connected to significant obligations with high legal and financial risks. The nature of liability requires all states to be bound at the same level and to the same extent. Further, the necessary institutions need to be in place.

Two issues regarding the unwillingness of states to ratify the Liability Annex merit mentioning. First, the harsh environment and geographic isolation of Antarctica have historically constrained the economic opportunities and incentives that attract operators' attention, unlike the shipping business or the deep seabed regime. The recent growth of the Antarctic tourism business, however, has the potential to alter this conventional perspective due to its profitability and environmental effects. Second, the reimbursement process for states that respond appropriately to incidents to safeguard the polar environment is lengthy and may have ambiguous results.¹⁴³ As a consequence, there is still a chance that any state party responding to a crisis brought on by another party may eventually have to pay for the response action's costs. Therefore, it is conceivable that states have been reluctant to ratify the Liability Annex due to the economic risks involved in taking action in response to the situation, as well as the historically low economic incentives associated with Antarctica. It must be highlighted, nonetheless, that it is unlikely that questions of liability will continue to be primarily hypothetical given the rise in private activity in Antarctica, notably the diversification of Antarctic activities related to tourism.¹⁴⁴

However, unless and until an event occurs that would qualify as a grave environmental emergency under the Liability Annex which may create a renewed sense of urgency, there does not appear to be any likelihood of the entry into force of Annex VI, let alone any active creation of further liability coverage.¹⁴⁵ Hemmings argues that

¹⁴³ n135.

¹⁴⁴ n128.

¹⁴⁵ n135.

*“this inability to bring even the first element of the long-sought Antarctic Liability regime into force after such a long gestation period is surely the greatest failure of the whole Madrid Protocol project.”*¹⁴⁶

2.3.5. The EU Environmental Liability Directive

The necessity of a liability regime for the European Union became clear through various accidents which resulted in environmental damage (in some cases even transboundary). Pleas were made for this regime to also create incentives for the prevention of such accidents. The ELD is based on several of the EU’s key environmental principles, especially the polluter-pays principle, as well as the preventive principles. The Commission hoped that the implementation of these principles would lead to more investment in research of technologies and knowledge on how to better prevent environmental damages.¹⁴⁷ This follows the concept of cost internalisation, resulting ideally in less environmental damage. The polluter-pays principle not only obligates the polluter to pay compensation for environmental damage, but entails the obligation to restore environmental damage. The EU Commission also hoped that a harmonised EU regime for environmental liability would create a level-playing field for EU Member States and therefore that competitive (dis)advantages resulting from national regimes would fade.¹⁴⁸

On April 30, 2004, the Environmental Liability Directive entered into force. The EU's Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Directive 2009/147/EC on the conservation of wild birds, Directive 2000/60/EC establishing a framework for Community action in the field of water policy, and Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy were all taken into consideration when this Directive was first

¹⁴⁶ Alan D. Hemmings, ‘Liability postponed: the failure to bring Annex VI of the Madrid Protocol into force’ (2018) 8 Polar J 315, 330.

¹⁴⁷ Geert van Calster and Leonie Reins, ‘The ELD’s background’ in Lucas Bergkamp and Barbara Goldsmith (eds) *The EU Environmental Liability Directive: A Commentary* (Oxford University Press 2010).

¹⁴⁸ *ibid.*

drafted.¹⁴⁹ Following that, the ELD was modified four more times by the following directives: Directive 2006/21/EC on the management of waste from extractive industries; Directive 2009/31/EC on the geological storage of carbon dioxide and amending several directives; Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC; and Regulation (EU) 2019/1010 on the alignment of reporting obligations in the area of environmental legislation. The addition of "management of extractive waste" and "operation of storage sites pursuant to Directive 2009/31/EC" to the list of hazardous occupational activities in Annex III of the ELD expanded the application of strict liability. In June 2013, the ELD (expansion of the extent of harm to marine waters) was modified by the Offshore Safety Directive. In order to build a stronger evidence base, the Reporting Alignment Regulation modified the reporting requirements.¹⁵⁰

The ELD did not, as the name might suggest, put into a place civil liability regime in which direct civil claims by private actors are possible. Rather, it installed an administrative law regime which obligates public authorities of states to ensure that the polluter pays for the environmental damage their private actors cause. Compensation with respect to traditional damage was already covered by the national laws the Member States. The overall aim of this Directive is to establish strict liability for environmental damage due to hazardous or potentially hazardous activities, as well as fault-based liability for other activities. The ELD aims to strengthen remediation by applying the polluter-pays principle and thereby internalising costs. Given the ELD's administrative law character, it does not cover traditional damage to private persons.¹⁵¹ The scope of the ELD specifically regarding the ocean and other bodies of water is limited to the waters protected under the EU Water Frameworks Directive, which in turn is limited to the waters in the coastal strip of the Member States. Additionally, for the express aim of safeguarding the natural habitats and species covered by the Wild Birds Directive and the Habitats Directive, the ELD is

¹⁴⁹ 'The Environmental Liability Directive' (ERA) accessed 10 May 2023 <<https://era.org.mt/topic/the-environmental-liability-directive/>>.

¹⁵⁰ *ibid.*

¹⁵¹ n147.

applicable to Natura 2000 sites found in coastal areas and other areas of marine waters in Member States.¹⁵²

At first glance, it seems there exists a strong rationale for the ELD. However, also this liability regime has its faults. It can be argued that the outlook of cost internalisation and the application of the polluter-pays principle do not actually create an incentive to research and improve preventative measures.¹⁵³ In fact, the industry at several occasions expressed concerns about the ELD imposing unpredictable and too high economic risk to economic growth, which demonstrates they are not necessarily approaching this topic with a preventative approach. It could be argued that prevention can be better achieved through other regulatory measures. Further, various conditions have to be fulfilled before liability can be imposed, for instance the ELD liability regime only applies in the case of significant environmental damage, which is determined based on threshold criteria.¹⁵⁴ Further, the issue of transboundary environmental harm may not be adequately addressed, as the ELD does not directly establish liability of the state, and can only provide for cooperation between the EU Member States.¹⁵⁵ Specifically Article 8(4) of the Directive seems problematic, stating that

*“Member States may exempt operators from the obligation to bear prevention and remediation costs in case they complied with specific permit conditions or the ‘state-of-science’ did not predict the risk (these are known as ‘permit’ and ‘state-of-science’ defences)”*¹⁵⁶

Additionally, a lot of the ELD's requirements are ambiguous and might easily lead to legal action, which is normally something public authorities wish to avoid. For instance, Article

¹⁵² Edward Brans, ‘Fundamentals of Liability for Environmental Harm under the ELD’ in Lucas Bergkamp and Barbara Goldsmith (eds) *The EU Environmental Liability Directive: A Commentary* (Oxford University Press 2010).

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ n147.

¹⁵⁶ Geert van Calster and Leonie Reins, ‘The ELD’s background’ in Lucas Bergkamp and Barbara Goldsmith (eds) *The EU Environmental Liability Directive: A Commentary* (Oxford University Press 2010) 15.

