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THE DISPUTE SETTLEMENT SYSTEM OF THE FUTURE THIRD UNCLOS IMPLEMENTATION AGREEMENT ON BIODIVERSITY BEYOND NATIONAL JURISDICTION (BBNJ): A PRELIMINARY ANALYSIS

Eduardo JIMÉNEZ PINEDA[1]

I. INTRODUCTION – II. THE DISPUTE SETTLEMENT SYSTEM OF THE LAW OF THE SEA CONVENTION AND ITS RECEPTION IN THE 1995 IMPLEMENTATION AGREEMENT – III. THE POSSIBLE SETTLEMENT OF DISPUTES IN THE FUTURE BBNJ IMPLEMENTATION AGREEMENT – IV. CONCLUSIONS

ABSTRACT: This article analyses the possible system of dispute settlement within the future implementation agreement of 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. In order to explain the dispute settlement system foreseen in UNCLOS Part XV, that likely will be adopted by the BBNJ Agreement, its main aspects are addressed in addition to, specially, its reception by the Part VIII of the implementation agreement on straddling fish stocks and highly migratory fish stocks. In this sense, the current terms of the draft agreement point out a new broad reception of the

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dispute settlement system of the Convention. Finally, taking into account the highly technic character of the disputes in this field, the article reflects on the possible convenience of changing the default mechanism for these disputes from the Annex VII arbitration to a more specialized jurisdictional organ, either the Annex VIII special arbitration or the International Tribunal for the Law of the Sea.

KEYWORDS: BBNJ agreement, settlement of disputes, UNCLOS Part XV, Straddling Fish Stocks Agreement, Law of the Sea.

EL SISTEMA DE ARREGLO DE CONTROVERSIAS DEL FUTURO TERCER ACUERDO DE APLICACIÓN DE LA CNUDM SOBRE BIODIVERSIDAD MARINA MÁS ALLÁ DE LA JURISDICCIÓN NACIONAL: UN ANÁLISIS PRELIMINAR

RESUMEN: Este trabajo estudia el posible sistema de arreglo de controversias del futuro Acuerdo de aplicación de la Convención de las Naciones Unidas sobre el Derecho del Mar relativo a la conservación y el uso sostenible de la diversidad biológica marina de las zonas situadas fuera de la jurisdicción nacional. Con objeto de contextualizar el sistema de solución de controversias previsto en la Parte XV de la CNUDM que previsiblemente acogerá el nuevo Acuerdo BBNJ, se exponen sus principales aspectos, así como, sobre todo, su recepción en la Parte VIII del Acuerdo de aplicación de 1995, el relativo a las especies transzonales y altamente migratorias. En este sentido, la formulación actual del borrador de acuerdo apunta a nueva recepción amplia del sistema de solución de controversias de la Convención. Finalmente, considerando el carácter altamente técnico de las controversias en esta materia, se reflexiona sobre la posible conveniencia de conferir la condición de mecanismo residual para el arreglo de estas futuras controversias a un medio jurisdiccional más especializado que el del arbitraje general del Anexo VII de la Convención, ya sea el del arbitraje especial previsto en el Anexo VIII o el del Tribunal Internacional del Derecho del Mar.

PALABRAS CLAVE: acuerdo BBNJ, arreglo de controversias, Parte XV de la CNUDM, Acuerdo de aplicación de 1995, Derecho del Mar.

LE RÈGLEMENT DES DIFFÉRENDS DANS LE FUTUR TROISIÈME ACCORD D'APPLICATION DE LA CONVENTION SUR LA BIODIVERSITÉ MARINE AU-DELÀ DE LA JURIDICTION NATIONALE : UNE ANALYSE PRÉLIMINAIRE

