

46th COLP - 20-23 September 2023

The Dispute Settlement Provisions of the BBNJ Agreement

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Part IX Settlement of Disputes

Article 56 : Prevention of disputes

Article 57: Obligation to settle disputes by peaceful means

Article 58: Settlement of disputes by any peaceful means chosen by the Parties

Article 59: Disputes of a technical nature

Article 60: Procedures for the settlement of disputes

Article 61: Provisional arrangements

- Were States successful in designing a dispute settlement procedure that serves to facilitate the effective implementation of the agreement?

Draft text (A/CONF.232/2019/6)

- Art. 54 Obligation to settle disputes by peaceful means
> now Art. 57
- Art. 55 Procedures for settlement of disputes
> identical to Art. 30(1)(3)(4) of UNFSA

Further Rev. draft text (A/CONF.232/2022/5)

- Addition of articles 54bis, 54ter, 55bis, 55ter
> now Arts. 56, 59, 61
> Art. 55 ter later moved to Art. 47(7) [advisory opinion]
- A new Option II (non-compulsory DS) added to Art. 55
- What was Art. 55 became Option I; addition of paras on optional exceptions and DS in IFBs > now Art. 60 paras. 4, 7 and 8

IGC 3
Aug 2019

IGC 4
Mar 2022

IGC 5
Aug 2022

IGC 5bis
Feb 2023

- DS provisions identical to Draft text

[Refreshed draft text]
(A/CONF.232/2022/CRP.12)

Further refreshed draft text
(A/CONF.232/2023/2)

[Updated draft text]
(A/CONF.232/2023/CRP.1)

[1:30 am version of the updated draft text]

Rev. draft text (A/CONF.232/2020/3)

- Addition of Article 54 ter ante > now Art. 58
- Reformulation of Art. 55 Option I
- Addition of para. 8 on unsettled disputes concerning sovereignty or other rights over territory > now para. 9 with changes

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Article 56
Prevention of disputes

Parties shall cooperate in order to prevent disputes.

→ repeats the first sentence of Article 28 of UNFSA

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.

→ closely follows the text of Article 27 of UNFSA with some modifications

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.

→ closely follows the text of Article 28 of UNCLOS

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.

→ almost identical to Article 29 of UNFSA

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.

→ repeats Article 31(1) of UNFSA

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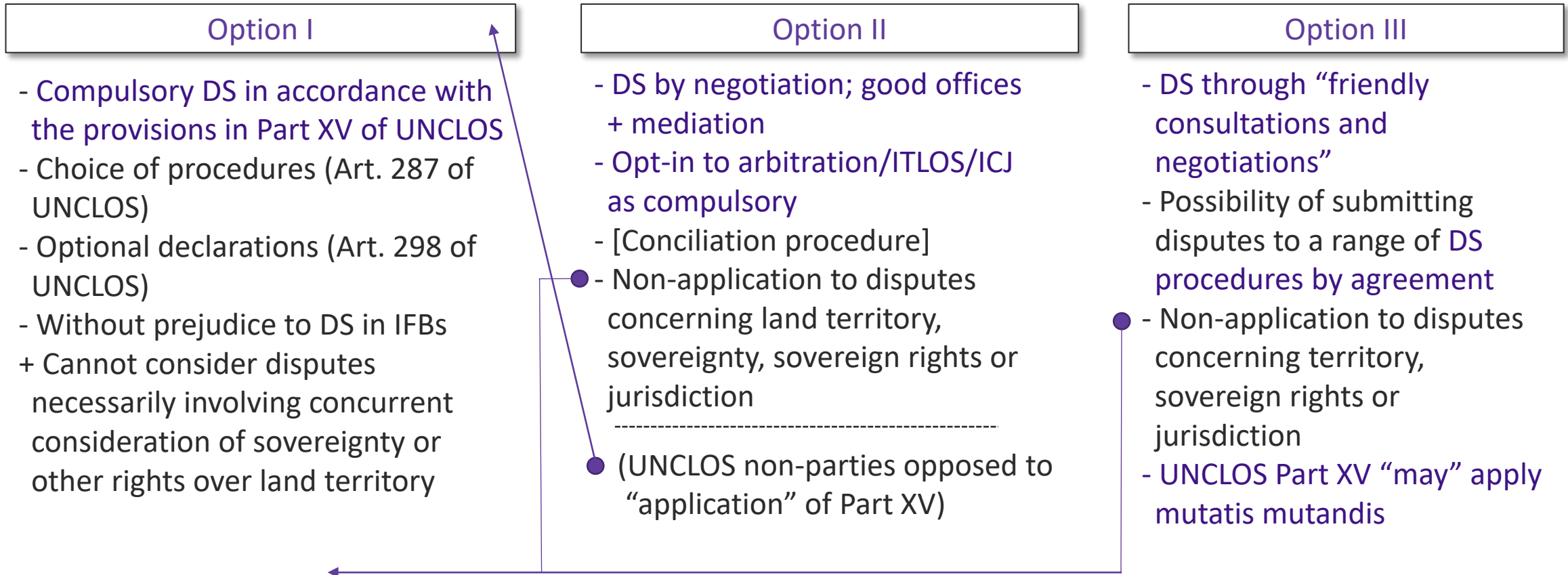
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Q: Compulsory dispute settlement based on UNCLOS Part XV or non-compulsory dispute settlement?