8(2) of the ELD mandates that public authorities consider the costs of legal proceedings before initiating the action in order to recover the costs of preventive and remedial measures. The public authorities may choose not to file a lawsuit if it appears that these costs would likely exceed the amount that can be recovered (notice that the ELD makes no mention of how these costs should be calculated). This argument will also be used by liable parties if it strengthens their defence.¹⁵⁷

The topic of liability has certainly been a critical issue for all the stakeholders involved. While Member States are hesitant to give up more sovereignty to the EU, the industry voiced concerns about the unpredictable costs and the toll this could take on their international competitiveness. Environmental organisations, on the other side, criticised that the ELD did not go far enough and left loopholes for industry.¹⁵⁸ Member States and operators have also criticised that the ELD is rather difficult to apply as it includes many ambiguities. As an illustration, it might not be evident for some time after an incident has occurred whether the ELD's threshold criteria have been satisfied or are likely to be met if a sudden event that has a negative impact on the habitats, species, or waters covered by the ELD happens.¹⁵⁹ Nevertheless, it remains “an ambitious experiment in practical implementation of key environmental policy principles.”¹⁶⁰

2.4. Costa Rica v Nicaragua and its potential influence on the BBNJ negotiations

In order to gain a more tangible understanding of liability for environmental damages, this chapter aims to look at case law, specifically the first adjudication by the International Court of Justice (ICJ) of a compensation claim for environmental damage in the Costa Rica v Nicaragua (Compensation) case.¹⁶¹ Even though this case does not concern the ocean

¹⁵⁷ n147

¹⁵⁸ *ibid.*

¹⁵⁹ n152.

¹⁶⁰ Edward Brans, ‘Fundamentals of Liability for Environmental Harm under the ELD’ in Lucas Bergkamp and Barbara Goldsmith (eds) *The EU Environmental Liability Directive: A Commentary* (Oxford University Press 2010) 30.

¹⁶¹ Monaliza Da Silva, ‘Compensation Awards in International Environmental Law: Two recent developments’ (2018) 50 NYU JILP 1417.

(but terrestrial wetlands), it was thought to possibly influence the negotiations of the BBNJ during its time, specifically the provisions on responsibility and liability.

Before looking more closely at the case, it can be said that from the outset, deriving from the legal status quo in international law, states have a clear, indisputable duty not to harm the (marine) environment, be it on their own territory, on another state's territory, or part of the global commons. In the *Costa Rica v Nicaragua* case, the Court also very clearly held that damage to the environment is compensable under international law 'in and of itself.' According to the Court, this also specifically includes harm to the environment in cases where it has no commercial value, or where the environment needs to be restored.¹⁶²

Further, the SDC held in its Advisory Opinion that any state party to UNCLOS can demand compensation in the case of damage to the marine environment of the Area or the high seas, using the dispute settlement procedures under the Convention. Even though there is significant general, normative guidance established under international law and the law of the sea, there are still many regulatory gaps. For instance, there is no agreed upon specific method of evaluation to assess (marine) environmental damage.¹⁶³

The legal proceedings between Costa Rica and Nicaragua took eight years. In the first instance, the case began on the premises of a territorial and environmental dispute.¹⁶⁴ Costa Rica accused Nicaragua to have incurred into, occupied and harmed Costa Rica's territory and environment, breaching international environmental obligations (including damage to protected wetlands and rainforests under the Ramsar Convention on Wetlands). The Court ordered provisional measures in 2011, ordering both parties to refrain from sending personnel into the area in question, and allowing for environmental monitoring by Costa Rica in coordination with the Ramsar Secretariat.¹⁶⁵ Nicaragua initiated independent legal actions against Costa Rica regarding infringements on its sovereignty and the alleged

¹⁶² n83.

¹⁶³ *ibid.*

¹⁶⁴ n161.

¹⁶⁵ n83.

detrimental environmental impact caused by the construction of a road alongside the San Juan River, which the Court joined with the first proceeding initiated by Costa Rica. In its 2015 ruling, the Court determined that Costa Rica had sovereignty over the contested territory, and that Nicaragua's actions, which included digging three canals and establishing a military camp on Costa Rican land, were illegal. As a result, reparations were deemed necessary to compensate for the damages caused by these activities. Due to Nicaragua and Costa Rica failing to agree on the amount of compensation, the Court had to settle the amount based on written pleadings of the two parties.¹⁶⁶

When determining the amount of compensation, the Court made use of different legal principles and rules of international law. It should specifically be noted that the Court based its judgement on the “well-established” principle that “the breach of an engagement involves an obligation to make full reparation in an adequate form” aiming to restore “the situation which would in all probability, have existed” before the illegal action.¹⁶⁷

Whenever natural restoration is not possible, monetary compensation can be an appropriate form of restoration. The use of norms and legal principles in the Court’s judgement is relevant to the contents of the BBNJ agreement, too. In contemporary law of the sea, legal principles and norms also play a very big rule and are often quoted by ocean organisations and institutions, and applied by dispute settlement bodies such as ITLOS. During the preparations and first negotiations of the BBNJ agreement, legal principles and different approaches were at the forefront of discussions.¹⁶⁸

Looking more closely at the legal principles that came out of the Costa Rica v Nicaragua case, we can firstly identify the no harm principle, which is also established under international customary law and is also integrated in many instruments regarding marine environmental protection. Further, the polluter-pays principle has been applied by the Court as well, requiring full reparation for environmental damage to be paid for by those who caused the damage. This principle was included in the President’s Aid to Negotiations

¹⁶⁶ *ibid.*

¹⁶⁷ *Costa Rica v Nicaragua* (Compensation), para 29.

¹⁶⁸ n83.

(ATN) as well as many discussions during the BBNJ process.¹⁶⁹ The President's draft text proposal also included a passage obligating state parties to

*“endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account that the polluter should in principle bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”*¹⁷⁰

If these concrete proposals were to be included in the final text, the new BBNJ agreement would considerably contribute to the existing liability regimes. An explicit mention of the polluter-pays principle would also close gaps in UNCLOS, which does not refer specifically to this instrument in its provisions regarding liability and compensation.¹⁷¹

In order to establish the causal relationship between the wrongful conduct and the injury suffered, the Court held that the party who alleges a fact needs to carry the burden of proof for this fact. The judges highlighted that determining the cause for environmental damage is particularly difficult given the uncertain nature of science and the fact that there can be several concurrent causes. The Court also confirmed its role as the final arbiter of the causal nexus. Especially in ABNJ, it will be incredibly difficult to establish causal nexuses, and in many cases there will be no evidence available to show correlations. This, however, does not mean that compensation is precluded, as the scope of compensation can also be determined based on equitable considerations.¹⁷² With regards to this, the Court stated that it will be sufficient if “the evidence show the extent of damages as a matter of just and reasonable interference, although the result be only approximate.”¹⁷³ Certainly, determining the environmental damage in *Costa Rica v Nicaragua* was much simpler than it would be to determine biodiversity damage in the ABNJ.

