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Dispute Settlement Provisions in the Agreement for Biodiversity beyond National Jurisdiction

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Abstract

This article explores the dispute settlement provisions of the New Agreement for the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction (the BBNJ Agreement). The history of the discussions behind many of the key features of article 60, are explained. These included whether to allow compulsory dispute settlement, exclusions from jurisdiction and how non-Parties to the United Nations Convention on the Law of the Sea (UNCLOS) would be covered. The article concludes with some possible issues that may arise when the articles are put into practice.

Keywords

BBNJ Agreement – Biodiversity beyond national jurisdiction – dispute settlement – Part XV – UNCLOS – jurisdiction – non-Parties – mutatis mutandis

1 Introduction[1]

On 4 March 2023, the President of the Intergovernmental Conference (IGC) for the negotiation of a new Agreement for the Conservation and Sustainable

1 The author was an independent academic adviser on the New Zealand delegation, and the discussion of various positions is informed by observations made during the negotiations. Because some negotiations were conducted in informal small working groups, it is not

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Use of Marine Biodiversity beyond National Jurisdiction (BBNJ Agreement), announced: "the ship has reached the shore". Negotiators had reached an agreement on a text.[2] This was a significant moment for many reasons. First, negotiators had been working for 36 hours straight since the morning before and a successful conclusion was in doubt up until the final moment. Second, the new BBNJ Agreement was the culmination of more than 17 years of discussion and then negotiation in the halls of the United Nations. The new Agreement establishes new rules for a range of issues and establishes new institutions. However, one crucial section of the new ship, dispute settlement, was not settled until the final hours.

The conclusion of the BBNJ Agreement in 2023 was preceded by a long process.[3] An Ad Hoc Open-ended Informal Working Group was established by the General Assembly and first met in 2006.[4] In 2015 the Working Group recommended that the General Assembly develop an international legally binding instrument focused on four topics: the legal regime for marine genetic resources, area-based management measures including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology. The General Assembly decided to establish a Preparatory Committee[5] which held four sessions in 2016 and 2017. The Intergovernmental Conference was created at the end of 2017[6] and held six sessions. The fourth session was postponed by Covid, and the last session (techinically a continuation of IGC5) was held in February and March 2023. While that session reached agreement on an English text, the need to translate and edit the text meant that the Agreement could not be adopted until a further resumed session was held on 19 June 2023. The Agreement opened for signature on 20 September 2023, and requires 60 ratifications to enter into force.

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always possible to identify proponents of positions unless they were repeated in 'informal' sessions, which may be reported more freely. The views expressed in this article do not represent the views of the New Zealand delegation.

2 The text was not formally adopted on 4 March. The text was subsequently edited and translated, and a resumed session of the IGC adopted the Agreement on 19 June 2023. For a description of the final negotiations session, see Elizabeth Mendenhall, Rachel Tiller and Elizabeth Nyman, 'The ship has reached the shore: The final session of the 'Biodiversity Beyond National Jurisdiction' negotiations' (2023) 155 Marine Policy 105686.

3 More information about the history of the process can be found on the website of the Division for Ocean Affairs and the Law of the Sea, https://www.un.org/depts/los/index.htm.

4 General Assembly Resolution 59/24, para 73.

5 General Assembly Resolution 69/292.

6 General Assembly Resolution 72/249.

In this article, I will discuss some of the key issues that arose during the negotiations for Part IX of the Agreement on dispute settlement.[7] The discussion is intended to inform the interpretation of the provisions on dispute settlement, and particularly article 60.[8] I then discuss some issues that may arise in the future as the dispute settlement provisions are used in practice.

In general, the dispute settlement provisions in Part IX of the BBNJ Agreement reflect the negotiating dynamics at the IGC sessions. The majority of delegations were happy to follow the model established by the United Nations Fish Stocks Agreement (UNFSA) in applying Part XV of the United Nations Convention on the Law of the Sea 'mutatis mutandis'. Other delegations were concerned about this approach and sought alternative processes. The final shape of Part IX reflects the desire to adopt the Agreement by consensus, and therefore the need to respond to delegations with particular worries about the dispute settlement processes.

