



IUCN BRIEFING FOR NEGOTIATORS

Section of the BBNJ Further revised draft text under consideration:
PART XI bis: RESPONSIBILITY AND LIABILITY

Key message:

Adding articles on responsibility, liability and compensation to the BBNJ Agreement would better implement UNCLOS and would underscore that Parties consider the obligations in this Agreement enforceable and that breach has consequences. Such articles are essential to meaningful implementation of the polluter pays principle and contribute to accountability and justice. They would further advance implementation of UNCLOS, Article 235.

1. Include article on responsibility and liability

A lightly edited version of UNCLOS, Article 235, which is already directly applicable to BBNJ Agreement obligations, should be included in the BBNJ Agreement.

How? This proposed text states the basic international law rule and implements UNCLOS, Article 235 in the BBNJ Agreement:

- 1. Parties are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment [and fair and equitable sharing of benefits]. They shall be liable in accordance with international law.**

This proposed text, like similar provisions in UNCLOS, is intended to stress the commitment of States to fulfill their obligations under the treaty and their willingness to implement the international law of state responsibility and liability. In this sense, it is different from liability regimes such as the IOPC Funds that are negotiated as risk management instruments (and referred to in the second part of Article 235(3)). We invite negotiators to reflect on this distinction and to consider adopting text similar to that found in UNCLOS, Part XII.

UNCLOS, Article 235 provides:

UNCLOS, Part XII, SECTION 9. RESPONSIBILITY AND LIABILITY

Article 235 - Responsibility and liability

- 1. 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.*
- 2. States shall ensure that recourse is available in accordance with their legal systems 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.*
- 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to*

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.

State liability refers to the consequences of a breach of an international obligation, such as the obligations in the BBNJ Agreement, entailing an obligation to provide reparation. By including a provision stating this, negotiators reinforce the rule of international law and create an incentive for all parties to be diligent in their observation of the commitments they make in joining the BBNJ Agreement. The ITLOS Seabed Disputes Chamber [Advisory Opinion on Deep Seabed Mining](#) discussed the extent of liability of a State Party for any failure to comply with the provisions of the Convention, under both the Convention and customary international law, stating that “liability arises from the failure of the sponsoring State to carry out its own responsibilities”.

As noted above, this proposal differs from liability conventions that provide for strict liability, specific terms for compensation, limits on liability, and other negotiated terms. An example of that kind of liability provision is found in the [oil spill pollution conventions](#) that provide risk management with a layer of financial protection to States that are involved in shipping petroleum products, and the [Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety](#).

Responsibility and Liability Provisions in UNCLOS

[Part VII \(High Seas\)](#), Article 106 (Liability for seizure without adequate grounds)

[Part XI \(The Area\)](#), Article 139 (Responsibility to ensure compliance and liability for damage)

[Part XII \(Protection and Preservation of the Marine Environment\)](#), Article 232 (Liability of States arising from enforcement measures)

[Part XII, Section 9 \(Responsibility and Liability\)](#), Article 235 (Responsibility and liability)

[Part XIII \(Marine Scientific Research\)](#), Section 5 (Responsibility and Liability), Article 263 (Responsibility and liability)

[Part XV \(Settlement of Disputes\)](#), Article 304 (Responsibility and liability for damage)

[Annex IX \(Participation by International Organizations\)](#), Article 6 (Responsibility and liability)

2. Recognize reparation owed for damage to the environment in and of itself

How? Include text reaffirming that environmental damage includes “damage caused to the environment, in and of itself,” also called “pure” environmental damage, “non-use values” or “non-market values”, ICJ, [Costa Rica v Nicaragua](#), along these lines:

2. Recognizing that the marine environment is an essential Earth system, all environmental damage, including that which is not economically quantifiable, shall be subject to reparations in order to restore, remediate, or replace ecosystem services and integral functions that have been harmed.

3. Prioritize ecological recovery as the appropriate form of reparation

Why? Marine ABNJ, and its biodiversity, is unique and essential for life on Earth. Emergency response to minimize harm, pollutant removal where possible, remediation, and measures to restore ecological function are appropriate forms of reparation for harm to the marine

environment in ABNJ. Under domestic legislation, such as the US Oil Pollution Act and the EU Liability Directive, the government is legally obligated to use compensation for the benefit of the public environmental interests that were harmed; the UN Compensation Commission created a [Follow-up Programme](#) for this purpose. The BBNJ Agreement should do no less.

How? Include text along these lines, focusing redress on environmental recovery of essential Earth systems:

3. Redress of any environmental damage shall prioritize recovery of ecological integrity as determined by use of the best available science.

4. Affirm standing of any BBNJ Agreement Party to invoke responsibility and liability for harm in areas beyond national jurisdiction

Why? To be sure that an international court will accept applications from any Party and that a special injury to the complaining Party is not required, the BBNJ agreement should include specific language expressing that intent.

Traditional approaches to the right of a State to make a legal claim for harm to the global commons could make it impossible for any State to invoke responsibility and liability, therefore the BBNJ Agreement should state clearly that Parties do have that right (“standing”). The traditional view required special material or moral damage to the claimant State to trigger a legal claim; violation of a legal rule was insufficient. The ILC Draft Articles on State Responsibility take the view that Parties to a treaty have standing without a special injury requirement when there is a breach of an obligation owed to the Parties (*erga omnes partes*) or of an obligation that is owed to the international community as a whole - such as the obligations in the BBNJ Agreement. We urge negotiators to note that the drafters of other conventions have made the right of parties to enforce treaty obligations explicit.

How? This paragraph clarifies that the obligations in this Agreement may be enforced by any party, without a requirement of “special injury”:

4. Any Party to this agreement is entitled, on behalf of itself or of the international community, to invoke the responsibility of another State that has breached its obligations under this agreement.

This is a version that includes more explanation and that covers international organizations as well:

(Alternative 1) 4. [Recognizing that the obligations under this Agreement are established for the protection of humankind’s collective interest in marine biodiversity in areas beyond national jurisdiction and are owed to the international community as a whole,]any Party to this agreement [and any competent international organization] is entitled, on behalf of itself or of the international community, to invoke the responsibility of another State that has breached its obligations under this agreement.

This is another alternative:

(Alternative 2) 4. Disputes between the Parties relating to the interpretation, application, or fulfilment of the present Agreement, including those relating to the responsibility of a State to fulfill obligations enumerated in the Agreement, shall be submitted to dispute settlement according to Article 55, at the request of any of the parties to this Agreement.

For more information, see:

International Law Commission, [Draft Articles on State Responsibility](#)
Stockholm [Declaration 1972](#), Principles 7, 21
Rio [Declaration 1992](#), Principle 13

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