¹⁶⁹ *ibid.*

¹⁷⁰ Draft Text art 5(d).

¹⁷¹ n83.

¹⁷² *ibid.*

¹⁷³ *Costa Rica v Nicaragua* (Compensation), para 32.

There are different approaches and methodologies used to determine environmental compensation, and in *Costa Rica v Nicaragua*, the two parties advanced two different methodologies. Costa Rica advanced the ecosystem services approach, whereby which all goods and services traceable on the market are taken into account. These services can have a direct value (e.g. timber) or an indirect value (e.g. flood prevention). The value is calculated either through direct valuation where possible, or through value transfer based on studies of other ecosystems. Nicaragua, on the other side, advocated for the use of the replacement cost methodology, which estimates the costs incurred by replacing the ecosystem services.¹⁷⁴ The Court considered both methodologies where applicable during its assessment, but ended up using an ‘overall valuation’ assessment. This decision was facilitated by the lack of an agreed upon methodology for valuation of environmental damage under international law, given that cases in this sphere are so unique that the system needs to allow a certain level of flexibility to accommodate for the specific characteristics of each case.¹⁷⁵ When considering the negotiation of a liability regime for the high seas, it is important to remember that monetising environmental harm is inherently intricate due to the diverse nature of the ocean environment and the lack of comprehensive scientific understanding of marine ecosystems, particularly those found in ABNJ. Given these challenges, the Court's adaptable approach in choosing a methodology may receive backing from dispute settlement bodies in future cases involving the decline or damage of deep ocean biodiversity. It is therefore recommendable to not opt for any single method of valuation in a BBNJ liability regime.¹⁷⁶

To determine the final compensation, the Court had to calculate the restoration costs as well as the value of the impairment of goods and services prior to recovery. This is specifically relevant to the law of the sea as many of its legal instruments set out obligations to restore the marine environment and its resources. While in some cases, natural restoration suffices for the environment to return to its natural state, in other cases

¹⁷⁴ n83.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

active restoration measures are required, as in *Costa Rica v Nicaragua*.¹⁷⁷ In cases where restitution is impossible, compensation may be the only possible form of restoration. It needs also to be noted that restoration outcomes are often uncertain, as was also mentioned in the South China Sea Arbitration, which states that it will take more than a century for coral colonies to regrow to the level they were at prior to damage. These restoration measures are also extremely expensive and have mostly been successful at smaller scales, thus implementing ecosystem restoration efforts in vast areas of the ABNJ will be rather difficult.¹⁷⁸ Given these difficulties in determining the amount of compensation, the greatest benefit of including liability provisions into the BBNJ agreement would be the deterrence effect for unlawful activities in the BBNJ, and simply the general idea that difficult negotiations and an undetermined level of costs can be expected. Restoration after a damaging event is very difficult to achieve on a broader scale in the BBNJ. Nevertheless, the case at hand underlines the importance of codifying the obligation that environmental damage is to be compensated by the entity who causes damage or pollution.¹⁷⁹

In *Costa Rica v Nicaragua*, the Court had to determine not only the extent of damage, but also had to prove that the unlawful activities of Nicaragua contributed to this damage. Costa Rica and Nicaragua greatly disagreed on the claims, as Costa Rica demanded compensation for the impairment and loss for a variety of categories of goods and services (e.g. tress, air quality services, costs for wetland restoration etc.). The Court found that the impairment and/or loss of six out of eight categories listed by Costa Rica were causally linked to Nicaragua's unlawful activities, one of which was the negative impact on biodiversity.¹⁸⁰ The Court used an holistic approach and looked at the entire ecosystem when determining the amount of compensation. It did therefore not identify specific goods and services, but instead undertook an overall evaluation of the affect of Nicaragua's activity on environmental goods and services, which aligns with the ecosystem-based approach. References to the value of the ecosystem-based approach can also be found in

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

the Aid to Negotiations and the President's draft text for the conservation of biodiversity in ABNJ. The approach of an overall evaluation allowed the Court to take into account the capacity of the area for natural regeneration and recovery of ecosystem goods and services. This is also relevant for the ABNJ as in many cases, natural restoration may be the only feasible option as active restoration measures are extremely difficult and costly to implement on the high seas. Again, it is important to note that despite the Court not being able to determine the extent of the damage in an exact manner, this did not preclude Costa Rica from receiving approximate compensation (which ultimately was a modest US \$378,890).¹⁸¹ The ICJ decision on this case was without doubt a step forward for environmental liability because it demonstrated that transboundary environmental harm is a violation of international law and therefore also requires reparation.¹⁸² Even though the compensation was not as high as Costa Rica had anticipated, the court clearly confirmed that

*“damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.”*¹⁸³

Even though case law can be helpful when assessing gaps in the negotiation of a new text or agreement, there are certainly a number of limitations to the use of jurisprudence of international courts and tribunals for guidance. It will not be possible to take an individual, small-scale case to the level of an entire regime based on a new legal instrument. Nevertheless, there are several similarities between the case at hand and the new BBNJ agreement. Both focus around questions of biodiversity and the protection of ecosystem goods and services.¹⁸⁴ The biggest difference might be the fact that while in the case the territory at hand was under the jurisdiction and territorial sovereignty of Costa Rica, the geographical scope of ABNJ is much larger and, as it says in the name, beyond any state's jurisdiction. Further, what emerged specifically was the difficulty of calculating the exact

¹⁸¹ *ibid.*

¹⁸² n161.

¹⁸³ Ronan Long, 'Restoring marine environmental damage: Can the Costa Rica v Nicaragua compensation case influence the BBNJ negotiations?' (2019) 28 RECIEL 244, p.245.

¹⁸⁴ n83.

value of environmental damage to biodiversity, or facing ecosystem damage which cannot be recovered naturally - but it has also shown that this does not impair the obligation to pay an estimated compensation.¹⁸⁵

It should also be kept in mind that this case solely discussed state liability, while the liability of private entities should also be a concern of the BBNJ agreement. The *Costa Rica v Nicaragua* case must be welcomed as it provides some insight into the need to meet a nexus-threshold in relation to the causing of environmental damage, as well as possible methods to determine the amount of compensation that is due for the loss of marine environmental goods and services, as well as in relation to the costs associated with taking action.¹⁸⁶

2.5. Concluding Summary of the Literature Review

In summary, the literature review of this paper provided a comprehensive understanding of the evolution of the BBNJ agreement, a journey that commenced in 2004 with the inception of United Nations General Assembly resolution 59/24 and the establishment of the Ad Hoc Open-ended Informal Working Group. The BBNJ agreement's significance lies in its overarching mission to ensure the conservation and sustainable utilisation of marine biological diversity in Areas Beyond National Jurisdiction.