2 The Dispute Settlement Provisions in the Agreement

2.1 *Background to Part IX*

During the Preparatory Committee (PrepCom) meetings in 2016 and 2017, dispute settlement was discussed and delegations proposed a variety of options. It is clear from the reports of the Chair that views on the appropriate dispute settlement process varied.[9] Proposals included adopting Part XV of UNCLOS mutatis mutandis following the UNFSA model, creating a new process requiring State consent for each dispute, creating a special chamber of ITLOS, or using regional dispute settlement mechanisms.[10]

Dispute settlement was not discussed in the first sessions of the IGC as time was devoted to the four substantive elements of the package and big picture aspects of the institutional framework. It was not until IGC3 onwards that

7 The text of Part IX can be found in the Appendix to this article.

8 During the negotiations, the article on dispute settlement processes was draft article 55. For clarity, all references to articles here refer to the final numbering. However where proposals are quoted and referenced, the article replicates the numbering from the draft text.

9 See generally https://www.un.org/Depts/los/biodiversity/prepcom.htm for reports from the PrepCom.

10 See e.g. *Chair's streamlined 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* (July 2017) available at https://www.un.org/Depts/los/biodiversity/prepcom.htm, p. 53. See also Yubing Shi, 'Settlement of Disputes in a BBNJ Agreement: Options and Analysis' (2020) 122 Marine Policy 104156, https://doi.org/10.1016/j.marpol.2020.104156 at 3.

dispute settlement was directly addressed, and only in a fairly brief way. At IGC 5 and 5bis,[11] the President appointed Victoria Hallum of New Zealand as Facilitator to assist in moving delegates to a consensus outcome for Part VIII on Implementation and Compliance and Part IX on Dispute Settlement.

Although discussions on dispute settlement were scant in the early sessions, the President did include draft dispute settlement provisions in the early draft texts. These were modelled on some provisions of the UNFSA.[12] As in UNFSA, the draft provisions applied Part XV of UNCLOS to the Agreement mutatis mutandis (with the necessary changes). Mutatis mutandis was considered a short-hand to mean that the dispute settlement procedure of UNCLOS applies to disputes arising under the Agreement without setting out a whole new dispute settlement process.[13]

11 At the close of the fifth session of the IGC in August 2022, there was a general sense that negotiations were nearing conclusion. The President announced that the fifth session would be suspended, so that the next meeting (which began in February 2023) would technically be a continuation of the fifth session. It was hoped that this would allow the momentum gained at the end of IGC5 to not be lost. The second session of IGC 5 was referred to in different ways. The official description of the February-March 2023 meeting is the 'resumed fifth session'. The shorthand use of IGC5bis by many delegations reflected the tradition of using latin numbers to indicate where something has been inserted between existing draft provisions. Other descriptions included IGC5.2. This article will use '5bis' to refer to the session that concluded in March 2023.

12 See articles 54 and 55 of the *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* (the Draft Text) 17 May 2019, A/CONF.232/2019/6; and the *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* (The Revised Draft Text) 18 November 2019, A/CONF.232/2020/3. For a comparison between these drafts and the UNFSA, see Joanna Mossop, 'Dispute Settlement in the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction' (23 December 2019), online: https://site.uit.no/nclos/2019/12/23/dispute-settlement-in-the-new-treaty-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/.

13 See generally, A.E. Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks' (1999) 14 International Journal of Marine and Coastal Law 1; Peter Örebech, Ketill Sigurjonsson and Ted L. McDorman, 'The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement;' (1998) 13 International Journal of Marine and Coastal Law 110; David Freestone and Zen Makuch, 'The New international Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement'(1997) 7 Yearbook of International Environmental Law 3.

When the Further Revised Text[14] was issued in June 2022, provisions had been added addressing prevention of disputes,[15] disputes of a technical nature,[16] provisional arrangements and advisory opinions. Some of these provisions mirrored text in other treaties, most notably UNCLOS and the UNFSA.

At IGC3, some delegations had called for a provision in the dispute settlement chapter that would allow the Conference of the Parties to the Agreement (COP) to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS). This appeared in Part IX of the Further Revised Text, but was subsequently moved to article 47 that addressed the COP's mandate.

During IGC3 some States called for options that required State consent for dispute settlement. This led to the inclusion in the Further Revised Text of Option II for article 60 which focused on the settlement of disputes by negotiation and States had to opt in to compulsory jurisdiction. A third option for article 60 was introduced by China during IGC5bis and included in the Updated Draft Text.[17] This option allowed for third-party dispute settlement only if all parties to the dispute agreed. These options are discussed further below.