RÉSUMÉ: cet article étudie le possible règlement des différends dans le futur accord d'application de la Convention des Nations Unies sur le droit de la mer relative à la préservation et l'utilisation durable de la biodiversité marine dans les zones situées au-delà de la juridiction nationale. Aux fins de contextualiser le système de règlement des différends prévue par la Partie XV de la CNUDM que probablement sera accueilli par le nouvel Accord BBNJ, leurs aspects principales sont exposés ainsi que sa réception dans la Partie VIII de l'accord de application de 1995 relative à la conservation et à la gestion des stocks chevauchants et des stocks de poissons grands migrateurs. À cet égard, la formulation actuelle du projet de convention vise à une nouvelle large réception du system de règlement des différends de la Convention. Finalement, compte tenu du caractère technique de ces différends, on réfléchit sur la possible convenance de conférer la condition de mécanisme résiduel pour le règlement des futurs différends à un moyen juridictionnelle plus spécialisé que l'arbitrage général de l'annexe VII de la Convention, ou bien l'arbitrage spécial prévue par l'annexe VIII, ou bien le Tribunal International du Droit de la Mer.

MOTS-CLÉS: accord BBNJ, règlement des différends, Partie XV de la CNUDM, accord d'application de 1995, droit de la mer.

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I. INTRODUCTION

On 24 December 2017, the United Nations General Assembly adopted its Resolution 72/249 by means of which it convened an Intergovernmental Conference on a new implementation agreement of the United Nations Convention on the Law of the Sea (UNCLOS or the Convention)[2], related to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (Agreement on Biodiversity Beyond National Jurisdiction or BBNJ Agreement)[3].

Since the beginning of this intergovernmental conference, several authors have studied the different legal issues related to this agreement in negotiation in addition to its multiple implications. In the event that this agreement would be adopted, as expected, it would be the third UNCLOS implementation agreement, following the Part XI implementation agreement and the 1995 Implementation Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter, 1995 Implementation Agreement)[4]. However, an aspect that has been less analysed by the authors, as a result of the uncertain status of the matter of substance, is the hypothetical dispute settlement system that the future convention would include. Moreover, I am convinced of the interaction between the substantive provisions and the provisions concerning the settlement of disputes.

This article will consider the different proposals presented in the negotiations in order to reflect on the possible dispute settlement system

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[2] As it is known, the Convention was negotiated and finally adopted within the framework of the Third United Nations Conference on the Law of the Sea.

[3] Intergovernmental Conference on 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 (General Assembly resolution 72/249). The official documents about the negotiation of this new implementation agreement can be accessed in https://www.un.org/bbnj/. To this respect, see Vázquez Gómez, E. M., "La protección de la diversidad biológica marina más allá de la jurisdicción nacional. Hacia un nuevo acuerdo de aplicación de la Convención de Naciones Unidas sobre el Derecho del Mar", *Revista Electrónica de Estudios Internacionales*, Vol. 37, 2019, pp. 1 ss.

[4] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, adopted in New York on 4 August 1995 and that entered into force on 11 December 2001. 34 *ILM* 1547, 1995.

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that would apply. Due to the fact that the most recent draft (the *revised draft text*) foresees the application *mutatis mutandis* of the UNCLOS Part XV to the disputes concerning the interpretation or application of the BBNJ agreement, this article will firstly refer to the UNCLOS system of settlement of disputes and to its reception by the 1995 Implementation Agreement. This article, subsequently, will focus on the provisions concerning dispute settlement foreseen in the latest draft text presented in the negotiations within the intergovernmental conference, particularly in its third and fourth sessions.

II. THE DISPUTE SETTLEMENT SYSTEM OF THE LAW OF THE SEA CONVENTION AND ITS RECEPTION IN THE 1995 IMPLEMENTATION AGREEMENT

The Part XV of the UNCLOS, untitled *settlement of disputes*, consists of twenty articles (279-299, inclusive), divided into three sections. The dispute settlement system established by those articles aims to conciliate and combine, essentially, the obligation to settle the disputes by jurisdictional means and the respect to the will and sovereignty of the States parties[5]. On the one hand, the obligation is developed in the second section by regulating the submission of the disputes -not solved in accordance with the first section- to compulsory procedures entailing binding decisions. On the other hand, the sovereignty of the State is concreted both in the free choice of means (established in several provisions of the first section) and in the third section by means of several limitations and facultative exceptions to the compulsory jurisdiction that entail the exclusion of some kinds of disputes from the compulsory dispute settlement system.