This literature review also explored the concept of environmental liability. In an era marked by escalating risks from activities such as maritime transportation and space exploration, the imperative for liability mechanisms to address environmental harm becomes glaringly evident. From a legal standpoint, liability serves as a vehicle for prompt reparations for environmental damages, while through an economic lens, it functions as an incentive to prevent environmental degradation.

The polluter-pays principle emerged as the guiding environmental principle for liability. Nonetheless, it is evident that only a handful of international environmental regimes have successfully implemented comprehensive liability and compensation frameworks. States,

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

in general, exhibit limited enthusiasm for establishing liability frameworks for environmental damage, despite the existence of numerous multilateral environmental agreements. This paucity of action underscores the pressing need for robust, unambiguous environmental liability regimes.

The literature review delved into various existing liability regimes, encompassing those within the international law of the sea, such as UNCLOS and the IMO's liability regime, alongside broader environmental law frameworks like the EU Environmental Liability Directive and the Protocol on Environmental Protection to the Antarctic Treaty. While each of these regimes carries its own set of limitations and none extend to the high seas, they serve as valuable templates for the development of a liability mechanism applicable to ABNJ. A recurrent theme throughout the literature is the reluctance of states to actively pursue or ratify liability regimes, often attributed to perceived economic risks. However, several scholars emphasise the indispensability of these regimes, even in acknowledgment of their intricate nature and the difficulties surrounding their implementation.

In a practical demonstration of environmental liability, the *Costa Rica v Nicaragua* case offers valuable insights into how to ascertain compensation when confronted with uncertainties. This case also provides instructive lessons for the BBNJ agreement, underlining the need for clearly defined procedures for addressing environmental harm within ABNJ.

In essence, the literature review underscores the pivotal role that the BBNJ agreement could take in tackling environmental concerns in ABNJ, and it emphasises the critical necessity for the development of comprehensive environmental liability regimes.

3. Methodology

This thesis employs a content analysis approach to examine the extent to which the topic of liability is addressed in the BBNJ agreement and its preceding drafts. The research design involves a systematic review of the final text of the BBNJ agreement, as well as multiple drafts leading up to its finalisation. Additionally, the study incorporates an analysis of other documents related to the negotiation process. The primary objective is to elucidate the treatment of liability within the context of the BBNJ agreement, thereby contributing to a deeper understanding of its implications for environmental policy and international law.

The data collection process entails the compilation of the BBNJ agreement's final text, earlier drafts, and other relevant documents into a digital database. The drafts leading up to the final agreement provide insights into the dynamic interplay of ideas and negotiations regarding liability provisions. The final text serves as the benchmark against which the evolution of liability-related content is evaluated. The author did consider to analyse video footage of the negotiations of the Intergovernmental Conference available on United Nations Webcast¹⁸⁷, but concluded that the amount of material would unfortunately go beyond the scope of this internship report. However, these recordings of the negotiations could be an interesting source for further research on the topic. Find below a table including all sourced material.

Document	Date	Source
Chair's non-paper on elements of a draft text 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	28/02/2017	https://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf
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	31/07/2017	https://digitallibrary.un.org/record/1306977?ln=en
President's aid to discussions (First Session)	25/06/2018	https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/197/15/PDF/N1819715.pdf?OpenElement
President's aid to negotiations (Second Session)	03/12/2018	https://digitallibrary.un.org/record/1661607?ln=en
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	17/05/2019	https://digitallibrary.un.org/record/3811328?ln=en

¹⁸⁷ <https://www.un.org/bbnj/content/webcast>.

Document	Date	Source
Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	18/11/2019	https://digitallibrary.un.org/record/3847798?ln=en
Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	27/11/2019	https://www.un.org/bbnj/sites/www.un.org.bbnj/files/revised_draft_text_a.conf_232.2020.11_advance_unedited_version.pdf
Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	30/05/2022	https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc_5_-_further_revised_draft_text_final.pdf
Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	01/06/2022	https://digitallibrary.un.org/record/3981722?ln=en
Further refreshed draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction	12/12/2022	https://digitallibrary.un.org/record/4001436
Draft 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	04/03/2023	https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf

TABLE 1: RESEARCH MATERIAL

Firstly, a simple coding framework is developed to find out if the topic of liability is mentioned at all and to identify the relevant text passage. The codes for which the texts and recordings were searched are inspired by the literature review:

Liability / Liable	Polluter-pays principle	Damage	Fund
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TABLE 2: CODING FRAMEWORK

Qualitative analyses are conducted to extract meaningful insights from the coded data. Quantitative analysis involves calculating the frequency and distribution of different aspects of liability across the documents. Qualitative analysis delves into the context

surrounding liability-related discussions, identifying patterns in language usage, stakeholder positions, and arguments presented. A comparative analysis is undertaken to assess the progression of liability-related content across different drafts and the final BBNJ agreement. This analysis highlights any shifts, modifications, or omissions in the treatment of liability. It is also enriched by insights from Mendenhall and Hassanali, who conducted research on the topic of liability in the BBNJ agreement before the final BBNJ treaty had been agreed upon, as well as other authors.

4. Analysis of liability in the BBNJ treaty

Deliberations on Liability Integration in the BBNJ Agreement

In the preparatory stages of the negotiations, Mendenhall and Hassanali stated in their paper that ‘Responsibility and Liability’ were still very much a hot topic.¹⁸⁸ Options for how to address the matter were included in the Chair’s streamlined non-paper from February 2017. It still included a significant amount of input on the topic of liability. Not only do we find the polluter-pays principle as part of the general principles and approaches of the agreement, but there are two liability related chapters: “B. Rehabilitation / Contingency Fund” and “X. Responsibility and Liability”. Based on the polluter-pays principle, the establishment of a rehabilitation fund is suggested, aimed at mandatory contributions from private entities that want to engage in the exploration and exploitation of the BBNJ. Their contributions would be scaled according to the degree of potential environmental damage of the respective activities. The purpose of the fund would be the rehabilitation of the BBNJ’s natural environment in case of pollution or damaging impacts on the BBNJ. Any payment from this fund should take into account the extent of environmental damage or loss before recovery, as well as the expenses of remedial actions when natural recovery is insufficient to restore the environment to its pre-disturbance state as practically possible. The text points towards examples on which the fund could be modelled after, specifically the Warsaw Mechanism for Loss and Damage established

¹⁸⁸ n19.

under the United Nations Framework Convention on Climate Change (UNFCCC), but also “other similar regimes”.¹⁸⁹

The issue of liability is also suggested to be taken into account in the establishment of Area-based Management Tools, including MPAs, even though there is no further elaboration on this. There is, however, quite an extensive passage on the topic of responsibility and liability itself.