Attempts to get agreement on the dispute settlement provisions continued through to the negotiations in the final hours of IGC5bis.

2.2 *Voluntary v Compulsory Dispute Settlement*

The FRT contained two options for article 60. The first version referred to compulsory dispute settlement under Part XV of the Convention, as already discussed. The second version, Option II, provided for a somewhat independent process. A State could, on accession to the Agreement, declare that it accepted compulsory jurisdiction under arbitration, the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice (the ICJ). A bracketed paragraph directed that if one or both of the States involved had not selected this option, then the dispute could be submitted to conciliation. This option allowed States to avoid compulsory jurisdiction, but kept open a

14 *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*, 1 June 2022, A/CONF.232/2022/5.

15 Cf article 28, UNFSA.

16 Cf article 29, UNFSA.

17 *Updated 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 as of 25February 2023,* (Updated Draft Text, UDT) 25 February 2023, A/CONF.232/2023/CRP.1.

possibility of a dispute being sent to conciliation, although the conditions on which this would be done were not clear.

Option II was initially supported by some non-Parties to UNCLOS as well as those who were concerned about the implications of compulsory dispute settlement.[18] China made its own proposal in Option III, discussed below. One or two delegations resisted the removal of Option II until the end of the process. However, little active discussion of Option II occured at IGC 5bis.

Instead, attention focused on the proposal that China made during IGC5bis. This was referred to as Option III in the Updated Draft Text (UDT)[19] released on 24 February 2023. This proposal was as follows:

1. State Parties to this Agreement shall settle any dispute between them concerning the interpretation or application of this Agreement through friendly consultations and negotiations.
2. In cases where no settlement has been reached by recourse to paragraph 1, any dispute concerning the interpretation or application of this Agreement may be submitted, with prior and explicit consent, on a case-by-case basis, given by all States that are parties to such a dispute, to judicial settlement, arbitration, mediation, conciliation or any other third-party dispute settlement mechanism.
3. In any case, this Article shall not apply to any dispute concerning the land territory, sovereignty, sovereign rights or jurisdiction of a State Party to this Agreement. No action or activity taken on the basis of the Agreement will be construed or considered to be prejudicial to the positions of States Parties to a land, insular or maritime sovereignty dispute or to a dispute concerning the delimitation of maritime areas.
4. Subject to paragraphs 1, 2 and 3 of this Article, the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS may apply mutatis mutandis to any dispute between States Parties to this Agreement and to the Convention concerning the interpretation or application of this Agreement.

Although paragraph 4 of the proposal referred to Part XV applying 'mutatis mutandis', this application was subject to the previous paragraphs. Paragraph 2 made it clear that the proposal ruled out compulsory jurisdiction for

18 States that expressed a preference for Option II at IGC5 included Venezuela, China, Israel, and Turkey.

19 *Updated 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 as of 25 February 2023,* A/CONF.232/2023/CRP.1.

binding dispute settlement, as it required 'prior and explicit consent' for such dispute settlement to proceed. The proposal therefore was seen as removing compulsory dispute settlement from disputes arising under the Agreement. The new proposal did not receive much support apart from one delegation which said it would consider it.

During discussions, China indicated that its key interest was in the narrowing of the jurisdiction of courts and tribunals over disputes arising under the Agreement. Attention therefore turned to whether this interest could be met. Those developments are discussed in the next section.

Overall, opposition to compulsory dispute settlement primarily came from States not party to UNCLOS, and China. China's concern about consent has arguably been driven by their experience in the South China Sea arbitration. Both the Chinese government and academics have subsequently made arguments about the need for consent in UNCLOS disputes.[20] Therefore, the fact that China was willing to back down from that position was significant and possibly reflected an assessment that the majority of the delegations were not willing to move too far from the UNCLOS processes. The issue for non-Parties was dealt with in a different way, and is discussed below.

2.3 *Exclusions from Jurisdiction*

Paragraph 8 of Option I in the Updated Draft Text provided for some exclusions from jurisdiction. The paragraph read:

> Nothing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement.

