



## IUCN BRIEFING FOR NEGOTIATORS

Section of the BBNJ Further revised draft text under consideration:  
**PART IX: SETTLEMENT OF DISPUTES AND ADVISORY OPINIONS**

### Key messages:

States and civil society have invested in this process because we recognize that the rule of law is a peaceful path to resolving conflicts and the surest route to the world we want. The UN General Assembly mandated the BBNJ Agreement as a “legally binding instrument”. Formal dispute settlement, either arbitration or adjudication, is a tool that is widely recognized as necessary to the rule of law. Advisory opinions provide valuable guidance before contentious disputes arise, but can only be sought if there is a provision for them in the text of the BBNJ Agreement. Technical disagreements might be efficiently addressed through ad hoc expert panels, but they should not foreclose formal dispute settlement under Article 55.

### 1. Compulsory, Legally Binding, Third Party Dispute Settlement, Article 55

**Why?** During the negotiation of the UN Convention on the Law of the Sea (UNCLOS) it was acknowledged that Parties would at times disagree about the interpretation and application of UNCLOS. States decided that compulsory, legally binding, third party dispute settlement provides a path to peaceful resolution of disagreements which protects the rights of the weak, the powerful, individual states and the international community as a whole. This view was also held by Parties to the Fish Stocks Agreement and the 1994 Agreement on seabed mining. It holds true for the BBNJ Agreement. To provide any less will undermine the BBNJ Agreement as a legally binding instrument and will erode the dispute settlement provisions of UNCLOS.

Flexibility in application of the dispute settlement provisions to certain subject matter is provided in UNCLOS, Article 298. Any such exceptions should be stated in narrowly drafted language that does not undermine UNCLOS or the objectives of this Agreement.

#### How?

- a) Include Article 55, Option 1. Option 2 does not provide for compulsory, binding third party dispute settlement; it requires only negotiation or conciliation. Neither of these results in a legally binding decision and selection of Option 2 would be inconsistent with UNCLOS.
- b) Delete Article 55 (6), which could undermine UNCLOS and BBNJ compulsory jurisdiction by permitting states to opt out by concluding or having previously concluded a different agreement with dispute settlement provisions that do not provide for compulsory jurisdiction. The issue of dispute settlement provisions in other agreements is already addressed in Articles 281 and 282 of UNCLOS with far greater clarity. Those provisions are incorporated by reference in Article 55 (1), and they properly distinguish between the effect of agreements that do and do not provide for ultimate settlement by resort to a binding procedure at the request of any party to the dispute.

## 2. Equal Footing for Non-Parties, Article 55

**Why?** Parties to UNCLOS are subject to its Part XV, Settlement of Disputes, which also applies to disputes arising under UNCLOS implementing agreements such as the BBNJ Agreement. (This is reinforced by Article 55, (2) Option 1.) This Agreement must provide for States and regional economic integration organizations that are not UNCLOS Parties to be on equal footing with UNCLOS Parties with respect to their access to dispute settlement bodies and relevant judiciary.

**How?** Option 1, Article 55 (1) “levels the playing field” by applying obligations comparable to UNCLOS Part XV to BBNJ Parties that are not UNCLOS Parties. Article 55 (4) equalizes the conciliation, arbitration, and expert provisions in the Convention for BBNJ Parties that are not UNCLOS Parties.

~~Option 1.~~ 1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

## 3. Advisory Opinions, Article 55 ter

**Why?** UNCLOS is sometimes referred to as a “framework convention”, to be developed through implementing agreements such as this one. Legal questions will inevitably arise. Rather than wait until they become costly and contentious, the BBNJ parties could choose to seek the guidance of a globally representative expert body. The International Tribunal for the Law of the Sea is an authoritative interpretive body capable, should the States Parties so desire, of providing legal advice to guide implementation.

For ITLOS to receive a request for an advisory opinion on legal questions related to the BBNJ Agreement (other than those submitted by the ISA) this treaty must include this provision, which confers advisory opinion jurisdiction on the Tribunal, see [Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission ITLOS Reports 2015](#), paras 37-69.

**How?** The further revised draft text (July 2022) offers an appropriate article to authorize requests for advisory opinions.

[The Conference of the Parties may decide, by a two-thirds majority of the representatives present and voting, to request the International Tribunal for the Law of the Sea to give an advisory opinion on any legal question arising within the scope of this Agreement. The text of the decision shall indicate the scope of the legal questions on which the advisory opinion is requested. The Conference of the Parties may request that such opinions be given as a matter of urgency.]

## 4. Ad hoc expert panel decisions, Article 54 ter, should not preclude referral to Article 55 Dispute Settlement

**Why?** The current draft text (July 2022) follows Fish Stocks Agreement, Article 29. The recommended additional text is intended to reduce confusion about where the ad hoc expert panel sits in the hierarchy of dispute settlement measures. The “without recourse” language could be taken to preclude the use of binding measures. As explained above, that would raise a number of legal and policy concerns.

**How?** Add to proposed Article 54 ter:

**2. Nothing in this Article limits the right of a Party at any time to refer a dispute concerning the interpretation or application of this Agreement for [compulsory] binding settlement in accordance with the provisions of this Agreement relating to the settlement of disputes.**

Alternatively, add:

**2. In any case where a dispute is not resolved through the means set out in paragraph 1, the provisions relating to the settlement of disputes set out in Article 55 shall apply.**

## **For more information, see:**

UNCLOS, Part XV (Settlement of Disputes) and Annexes

Lijnzaad, L. (2020). "Chapter 5 Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an Afterthought". In *A Bridge over Troubled Waters*. Leiden, The Netherlands: Brill | Nijhoff. doi: [https://doi.org/10.1163/9789004434950\\_007](https://doi.org/10.1163/9789004434950_007)

Mensah, T., The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea. In *Max Planck Yearbook of United Nations Law*. [https://www.mpil.de/files/pdf2/mpunyb\\_mensah\\_2.pdf](https://www.mpil.de/files/pdf2/mpunyb_mensah_2.pdf)

## **Contact:**

Minna M. Epps, Head, IUCN Head of Delegation, IUCN Centre for Conservation Action, [Minna.EPPS@iucn.org](mailto:Minna.EPPS@iucn.org)

Cymie R. Payne, Rutgers University and Chair, Ocean Law – World Commission on Environmental Law, IUCN [cp@cymiepayne.org](mailto:cp@cymiepayne.org)