The Chair’s non-paper suggests a provision similar to Article 35 of the United Nations Fish Stocks Agreement (UNFSA) to be included into the BBNJ agreement, which states that “State Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement.”¹⁹⁰ Further, it was suggested to include a provision building upon the responsibility of states under international law to not cause damage to ABNJ or other states, but also invites the BBNJ negotiators to “reflect and build upon the responsibility of states under international law to not cause damage to Areas Beyond National Jurisdiction or to other states”.¹⁹¹

But most importantly, the document gives the suggestion that the new BBNJ agreement could allow for State Parties to establish liability and seek compensation in connection with pollution and other environmentally harmful activities of private entities and other State Parties, drawing advice from the polluter-pays principle, the International Law Commission Articles on the Prevention of Transboundary Harm from Hazardous Activities, as well as ‘conventional regimes’ dealing with liability. The non-paper also specifically names Section 21 of the draft regulations on exploitation of mineral resources in the Area of the ISA to draw guidance from regarding the determination of the scope of liability, as well as the 2011 Advisory Opinion of the International Tribunal on the Law of the Sea on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area to inform the liability instrument.¹⁹²

¹⁸⁹ Chair’s non-paper on elements of a draft text 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, p.51.

¹⁹⁰ Article 35 of the United Nations Fish Stocks Agreement.

¹⁹¹ Chair’s non-paper on elements of a draft text 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, p.55.

¹⁹² *ibid.*

About five months later, in the Report of the Preparatory Committee from July 2017, the mention of the polluter-pays principle remains, yet the passage on responsibility and liability is significantly shortened, stating solely that “the text could address issues relating to responsibility and liability”.¹⁹³

In the President’s aid to discussions for the first session in 2018, it is solely mentioned that the topic of liability has not been addressed. It is, however, noted that that this should not mean that the topic was excluded, but rather that it will be taken up again at a later point. Mendenhall and Hassanali note that while this only marked a postponement of the discussion, the omission of liability in the President’s aid of discussion may have been the start of its disappearance from the discussion table.¹⁹⁴

The President’s aid to negotiations in the second session therefore invited the delegations to consider the topic of responsibility and liability despite not being included in the President’s aid to discussions. Moreover, the topic of liability can again be found as one of the general principles and approaches for ABMTs, as well as regarding Environmental Impact Assessments, however without any further elaboration. The idea of the rehabilitation/liability fund is again included, as part of the special fund. However, these were the only references to liability, which shows that it was certainly not on the forefront of discussion.

For the IGC-3, liability was not at all mentioned in the draft text of the BBNJ agreement. Due to the Covid-19 pandemic, a long period without negotiations followed.¹⁹⁵ During virtual High Seas Treaty Intersessional Dialogues, some delegations brought up the topic again and expressed a desire for more increased discussion on the topic (particularly during

¹⁹³ 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, p. 17.

¹⁹⁴ n189.

¹⁹⁵ *ibid.*

the Dialogue held in October 2020), but it never got properly picked up.¹⁹⁶ From then onwards, however, all draft agreements as well as the final agreement, exhibit no mention of liability at all, except for the inclusion of the polluter-pays principle under the general principles and approaches. Lastly, the final agreement did keep the idea of the special fund included, but limited its purpose to the provision of financial assistance to developing states in implementing the treaty as well as capacity-building, with no mention of rehabilitation of the BBNJ's natural environment in case of pollution or damaging impacts on the BBNJ.

¹⁹⁶ *ibid.*

Document	Text passages
Chair's non-paper on elements of a draft text 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 (28/02/2017)	"A. GENERAL PRINCIPLES AND APPROACHES [...] • Polluter-pays principle" (p.11) "2. Guiding principles and approaches 93. Possible guiding principles and approaches could include: [...] • Polluter-pays principle [...] • Liability" (p.21) "B. REHABILITATION / CONTINGENCY FUND Possible approaches to address rehabilitation and contingencies could include the following: 281. A mechanism to deal with loss, damage and contingencies could be developed drawing on experience from the Warsaw Mechanism for Loss and Damage established under the UNFCCC, and other similar regimes. Such mechanism would have a residual nature, i.e. to enter into action only when the primary entities liable or responsible could not completely deal with the damage or rehabilitation need. Clear criteria would be established for the funding, which could come from an enterprise's up-front payment, sponsoring States' deposit of a bond, voluntary contributions, mandatory contributions, or a mix of all of these. 282. In line with the polluters-pay principle, a rehabilitation fund could be established. Private entities wishing to engage in the exploration and exploitation of marine biodiversity of areas beyond national jurisdiction would be required to contribute to the fund, in accordance with a scale tied to the degree of potential environmental harm stemming from activities related to marine biodiversity of areas beyond national jurisdiction of those entities. The fund would be used to finance the rehabilitation of marine biodiversity of areas beyond national jurisdiction, including their natural environments, in the event of pollution or other damaging impacts on marine biodiversity of areas beyond national jurisdiction and/or the areas beyond national jurisdiction in which they reside. " (p.51).

Document	Text passages
	“X. RESPONSIBILITY AND LIABILITY Possible approaches to responsibility and liability include: Option 1: A provision similar to article 35 of UNFSA would be included. Option 2: A provision would be included which reflects and builds upon the responsibility of States under international law to not cause damage to areas beyond national jurisdiction or to other States, by “ensur[ing] that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. Option 3: No provision on responsibility would be included in the instrument as the articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission and attached to General Assembly resolution 56/83 represent an authoritative body of international law in this field. Guidance could be drawn from the polluter-pays principle, the International Law Commission Articles on Transboundary Harm from Hazardous Activities, as well as conventional regimes addressing liability. 305. In determining the scope of the liability, guidance could be drawn from Section 21 of the draft regulations on exploitation of mineral resources in the Area of the ISA. 306. The 2011 Advisory Opinion of the International Tribunal on the Law of the Sea on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area could inform the instrument.” (p.55)
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 (31/07/2017)	“1. General principles and approaches • Polluter-pays principle” (p.9) “IX. Responsibility and liability The text could address issues relating to responsibility and liability. “ (p. 17)

Document	Text passages
President's aid to discussions (First Session) (25/06/2018)	"I. Introduction [...] 6. The structure of section III.A has been maintained and cross-cutting issues, apart from the preambular elements, scope of application, financial resources and issues, compliance, the settlement of disputes, responsibility and liability, review and final clauses, have been added to the end of each thematic cluster, with a view to facilitating the determination of how those cross-cutting issues might relate, in practical terms, to those specific clusters." (p.2) "II. Issues, questions and options to be further discussed [...] 14. As also indicated in paragraph 6 above, the following subsections under section III.A of the report of Preparatory Committee have not been addressed in the present document: subsection I, Preambular elements; subsection II.2, Scope of application; subsection VI, Financial resources and issues; subsection VII, Compliance; subsection VIII, Settlement of disputes; subsection IX, Responsibility and liability; subsection X, Review; and subsection XI, Final clauses. This does not mean that these elements will be excluded; rather, they will be taken up subsequently." (p.3)