This paragraph was first included in the Further Refreshed Draft Text following IGC5. The language was proposed by Australia and is based on article 298(1)(a)(1). In UNCLOS, this language refers to whether or not compulsory conciliation is available for certain types of dispute. If the dispute involves 'unsettled dispute[s] concerning sovereignty or other rights over continental or insular land territory' then compulsory conciliation is not available. Of course, compulsory conciliation only applies if a State has excluded compulsory arbitration via a declaration in article 298(1). So, the relevance of this language is much more limited in UNCLOS, compared to its use in article 60(8) of the

20 E.g. See Shi, above n 10.

Agreement. In the latter, the exclusion applies to *all* disputes. Nevertheless, it received considerable support and was incorporated into the text without opposition. It seems that it was aimed to provide comfort to States possibly concerned about UNCLOS tribunals exceeding their perceived mandates.

When delegates began thinking about bridging the differences between option I and III, a proposal was made to add an additional paragraph to Option I, picking up on paragraph 3 of Option III. On 2 March the proposal appeared as follows in the outcome of the informal informal:

> [8 bis. For the avoidance of doubt, nothing in this Agreement shall be relied upon as a basis for asserting or denying any claims to sovereignty, sovereign rights or jurisdiction over land or maritime areas, [or prejudice the position of any Party as regards recognition or non-recognition of such claims,] including in respect to any disputes relating thereto.]

The new paragraph 8bis was intended to replicate the point made in the second sentence of paragraph 3 of Option III. While paragraph 8 was intended to exclude certain matters from the jurisdiction of courts or tribunals under the Agreement, Paragraph 8bis is intended to confirm that nothing in the Agreement affects sovereignty claims or disputes. The use of 'for the avoidance of doubt' is sometimes used in some English-speaking jurisdictions to indicate that the phrase that follows is clarifying the meaning rather than creating a new rule.

The proposed text was not accepted by China. Following considerable discussion in search of a compromise, the final version of article 60(9) was agreed:

> 9. Nothing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement, provided that nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Section 2 Part XV of the Convention.

In addition to the wording of the prior proposal, the paragraph states that jurisdiction is not available for a dispute that involves 'the legal status of an area as within national jurisdiction'. Thus, a court or tribunal will not have jurisdiction if one of the issues involves whether or not a particular area is within national jurisdiction or not.

This does exclude potential disputes that could arise under the BBNJ Agreement, and it should be noted that other paragraphs of the Agreement also attempt to ensure that issues relevant to national jurisdiction are not considered by the COP.[21] However, it does not necessarily exclude all disputes that involve areas within national jurisdiction. For example, a State might believe that an action taken by the vessel of another State Party pursuant to measures under an ABMT has violated its sovereign rights in the continental shelf under the high seas. If there is no question that the continental shelf belongs to the offended State, then the dispute will not be about 'the legal status' of the 'area as within national jurisdiction'. Jurisdiction is only excluded if the tribunal has to determine whether the area is within national jurisdiction or not.

This approach is narrower than one proposal that delegates considered, based on the wording in option III, paragraph 3. This would have excluded jurisdiction over disputes concerning 'the concurrent consideration of any dispute concerning sovereignty, sovereign rights or jurisdiction or a claim thereto of a State.' Such wording would have excluded almost all disputes where flag State jurisdiction was involved on the high seas.

Finally, it is worth noting the final phrase of article 60(9), that 'nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Section 2 Part XV of the Convention'. This prevents any inference that the jurisdiction of disputes arising under UNCLOS is affected by the exclusions from jurisdiction under the Agreement.

2.4 *Non-Parties to UNCLOS*

A number of non-Parties to UNCLOS opposed the use of Part XV 'mutatis mutandis', as provided for in the Draft and Revised Draft Texts. Some believed that using 'mutatis mutandis' implied that UNCLOS provisions would apply directly to them. There was a strong political opposition to any idea that UNCLOS applied to non-Parties. This lead to a number of proposals that tried to accommodate their position whilst still retaining the use of Part XV in resolving disputes under the Agreement.

One proposal that was made by the CLAM regional group was to establish a settlement process that mirrored Part XV for the non-Parties to UNCLOS.[22] According to this proposal, Part XV would apply mutatis mutandis for Parties

21 See, for example, article 18.

22 *Compilation of outcomes of small group work submitted after the issuance of the 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,* 1 February 2023, A/CONF.232/2023/INF.2, at p. 48.

to UNCLOS. A new paragraph then provided that '[t]he provisions of Part XV and Annexes V, VI, VII and VIII of the Convention are incorporated into this Agreement for the purpose of settlement of disputes involving a Party to this Agreement that is not a Party to the Convention'. This was referred to as a 'mirror' provision. Colombia, the main proponent of this approach, argued that this would mean that Part XV would apply equally to Parties and non-Parties. However, the incorporation of those provisions into the Agreement would avoid the implication that UNCLOS was directly being applied to non-Parties.