- The majority of delegations were in support of Option I
- Efforts were made to incorporate elements of Option II and III into Option I as much as possible

Further revised draft text

Article 55 **Procedures for the settlement of disputes**

OPTION I:

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.

... apply *mutatis mutandis*, ... whether or not they are also Parties to the Convention

Further refreshed draft text

Article 55 **Procedures for the settlement of disputes**

OPTION I:

1. Disputes concerning the interpretation or application of this Agreement shall, at the request of any party to the dispute, be submitted for binding decision in accordance with procedures for the settlement of disputes provided for in Part XV of the Convention whether or not the parties to the dispute are also Parties to the Convention.

... in accordance with procedures ... in Part XV of the Convention whether or not ... also Parties to the Convention

Agreed text

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

Para. 1: shall be settled in accordance with the provisions ... in Part XV of the Convention

Para 2: The provisions of Part XV and Annexes ... shall be deemed to be replicated ... disputes involving a Party ... that is not a Party to the Convention

Further refreshed draft text

8. 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.

Agreement, Art. 60

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.

The jurisdiction of courts and tribunals under Part IX of the BBNJ Agreement excludes:

- dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction
- dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party

- Provisions are based on dispute settlement provisions of UNCLOS and UNFSA
 - ⊕ Consistency with UNCLOS Part XV
 - Disputes could arise under both BBNJ and UNCLOS (and UNFSA, RFMO Conventions)
 - ⊖ The types/nature of disputes under BBNJ may be different from those arising under UNCLOS or UNFSA
 - UNCLOS Part XV envisages disputes between States regarding rights/obligations allocated to them
 - Disputes under BBNJ Agreement may involve infringement of community interests that may not be broken down into individual State interests
 - ex. Article 25(1) (on ABMTs/MPAs) “Parties shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part.”

 Alternative approaches were not fully explored

 Little discussion on the relationship between Part IX and the implementation and compliance committee (Art. 55)

- Questions remain on the scope of disputes excluded under Article 60(9)
 - One issue that was in the minds of some delegations was the application of the BBNJ Agreement to the South China Sea
- “any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction”
 - the language adopted is very broad (would cover waters around Antarctica or issues involving the continental shelf beyond 200M)
 - however, there is a unique situation in the South China Sea that the legal status of the waters was clarified through a binding decision from a tribunal having jurisdiction under UNCLOS Part XV
 - “concurrent consideration of ...”: is there an issue to “consider”?
 - the proviso on the applicability of UNCLOS Part XV suggest that such issues were considered suitable for consideration under UNCLOS Part XV

- A missed opportunity in designing the dispute settlement to best address the disputes that could arise under the Agreement
- Some States were more concerned about the implications of the dispute settlement provisions BBNJ Agreement for their jurisdictional claims/disputes rather than for the effective implementation of the agreement
- There is still room to discuss the possible role of a multilateral environmental agreement (MEA) – type mechanism when the COP decides on the modalities for the implementation and compliance committee (Art. 55)
 - the relationship between the role of the committee and dispute settlement procedures could be taken into account
- How the dispute settlement procedure is put into operation will be an interesting testing ground for theories related to dispute settlement and compliance mechanisms for multilateral treaties (– but it may also be possible that the shortcomings may lead to the disuse of the procedures)