Document	Text passages
President's aid to negotiations (Second Session) (03/12/2018)	"Finally, delegations are invited to consider the cross-cutting issues that were not included in the President's aid to discussions – preambular elements, financial resources and issues, compliance, settlement of disputes, responsibility and liability, and review and final clauses – in the light of the options contained in the present document." (p.3) "(3) The following general principles and approaches apply to measures such as area-based management tools, including marine protected areas: [...] (j) Liability" (p.10) "(4) The following general principles and approaches apply to environmental impact assessments: [...] (o) Polluter-pays principle; (p) Liability" (p.11) "Option B: the special fund composed of: (a) the operational fund, (b) the endowment fund, (c) the contingency fund, and (d) the rehabilitation fund/liability fund." (p.54) "(e) (i) The rehabilitation/liability fund shall be used to finance the rehabilitation and/or ecological restoration of marine biological diversity of areas beyond national jurisdiction, including its natural environments, in the event of pollution or other damaging impacts on marine biological diversity and ecosystems of areas beyond national jurisdiction;" (p.55)
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 (17/05/2019)	/

Document	Text passages
Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (18/11/2019)	“Article 5 General [principles] [and] [approaches] In order to achieve the objective of this Agreement, States Parties shall be guided by the following: [...] (b) [The polluter pays principle] [The endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should [, in principle,] bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment]” (p.7)
Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (27/11/2019)	“Article 5 General [principles] [and] [approaches] In order to achieve the objective of this Agreement, States Parties shall be guided by the following: [...] (b) [The polluter pays principle] [The endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should [, in principle,] bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment]” (p.7)
Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (30/05/2022)	“Article 5 General principles and approaches In order to achieve the objective of this Agreement, Parties shall be guided by the following: (a) The polluter pays principle” (p.8)
Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (01/06/2022)	“Article 5 General principles and approaches In order to achieve the objective of this Agreement, Parties shall be guided by the following: (a) The polluter-pays principle” (p.8)

Document	Text passages
Further refreshed draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (12/12/2022)	“Article 5 General principles and approaches In order to achieve the objective of this Agreement, Parties shall be guided by the following: (a) The polluter-pays principle” (p.5)
Draft 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 (04/03/2023)	“Article 5 General principles and approaches In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: (a) The polluter-pays principle” (p.5)

TABLE 3: CONTENT ANALYSIS FINDINGS

Difficulty of establishing liability on the high seas

What is so unique to the ABNJ specifically is that damage might occur where no-one is directly affected by it, yet in the long-term, due to ecosystem connectivity negative impacts on humankind may be felt in other ways, such as declining fish stocks due to a polluting event in the ABNJ, under which particularly developing countries suffer. The importance of protecting ABNJ as an international community is therefore established both by legal scholars, as well as by ITLOS Advisory Opinion No. 17. This naturally means that non-injured states need to be able to bring a liability claim, which is not guaranteed in the current practice of international tribunals.¹⁹⁷

According to Gaskell, gaps in liability can be of two different natures: actual or theoretical. Actual gaps would mean that there are certain threats which are not (yet) compensated by the liability regime. Theoretical gaps means that there is a lack of necessary legal instruments or doctrine that stands in the way of effective liability and compensation.¹⁹⁸ Both apply to the high seas. First of all, the threats which the environment faces in the high

¹⁹⁷ n62.

¹⁹⁸ *ibid.*

seas may be similar to those threats in coastal waters, yet the sheer distances from land and their remoteness makes the high seas so much more exposed to some of these threats. Activities causing harm to the marine environment include commercial activities, such as shipping, fishing and dumping, as well as offshore exploration and exploitation for oil and gas. New or developing activities are, for instance, carbon capture and storage, mining, and the extraction of ‘flammable ice’. The potential harmful effects on the marine environment of these activities are not yet fully researched and proven.¹⁹⁹

Secondly, the analysis has shown that there is currently no liability regime for the high seas in place, and several factors stand in the way of establishing a high seas liability instrument. The division of the ocean in several jurisdictional zones in itself hinder filling legal gaps on liability, simply because the International Seabed Authority can solely regulate activities on the seabed, but not activities that take place in the column, which hinders an holistic approach.²⁰⁰

Further, the preceding chapters on the liability regimes of the IMO and deep-seabed mining have demonstrated that the liability regime of international law of the sea is incredibly fragmented and heterogenous. Firstly, the IMO has created a compensation system based on liability insurance, which does however not extend to the high seas. Secondly, UNCLOS Part XI speaks about potentially harmful activities such as mineral exploitation or extraction. According to UNCLOS, these activities must be controlled by regulation, as well as licensing conditions, enforced through administration mechanisms or contracts.²⁰¹ Already existing institutions like ISA and the IMO, who are the authorities of these compartmentalised liability regimes, may effectively already hold too much power and responsibility to have enough room for one single administrative body with a comprehensive marine environmental remit (and potential specific tribunals).²⁰²

Overall, it is certainly extremely demanding to include a liability provision in a big international treaty such as the BBNJ agreement. A liability provision would bind states to hold their private actors accountable, which means that states would either have to pay

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² *ibid.*

compensation themselves, or set up their own laws that hold private actors accountable, which is a complex and costly task. Nevertheless, even if the necessary national legal structures are in place, the BBNJ treaty can only bind states directly, and they would be the ones having to bring a claim against another state in court, while private actors can only be held liable directly by states. Therefore, a liability provision would incentivise states to fulfil UNCLOS Art. 235(2), requiring states to “ensure that resources are available...for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.”²⁰³

One of the most challenging factors about this, however, is the (dis)connection between the states that ratify ocean treaties and the private actors that conduct ocean activities. Due to the so-called phenomenon of ‘flags of convenience’²⁰⁴, there is relatively weak oversight from flag states due to the traditional emphasis on flag state power in UNCLOS, which limits the regulation of shipping activities.²⁰⁵ The coastal state, on the other hand, cannot exercise strict oversight either, simply due to the large distance from shore. Environmental harm is most of the time caused by private actors, which is why the state only has indirect responsibility for the damaging actions of private actors under their jurisdiction. Only in cases where the damage can be directly linked to the state’s failure to act, can they be held directly responsible. Not only does this place a high burden of proof on states, it also puts states in a difficult position as they face shell corporations, bankruptcy, and disappearance when trying to make a private entity pay compensations.²⁰⁶

Supporters of the inclusion of liability in the BBNJ agreement

The Group of 77 (G77) is a United Nations coalition that consists of 134 mostly developing countries, but also including a number of emerging states such as Brazil, Indonesia, China, India and South Africa. Its agenda focuses around the creation of a more equitable and just international order, based on the fact that developing countries often

²⁰³ n65.

²⁰⁴ Definition: A flag of a country under which a ship is registered in order to avoid financial charges or restrictive regulations in the owner's country. From: Oxford Languages.