This proposal was objected to by some delegations. The concern expressed during the discussions appeared to rest on the possibility of a divergent interpretation of UNCLOS if mirror provisions were used. The opponents of this proposal wanted to avoid any implication that different rules applied to parties and non-Parties.

The text that resolved the difficulty appears in the Agreement in article 60:

1. Disputes concerning the interpretation or application of this Agreement shall be settled in accordance with the provisions for the settlement of disputes provided for in Part XV of the Convention.
2. The provisions of Part XV of and Annexes V, VI, VII and VIII to the Convention shall be deemed to be replicated for the purpose of the settlement of disputes involving a Party to this Agreement that is not a Party to the Convention.

There are a number of key observations to make about the first two paragraphs of article 60. First, the mirroring has disappeared. Article 60(1) is clear that the same process applies to all States, regardless of whether they are Parties or non-Parties to UNCLOS.

Second, there is no reference to 'mutatis mutandis'. Non-Parties would not have found it acceptable to include this language because of the perception that it directly applied UNCLOS to them. Although most delegations would have preferred to retain mutatis mutandis because they believed it added clarity, there was very little opposition to removing it. The comments in the discussion indicated that the lack of reference to 'mutatis mutandis' should not prevent courts and tribunals in reading the application of Part XV with the changes necessary to apply it to the Agreement. It was argued that, in order to apply Part XV meaningfully to disputes arising under the Agreement, tribunals would take a pragmatic approach to applying Part XV and make the necessary changes as a result of treaty interpretation. There is no evidence that States intended for it to apply Part XV in a completely literal manner.

Third, paragraph 2 was inserted to address the concerns expressed by some non-Parties, who wanted it to be clear that the dispute settlement processes derived from the Agreement, rather than UNCLOS. Although the language is

somewhat unusual, the fact that the relevant provisions are 'deemed to be included' is intended to provide political safety for non-Parties. This was not considered to amount to a separate system that created the concerns that a mirror provisions did. This is because paragraph 1 is clear that the same process applies to all Parties to the Agreement, regardless of their position in relation to UNCLOS.

Paragraphs 5 to 7 of article 60 were inserted to enable non-Parties to UNCLOS to make similar declarations and choices that are available to Parties to UNCLOS under Part XV. For example, a non-Party to UNCLOS can, on ratifying the Agreement, make a declaration as to the type of forum it wishes to use in dispute settlement. These are taken from article 287 of UNCLOS. The fact that they are included in the text of the Agreement again reinforces the non-Parties' position that the dispute settlement provisions apply to them through the operation of the Agreement rather than UNCLOS. The formulation here differs from article 30(4) of the UNFSA, which allows non-Parties to make a declaration under article 287. The UNFSA formulation was rejected by non-Parties on the basis that it again implies that UNCLOS applied directly to them.

As can be seen, significant effort went into trying to address the concerns of non-Parties. The basic approach that seemed to prevail during the discussions was a desire to ensure that the dispute settlement provisions would not prevent any State from ratifying the Agreement. The final result is not particulary tidy, but it will hopefully provide the political space for non-Parties to join the BBNJ Agreement, in contrast to the UNFSA, to which only the United States has acceded.

2.5 *Without Prejudice*

Paragraph 8 of article 60 provides that 'The provisions of this article shall be without prejudice to the procedures on the settlement of disputes to which Parties have agreed to as participants in a relevant legal instrument or framework, or as members of a relevant global, regional, subregional or sectoral body concerning the interpretation or application of such instruments and frameworks.'

The primary intention of this paragraph was to ensure that UNCLOS dispute settlement processes would not override dispute settlement provisions in other agreements such as multilateral environmental agreements. The provision reserves dispute settlement process in those agreements for disputes 'concerning the interpretation or application' of those instruments and frameworks.

