

BBNJ Treaty and the ITLOS Advisory Jurisdiction

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The Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction, convened in New York, adopted 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* (“BBNJ Agreement” or “Agreement”) by consensus on 19 June 2023. Currently, the instrument has been signed by 84 States, including China, the UK, the USA, the European Union, and all its Members. This marks a significant breakthrough after years of lengthy negotiations and diplomatic efforts to protect marine biodiversity and promote its sustainable use in areas beyond national jurisdiction (“ABNJ”) covering almost two-thirds of the global oceans with all its riches and resources.



The process began almost two decades ago, when the UN General Assembly established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity in ABNJ. However, the intergovernmental conference was only convened by the UN General Assembly in 2017.

The new Agreement is not only an addition to the regime of the seas established under the 1982 UNCLOS but also further develops a response to recent biological loss and degradation of ecosystems in the ocean caused by climate change, pollution, and overuse of marine resources. However, effective implementation of the newly available tools and compliance with the BBNJ Agreement regime depends on a rigid dispute settlement mechanism. This post aims to present only one but innovative aspect of this mechanism – the advisory jurisdiction of the International Tribunal for the Law of the Sea (other features were discussed previously here and here).

During the negotiations, several proposals were made and discussed on strengthening the role of the ITLOS (see Y. Shi), including designing the Tribunal as a default dispute settlement option instead of Annex VII arbitration or establishing a special chamber responsible for adjudicating cases under the BBNJ Agreement. None of those survived into the final draft, except for the advisory function. Interestingly, a relevant provision pertaining to advisory opinions was included at the later stage of negotiations in the *Further Revised Draft Text of 1 June 2022*. It had a simple wording conferring on the Conference of the Parties (“CoP”) the power to request the ITLOS to give an advisory opinion “on any legal question arising within the scope of this Agreement”. The final text, however, was a compromise that includes substantive limitations of the advisory jurisdiction. Art. 47(7) of the BBNJ Agreement reads:

“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 shall not be sought on a matter within the competences of other global, regional, subregional or sectoral bodies, or on a matter that necessarily involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto, or the legal status of an area as within national jurisdiction. 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”.

On the one hand, it is a significant improvement compared to other sectoral conventions at the intersection of the law of the sea and international environmental law. It is, in fact, the first universal, truly multilateral, international legal instrument conferring upon the full International Tribunal for the Law of the Sea the advisory jurisdiction. This special character has been recognized by States immediately after the conclusion of the Intergovernmental Conference, e.g. by the Chinese and Italian delegations. It is also an important voice of the international community in the controversy over the advisory function of the Tribunal after its 2015 Sub-Regional Fisheries Commission Opinion, not to mention the pending request from the Commission of Small Island States. Within this context, the advisory opinions provision seems like an explicit acknowledgement of the advisory function inscribed into Art. 21 of the ITLOS Statute.

Additionally, in the light of the objective of the BBNJ Agreement in its Art. 2 – the conservation and sustainable use of marine biological diversity in ABNJ, its principles stipulated in Art. 7 – particularly the common heritage of humankind, and the *erga omnes* and *erga omnes partes* character of many of the environmental obligations within the BBNJ (See 2011 ITLOS Advisory Opinion, ¶ 180; J.Mossop), typical inter-State proceedings may not be frequent and adequate venues for addressing conflicting interests. As the BBNJ Agreement regulates States’ activities beyond national jurisdiction, it shifts the centre of gravity from bilateral disagreements – like maritime delimitation cases – to community interest litigations. The advisory channel would probably be more effective and appropriate forum in this regard, allowing also the procedural engagement of all interested States (Art. 133 by virtue of Art. 138(3), ITLOS Rules).

On the other hand, the wording of the provision is disappointing as its meticulous drafting significantly restricts the Tribunal’s reach. Firstly, the request of the CoP has to meet four positive prerequisites for triggering the advisory jurisdiction: i) there has to be a proposal before the CoP; ii) the proposal needs to pertain to any matter but within CoP competences; iii) a possible request needs to be on a legal question; and finally, iv) its subject-matter shall address the conformity of the proposal and the BBNJ Agreement. There are, however, also negative conditions, the occurrence of which precludes the ITLOS advisory jurisdiction. A request shall not touch upon: i) matters within the competences of other international

institutions (“global, regional, subregional or sectoral bodies”); ii) disputes on sovereignty or other rights over continental or insular land territory or a claim, even if only a concurrent consideration is necessary; iii) the legal status of an area as within national jurisdiction. Negative conditions ii) and iii) replicate the limitations envisaged in Art. 60(9) and in general relate to traditional maritime inter-State disputes and as such should not normally be addressed through advisory channel. Notwithstanding, the negative condition i) is very far-reaching and problematic, as it excludes altogether the ITLOS jurisdiction to address issues that fall within the competences of other institutions, probably even if shared with organs established under the BBNJ Agreement.

Despite those extensive limitations not found in other legal instruments conferring advisory jurisdiction on international courts and tribunals (e.g. Art. 96(1) UN Charter; Art. 159(10) & 191 UNCLOS) that are normally restricted only by the principle of speciality (see e.g. Nuclear Weapons Advisory Opinion, ¶¶ 25-6), there is a room for the International Tribunal for the Law of the Sea to play a coordinating function within the fragmented regime and governance of ABNJ. Art. 47 of the BBNJ Agreement envisages the competence of the CoP mostly in technical matters (budgetary and procedural issues) and those relating to the implementation of the Agreement. But its section (6)(c) stipulates that the CoP has also a mandate to:

“promote, including by establishing appropriate processes, cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, with a view to promoting coherence among efforts towards the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.

Should there be a relevant proposal in this regard before the CoP, the ITLOS could be requested to provide legal guidance. But it would need to navigate through the negative condition of not addressing matters within competences of exactly the same global, regional, subregional, and sectoral bodies. Only the future practice of both the CoP and the Tribunal will show whether this balance is to be achieved. Notwithstanding, it remains without question that general and cross-cutting questions – like the ones before the ICJ and ITLOS on climate change and obligations of State – would not be permitted under Art. 47(7)

Importantly, the BBNJ Agreement has institutionally strengthened the International Tribunal for the Law of the Sea, although conservatively. It is the first environmental and law of the sea instrument that confers on the full Tribunal advisory jurisdiction by the request of the Conference of the Parties. Most recent State practice unequivocally indicates that the international community is willing to use this mode of legal guidance in protecting and preserving the Commons and its riches. One may see this innovation as a meaningless addition, but it has the potential of becoming a tool of coordination in the fragmented framework of ABNJ.

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