²⁰⁵ *ibid.*

²⁰⁶ n83.

share concerns about over-exploitation and environmental degradation by developed states and multinational corporations. It was very influential during the negotiation of UNCLOS.²⁰⁷ The G77 was also at the forefront in the plea for strong and specific liability provisions, and they formulated this idea through Ministerial Declarations before the BBNJ. Even though the G77 outnumber developed countries by far (both in terms of total population and number of BBNJ ratifications), they have over time significantly backed off from their initial position towards including a liability provision.²⁰⁸

Mendenhall and Hassanali argue that the negotiation modalities of the treaty disadvantage small states, as well as large coalitions like the G77, which could be the reason for why the G77 could not move forward with their idea to include a liability provision. It is generally known that potentially damaging or polluting activities will most likely only be exercised by developed states and the private actors within their reach, which will enhance global imbalances both in terms of economic revenue and environmental burden. Especially when talking about the high seas, as the global commons of ABNJ, this area should theoretically belong to all states regardless of their level of development, and a provision on liability could help to prevent reckless behaviour by stronger actors and create a fairer level-playing field.²⁰⁹

Before and during the negotiations, ministers of the G77 Member States tried to bring the topic of liability on the agenda as they regarded it an issue of great importance. While the first Ministerial Declarations in 2015 and 2016 did not mention liability, they did stress the importance of the Common Heritage of Mankind (CHM) principle. New language was then included in the official G77 Ministerial Declaration, asking for the new BBNJ agreement to include “liability for damage to the marine environment from activities from Areas Beyond National Jurisdiction.”²¹⁰ The same statements can be found again in the Declarations of 2018 and 2019. With the 2020 Declaration, the language changed and became less precise, solely stating that “the Ministers expressed the importance of the

²⁰⁷ n19.

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ G77 Ministerial Declaration 2017, p162.

liability for damage to the marine environment.”²¹¹ This imprecise, weaker language can also be found in the 2021 and 2022 Declarations. This demonstrates how the G77 were open proponents of a liability provision in the early stages of development of the BBNJ agreement, but over time backed away from a strong stance, and no text proposal for a liability provision was ever submitted.²¹²

Two other entities that were in favour of the inclusion of liability in the BBNJ agreement were the Holy See (the Catholic Church) and the IUCN. Many of the few draft text suggestions regarding liability were made by them. The IUCN's ability to exert influence in this matter has been partially hindered due to its observer status, which restricts its participation in sessions exclusively open to UN Member States. Similarly, the Holy See, which is a small delegation and not traditionally considered a dominant force in ocean negotiations, lacked the necessary influence to garner support for liability measures on its own.²¹³

Further, the CARICOM Community, an intergovernmental organisation that is a political and economic union of 15 Member States throughout the Americas and Atlantic Ocean, released a statement on the BBNJ agreement on 3 March 2023, in which it states that the agreement should "support additional funding arrangements for a liability mechanism.”²¹⁴

Liability in the BBNJ Agreement: A Missed Opportunity

As the analysis of the documents has shown, the topic of liability was strongly represented and supported in the beginning of the negotiations, but throughout the years lost more and more presence as other topics came to the foreground. The draft agreements as well as the final agreements left out the issue of liability completely, solely mentioning the polluter-pays principle. It becomes clear that the topic of liability was always scattered across

²¹¹ G77 Ministerial Declaration 2020, p94.

²¹² n19.

²¹³ *ibid.*

²¹⁴ ‘Caribbean Community (CARICOM) Statement on the Legally Binding Instrument of the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdictions (BBNJ)’ (CARICOM) accessed 1 August 2023 <<https://caricom.org/caribbean-community-caricom-statement-on-the-legally-binding-instrument-of-the-conservation-and-sustainable-use-of-marine-biodiversity-of-areas-beyond-national-jurisdictions-bbnj/>>.

different issues in the BBNJ or omitted, and it never was a separate agenda item. Mendenhall and Hassanali argue that if there had been a specific article or agenda item dedicated to liability, it might have gained more prominence.²¹⁵

The remaining mention of the polluter-pays principle is welcomed, but as Gaskell noted, the lack of an appropriate legal instrument can stand in the way of effective liability and compensation. It is way too early to evaluate whether liability and compensation will be implemented in practice in the unfortunate case of environmental damage occurring on the high seas, yet it remains highly doubtful due to the difficulties mentioned earlier on. While there are many examples of liability regimes within international law of the sea/maritime law, all of these systems are imperfect and not implemented in an ideal way, as the literature review has shown. According to the literature, the liability regime of the IMO seems to be the best established and working liability regime, yet it does not apply to the high seas and instead to a specific sector.

Nevertheless, the BBNJ negotiators could have taken inspiration from this and other regimes. For instance, it would have been useful to include a definition of certain terms, for instance what counts as ‘environmental damage’ in order to create a bit more legal certainty in those cases, as well as what exactly falls under liability, as well as guidance on which methodology to choose in order to calculate the amount of compensation, as this was a difficult issue to solve in the *Costa Rica v. Nicaragua* case. The decision on the amount of compensation is a whole separate extensive topic, and cannot be discussed in this paper. However, it is clear that a standardised system is necessary (and even if this system was in place, certain decisions may be perceived as arbitrary by states and private actors, potentially leaving them dissatisfied).

Further, there should be some guidance on who exactly will be liable for damages, especially since no rehabilitation fund has been established as part of the BBNJ agreement. If such fund is not established in the future, it may be considered to actually find a solution where states have the obligation to provide due diligence, but it is solely the private actors to directly make good the environmental damage caused by them, carrying all responsibility and financial liability by themselves. In the long run, it would in fact be

²¹⁵ n19.

more advantageous for them to pay into an industry-supported compensation fund (separate from the Special Fund) and to share the risk with other private companies, but to have money assured at all times.

What could be borrowed from the IMO liability regime specifically is the idea of mandatory insurance operationalised by the State Parties. Port states as well as flag states could have the responsibility to carry out inspections and check if vessels operating on the high seas carry insurance certificates with them.

One point that has been quite strongly criticised in *Costa Rica v. Nicaragua* is the fact that the Court did not make use of expert opinions in order to assess the amount of compensation, which is usually a significant aspect of law of the sea dispute settlement proceedings, especially when cases are as complex as *Costa Rica v. Nicaragua* (e.g. also in maritime delimitation cases).²¹⁶ When it comes to liability and responsibility under the BBNJ agreement, scientific knowledge and expert opinions would need to have a place in the regime and should be included in relevant provisions, if there were any.

Serious doubts can be raised about the BBNJ's consistency with UNCLOS and Article 235 if it does not develop specific rules for responsibility and liability in the future. The BBNJ agreement deals with a large array of human activities that could potentially be harmful for the marine environment, and it can only be effective if there are rules for liability in place.

5. Conclusion

In this second part of the internship report, the author focused on environmental liability and its integration into the BBNJ agreement. The exploration began with a comprehensive review of relevant literature, encompassing the evolution of the BBNJ treaty, the concept of environmental liability, and various liability regimes in both the international law of the sea and the broader realm of environmental law.