One potential interpretative question is whether this paragraph operates as an opt-out clause under article 281. Following the *Southern Bluefin Tuna*

arbitration,[23] there is the possibility that a tribunal or court might consider the paragraph rules out application of Part XV of UNCLOS in disputes that arise both under the Agreement and another instrument or framework. However, there is currently no consistent approach to this issue that can be discerned from the jurisprudence, with the tribunal in the *South China Sea* arbitration preferring a different approach.[24]

2.6 *Advisory Opinions*

A further question was whether the COP would be able to request ITLOS deliver advisory opinions on the request of the COP. Despite some strong support, there was also strong opposition. Some delegations were concerned about the possibility that advisory opinions could be used to substitute for contentious cases, a concern that appears to arise from the practice of the International Court of Justice.[25] Another view expressed was that ITLOS does not have the ability to consider requests for advisory opinions beyond those authorised by UNCLOS. This is despite the fact that ITLOS has already established that it does have jurisdiction in some cases.[26]

An option for advisory opinions was included in the dispute settlement chapter of the Further Revised Draft Text and the Further Refreshed Draft Text.[27] A small group then negotiated a narrowing of the option. First, rather than having an option in Part IX on dispute settlement, the provision was moved to paragraph 47(6). The final text reads:

> 6. The Conference of the Parties may decide to request the International Tribunal for the Law of the Sea to give an advisory opinion on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence. A request for an advisory opinion may not be sought on a matter within the

23 *Southern Bluefin Tuna* (*New Zealand/Japan, Australia/Japan*), Award on Jurisdiction and Admissibility (2000) XXIII RIAA 1.

24 South China Sea (Philippines v China) Award on Jurisdiction and Admissibility, 29 October 2015, [223] <https://pca-cpa.org/en/cases/7/> at [224]. For further on this point, see Natalie Klein and Kate Parlett, *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea* (Oxford University Press, 2023) pp. 48–51.

25 See Karin Oellers-Frahm, 'Lawmaking through Advisory Opinions?' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 69, 70; Anthony Aust, 'Advisory Opinions' (2010) 1 Journal of International Dispute Settlement 123, 149.

26 *Seabed Advisory Opinion* (n 9); *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4.

27 The proposals were labelled draft article 55 ter.

> competence of other global, regional, subregional or sectoral bodies, or on a matter that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto. The request shall indicate the scope of the legal question on which the advisory opinion is sought. The Conference of the Parties may request that such opinion be given as a matter of urgency.

This option is clearly circumscribed. First, the advisory opinion may only be requested on a legal question 'on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence.' This prevents a general question about the interpretation of the Agreement from being put to ITLOS. Second, it prevents an advisory opinion from being sought on a matter that involves the consideration of a matter within the competence of other bodies. This would potentially prevent the advisory opinion from touching on matters that involves both the Agreement and another organisation. Depending on how this phrase is interpreted, it may even prevent the Tribunal from considering whether a proposal under the COP would undermine the other organisation. However, it is possible that the Tribunal may consider such an issue if it involves the question of what is 'within the competence' of another body. Finally, the request may not touch on matters regarding sovereignty or territorial claims.

This circumscribed jurisdiction to request an advisory opinion is less than the broad mandate envisaged by some delegations. However, considering that a number of States maintain that the ITLOS cannot have an advisory jurisdiction beyond that provided for in UNCLOS,[28] this compromise represents a useful tool for the COP to use in future if necessary.

3 The Dispute Settlement Provisions in Practice

In this next section I offer some thoughts on areas that may give rise to some debate about how the dispute settlement provisions will work in future disputes.

28 See also Yoshifumi Tanaka, 'Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015' (2015) The Law and Practice of International Courts and Tribunals 318–339, at 319.

3.1 *Reference Back to Part XV of UNCLOS*

One potential issue is how the courts and tribunals will approach the formulation in article 60(1) and (2). Without the express use of 'mutadis mutandis', will they consider a different approach is required? It is clear that Part XV cannot apply directly to disputes arising under the Agreement. For example, article 288 of UNCLOS on jurisdiction, and 293 on applicable law, refer to the Convention. Presumably these provisions would need to be adapted to apply in the context of the Agreement.[29]

Nothing should be read into the decision not to use 'mutatis mutandis' in article 60(1). While this is one formulation that has been employed in the past, nothing in the debate around that paragraph indicated that delegates envisaged Part XV applying *without* the necessary changes – this would be absurd and rid the provisions of their meaning. The phrase was removed due to concerns expressed by non-Parties to UNCLOS.

Of course, one problem facing future courts and tribunals interpreting Part IX of the Agreement is that some provisions from other treaties have been incorporated into the text, while others have not. One example are provisional arrangements as provided for in article 61 of the BBNJ Agreement. In the UNFSA, the first paragraph of article 31 contains the sentence that appears in article 61. However, article 31 of UNFSA goes on to provide for provisional measures to be granted by the court or tribunal, with an option for non-parties to opt out. These provisions were not included in article 61. What does this mean for the availability of provisional measures in disputes under the BBNJ?

There are two ways of interpreting the failure to include the UNFSA provisions on provisional measures. First, the decision not to explicitly refer to provisional measures could reflect an intention that a court or tribunal cannot prescribe provisional measures in a BBNJ dispute. This comes from the fact that article 31(2) and (3) were omitted from article 61, when it would have been possible to include them.

However, a better interpretation is that article 61 refers only to arrangements between the parties, and does not rule out provisional measures, which are, after all, contained in Part XV which is incorporated in article 60. This example indicates the potential challenges for negotiators in picking and choosing which articles from UNCLOS and UNFSA to incorporate directly rather than by reference.

29 Even using 'mutatis mutandis' leaves many questions unanswered. See Liesbeth Lijnzaad, 'Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an Afterthought' in Helene Ruiz Fabri, Erik Franckx, Marco Benatar and Tamar Meshel (eds) *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill, 2020) pp. 161–162.

3.2 *Limitation on Jurisdiction*

A second issue arises from the limitations placed on jurisdiction of courts and tribunals under the Agreement. The desire on the part of some States to restrict the potential jurisdictional application of dispute settlement probably reflects a certain level of dissatisfaction with the broad approach to jurisdiction taken by tribunals under Part XV of the Convention. The provisions in articles 60(8) through (10) clearly impose limitations that go beyond what exist in the Convention. While paragraph 8 is related to the obligation not to undermine other instruments, paragraphs 9 and 10 place restrictions that may need to be interpreted by a tribunal before we know what they mean in practice.

Paragraph 9 of article 60 is very important in that it limits significantly the jurisdiction a court or tribunal may have where a dispute concerns or necessarily involves the concurrent consideration of two types of dispute.

The first is a dispute about whether a particular area is within national jurisdiction or beyond. Two examples come immediately to mind. One is the South China Sea, where the tribunal in the South China Sea arbitration found that no features generated an EEZ, which has the effect of potentially creating a high seas pocket there. This exclusion would mean that no State could argue under the BBNJ Agreement that the Agreement applies to that area. Another potential example is the Southern Ocean, where a number of Antarctic Treaty Parties have territorial claims to Antarctica that are held in abeyance. This provision would probably mean that a dispute could not be brought to a tribunal about whether the BBNJ Agreement applies to the Southern Ocean where a tribunal would have to determine whether the Ocean is high seas or falls within national jurisdiction.

The second dispute that is excluded from jurisdiction involves those concerning sovereignty or other rights over consular or insular land territory. This language comes from article 298(1)(a)(i) which excludes this type of dispute from compulsory conciliation. However, the effect of including it in paragraph 8 has raised the importance of this exception as it automatically excludes any disputes concerning or necessarily involving a dispute over sovereignty or rights to territory. This is in contrast to judicial opinions under UNCLOS, which indicated that a tribunal might consider disputes over territory if it is incidental but necessary to resolve a dispute under UNCLOS.[30] This inclusion was probably an attempt by some delegations to reign in what they might consider overreach by tribunals under UNCLOS.

30 *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*) (Award, 18 March 2015) PCA Case 2011–03.

The effect of these exclusions may not be significant, although I think the first is more important than the second. One concern might be that it could result in States artificially inflating their maritime claims to include areas otherwise beyond jurisdiction in order to exclude the dispute settlement process in the Agreement. This cannot be ruled out, but is probably unlikely to occur.

4 Conclusion

The purpose of this article has been to highlight the reasons for the shape of the dispute settlement provisions in Part IX. The length of article 60 reflects a number of key issues that are addressed above. However, it is important to emphasise that enormous effort was put into discussions around dispute settlement in the final two sessions of the IGC. The President's instructions were that the text should, as much as possible, reflect a consensus position. Therefore, delegations that might have preferred to follow the UNFSA more closely, were required to engage with a minority who wished to see a different approach. A formulation that reflected the concerns of non-Parties to UNCLOS needed to be drafted, and this explains article 60, paragraphs 2 to 7. Paragraphs 9 and 10 of article 60 were an effort to reassure some delegations that the dispute settlement provisions could not be used to bring disputes over territorial or maritime areas before a court or tribunal under the Agreement.