The review revealed that liability regimes, as they presently stand, often remain underdeveloped and encounter resistance from states. The liability regime for ocean

²¹⁶ n83.

activities is highly fragmented, including the liability rules of the IMO, the liability of sponsoring states for seabed mining, the liability rules of the Protocol on Environmental Protection to the Antarctic Treaty, as well as regional regimes such as the European Union's Environmental Liability Directive. There is a clear absence of a comprehensive multilateral liability regime for the marine environment, which would facilitate transnational compensation claims for environmental damage of BBNJ. Nevertheless, it is important to acknowledge that some positive developments have occurred in this field. Effective liability systems have the potential to strengthen the implementation of environmental regulations, thereby potentially contributing significantly to the protection of the (marine) environment.

One notable finding from this research was the absence of a dedicated liability regime that would apply to the high seas. This observation highlights a notable gap in the existing legal framework governing international waters. Even in UNCLOS, a strong liability provision is missing from the treaty, while it would be crucial especially in ABNJ as monitoring is a big challenge. The area is far away from land and there exist only weak requirements for sponsorship of activities and flagging of vessels. Meanwhile, activities taking place in the ABNJ are intensifying, and many new ones are evolving, such as seabed mining and bioprospecting. The sheer amount of activities in the ABNJ create great potential for conflicts between different sectors and stakeholders.

Using content analysis and leaning onto Mendenhall and Hassanali's paper, the author looked at the documents of the BBNJ negotiation process (draft agreements and others) in order to trace the evolution of the liability discourse throughout the negotiation process and to understand to what extent the topic of liability is included in the final BBNJ treaty. The overarching outcome of the content analysis reveals a discernible pattern. While liability was initially part of the discussions, it gradually faded into the background and became increasingly marginalised as the negotiation process unfolded. This omission results in a distinct gap within the agreement, representing a missed opportunity to introduce a more effective mechanism. The negotiations of the new BBNJ agreement could have been a great opportunity to address these gaps and set out rules for the liability for damage of the ABNJ, by clarifying the UNCLOS with normative guidance in terms of how claims should

be made, how compensation should be measured and who exactly will receive payments for reparations. Unfortunately, the aspects of state responsibility, liability and obligation to pay compensation was by far not discussed sufficiently by states and was generally approached with caution. The absence of a robust liability provision compromises the treaty's ability to exert significant influence and enforce its objectives, potentially affecting its overall effectiveness.

Building onto the IMO framework and other existing liability regimes is necessary for liability to be reality for states, and one that shapes their behaviour in favour of marine environmental protection. Looking forward, it could be considered to elaborate on the topic of liability in a separate protocol, as has been done in Annex VI (Liability) to the Protocol on Environmental Protection to the Antarctic Treaty (even though, admittedly, it took over a dozen years to negotiate and has not yet entered into force). It may be too difficult to establish very ambitious provisions regarding liability and compensation, but a liability annex to the BBNJ agreement could still provide the operational mechanisms that will ensure that compensation is paid into a sort of compensation fund.

The exploration of environmental liability within the context of the BBNJ agreement has also generated potential avenues for future research. One of these directions involves conducting a more comprehensive analysis of the negotiation dynamics surrounding liability. While this study focused on relevant documents, a deeper understanding can be gained by examining recordings of the IGC sessions and other available materials. This approach would provide a clearer picture of how liability discussions evolved throughout the negotiation process, considering the intricacies and influencing factors. Another challenging but vital area for future exploration involves contemplating in more detail the potential design of a liability annex within the BBNJ agreement. This entails considering what an effective structure, scope, and operational framework for such an annex might look like within the context of other international environmental agreements. Investigating these possibilities could offer valuable insights into the development of robust liability regimes, even if such provisions are yet to be established. Furthermore, as environmental issues arise on the high seas under the BBNJ agreement, there is a need to assess actual

state practice. Researchers can analyse instances where the polluter-pays principle, outlined in the general principles and approaches of the agreement, is put into practical action. Examining how states implement and enforce environmental liability can offer real-world examples of the agreement's effectiveness in addressing environmental damage. While these research directions present challenges, they hold the potential to enhance our understanding of environmental liability within the BBNJ context. By delving into these areas, scholars and policymakers can collectively address the gaps and opportunities identified in this study. This collaborative effort can contribute to the development of more robust international frameworks for conserving marine environments and preserving their biodiversity, aligning with the broader goals of the BBNJ agreement.

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As an independent private company, GOPA has been carrying out consulting projects worldwide for national and international public clients, as well as private clients, since 1965. GOPA's consulting services cover the areas of economic development, education, monitoring & evaluation, statistics, and health & social affairs, as well as rural development & environment. With an annual turnover of approximately €70 million, GOPA is one of the leading European consulting companies in the field of international technical cooperation with developing and emerging countries. GOPA is part of the GOPA Consulting Group, which currently has more than 700 employees working on approximately 800 projects worldwide.

During her internship, Ms Thomas was involved in the department's EU-financed project "Ocean Governance" to get the opportunity to familiarise herself with the various areas within a project.

Ms Thomas' major tasks were the following:

- Working directly with the core team under the leadership and guidance of Dr Puri Canals (Team Leader) as well as Arnaud Gotanegre (Project Backstopper) and Dr James Walsh (Project Manager);
- Supporting content production for the website and social media channels;
- Developing, contributing to, and reviewing project-related documents, concepts, and reports and related issues;
- Writing articles and preparing presentations, reports, newsletters as well as e-mails;
- Proofreading and formatting reports and studies;
- Supporting communication and organising international events;
- Participating in the Annual MPA Networks Twinning Meeting and the Learning Exchanges between the Atlantic and South-East Asia in Kota Kinabalu, Malaysia;
- Supporting project reporting within the framework of the information system of the European Commission (OPSYS);
- Taking minutes at team meetings and webinars.

Ms Thomas was driven by a great personal and professional interest in ocean governance and used all practical learning opportunities right from the first day. She easily adjusted to her new tasks and was thus rapidly able to cope even with challenging tasks in a very independent way. Ms Thomas' working method was always characterised by a clear structure as well as a high degree of organising ability and conscientiousness. She constantly completed all her tasks and responsibilities to our full satisfaction.

Ms Thomas' behaviour towards her superiors, colleagues and clients was consistently perfect. She quickly integrated herself into the team and was highly appreciated, due to her friendly, helpful and - even in stressful times - even-tempered and cool-headed nature. Moreover, her behaviour towards external partners and experts was always exemplary.

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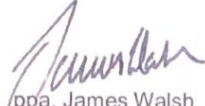
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The internship ended, as agreed on 31.01.2023. We thank Ms Thomas for her constantly committed cooperation and wish her all the best and continued success for the future in both, her professional and private life.

Bad Homburg, 31.01.2023

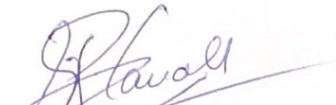
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