Part IX of the BBNJ Agreement was a compromise to achieve as much agreement as possible. It is certainly not perfectly drafted, and some issues will need to be dealt with by courts and tribunals as disputes arise. Not all legal disputes that might arise as a result of the operation of the Agreement will be able to be dealt with through Part IX. It is to be hoped that other mechanisms within the Agreement, such as the Implementation and Compliance Committee, will provide a forum for disputes over the interpretation of the Agreement to be resolved without engaging Part IX.

Appendix: Part IX Settlement of Disputes

Article 56 Prevention of disputes
Parties shall cooperate in order to prevent disputes.

Article 57
Obligation to settle disputes by peaceful means
Parties have the obligation to settle their disputes concerning the interpretation or application of this Agreement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Article 58
Settlement of disputes by any peaceful means chosen by the Parties
Nothing in this Part impairs the right of any Party to this Agreement to agree at any time to settle a dispute between them concerning the interpretation or application of this Agreement by any peaceful means of their own choice.

Article 59
Disputes of a technical nature
Where a dispute concerns a matter of a technical nature, the Parties concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the Parties concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes under article 60 of this Agreement.

Article 60
Procedures for the settlement of disputes
1. Disputes concerning the interpretation or application of this Agreement shall be settled in accordance with the provisions for the settlement of disputes provided for in Part XV of the Convention.
2. The provisions of Part XV of and Annexes V, VI, VII and VIII to the Convention shall be deemed to be replicated for the purpose of the settlement of disputes involving a Party to this Agreement that is not a Party to the Convention.
3. Any procedure accepted by a Party to this Agreement that is also a Party to the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that Party, when signing, ratifying, approving, accepting or acceding to this Agreement, or at

any time thereafter, has accepted another procedure pursuant to article 287 of the Convention for the settlement of disputes under this Part.

4. Any declaration made by a Party to this Agreement that is also a Party to the Convention pursuant to article 298 of the Convention shall apply to the settlement of disputes under this Part, unless that Party, when signing, ratifying, approving, accepting or acceding to this Agreement, or at any time thereafter, has made a different declaration pursuant to article 298 of the Convention for the settlement of disputes under this Part.
5. Pursuant to paragraph 2 above, a Party to this Agreement that is not a Party to the Convention, when signing, ratifying, approving, accepting or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, submitted to the depositary, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Agreement:
    (a) The International Tribunal for the Law of the Sea;
    (b) The International Court of Justice;
    (c) An Annex VII arbitral tribunal;
    (d) An Annex VIII special arbitral tribunal for one or more of the categories of disputes specified in said Annex.
6. A Party to this Agreement that is not a Party to the Convention that has not issued a declaration shall be deemed to have accepted the option in paragraph 5 (c) above. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration under Annex VII to the Convention, unless the parties otherwise agree. Article 287, paragraphs 6 to 8, of the Convention shall apply to declarations made under paragraph 5 above.
7. A Party to this Agreement that is not a Party to the Convention may, when signing, ratifying, approving, accepting or acceding to this Agreement, or at any time thereafter, without prejudice to the obligations arising under this Part, declare in writing that it does not accept any or more of the procedures provided for in Part XV, section 2, of the Convention with respect to one or more of the categories of disputes set out in article 298 of the Convention for the settlement of disputes under this Part. Article 298 of the Convention shall apply to such a declaration.
8. The provisions of this article shall be without prejudice to the procedures on the settlement of disputes to which Parties have agreed as participants in a relevant legal instrument or framework, or as members of a relevant

global, regional, subregional or sectoral body concerning the interpretation or application of such instruments and frameworks.

9. Nothing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement, provided that nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Part XV, section 2, of the Convention.
10. For the avoidance of doubt, nothing in this Agreement shall be relied upon as a basis for asserting or denying any claims to sovereignty, sovereign rights or jurisdiction over land or maritime areas, including in respect to any disputes relating thereto.

Article 61 Provisional arrangements

Pending the settlement of a dispute in accordance with this Part, the parties to the dispute shall make every effort to enter into provisional arrangements of a practical nature.