Within the first section (*general provisions*), it must be noted, in my opinion, that besides the general obligation of peaceful settlement (article 279), the priority is given to the means agreed by the parties, since according to article 281 the dispute just will be submitted to the proceedings foreseen in the Part XV in case that a solution has not been reached by that means. Whether the means is agreed between the parties, either in an agreement or in another way,

[5] Rey Aneiros, A., "El sistema de solución de controversias de la Convención de las Naciones Unidas sobre el Derecho del Mar", in Vázquez Gómez, E. M., Adam Muñoz, M. D, Cornago Prieto, N. (ed.), *El arreglo pacífico de controversias internacionales*, Tirant Lo Blanch, 2013, pp. 225 ss, in particular, p. 228.

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in accordance with article 282 that very proceeding will apply in spite of the compulsory proceedings established in the second section of Part XV[6].

In any case, according to UNCLOS article 286 (the first article of the second section), whether the States parties in a dispute concerning the interpretation or application of the Convention have not settled it in accordance with the first section, any dispute (by virtue of the third section) shall "be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section"[7]. The international tribunals that can have jurisdiction pursuant to this section, following the order of article 287.1 (*choice of procedure*), are: a) the International Tribunal for the Law of the Sea (ITLOS), established in accordance with Annex VI of the Convention; b) the International Court of Justice; c) an arbitral tribunal constituted in accordance with the Annex VII of UNCLOS; and, d) a *special* arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein[8]. Regarding these four compulsory procedures, also the first paragraph of article 287 disposes that the States parties, "when signing, ratifying or acceding to this Convention or at any time thereafter, shall be free to choose, by means of a written declaration, one or more" of these means for the settlement of disputes[9]. As such, this is a flexible mechanism concerning

[6] Casado Raigón, R, "Règlement des différends", in Vignes, D., Cataldi, G., Casado Raigón, R. (ed.), *Le droit international de la pêche maritime*, Bruselas, Bruylant, 2000, pp. 322 ss. See also Casado Raigón, R., "Procedures entailing binding decisions and disputes concerning the interpretation or application of the Law of the Sea", in Boschiero, N, Scovazzi, T, Pitea, C, Ragni, C. (ed.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves,* Springer, 2013, pp. 245-256.

[7] Article 286, untitled *application of procedures under this section*, which is the first article of the second section untitled *compulsory procedures entailing binding decisions*, establishes: "subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section".

[8] Godio, L, "La fórmula Montreux y la III Conferencia de las Naciones Unidas sobre el Derecho del Mar (1973-1982)", in Godio, L. (ed.), *El sistema de solución de controversias de la Convención de las Naciones Unidas sobre el Derecho del Mar: contribuciones de su experiencia*, Buenos Aires, Editorial Universitaria de Buenos Aires, 2019, pp. 81 ss.

[9] Virzo, R., *Il regolamento delle controversie nel Diritto del Mare: rappoti tra procedmenti*, CEDAM, Dipartimento di Scienze giuridiche, Collana di Studi 4, 2008, pp. 69 ss.

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both the choice of the procedure or procedures and the moment of the choice[10].

In my opinion, the most relevant paragraphs of article 287 are its third, fourth and fifth paragraphs. In accordance with the fourth paragraph, whether the parties in a dispute, choosing among the jurisdictional means foreseen in this section, "have accepted the same procedure for the settlement of the dispute", it consequently "may be submitted only to that procedure, unless the parties otherwise agree". Nonetheless, in cases where the States parties in a dispute have not declared its preference by the same compulsory procedure for the settlement of the dispute, pursuant to paragraph five "it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree". Moreover, according to paragraph three, "a State Party, which is a party to a dispute not covered by a declaration in force, *shall be deemed to have accepted arbitration in accordance with Annex VII*" (emphasis added). Thus, these two paragraphs (fifth and third) of article 287 turn Annex VII arbitration into the default mechanism, the residual procedure or closing means of the compulsory system of settlement of disputes concerning the interpretation or application of UNCLOS.

In this sense, it must be highlighted that the majority of UNCLOS States parties have not made a declaration pursuant to article 287, paragraph one[11]. The study of the States parties' declarations shows that, nowadays, just 51 States among the 167 States (plus the European Union) parties have made a declaration, choosing one or several compulsory procedures entailing binding decisions. Consequently, as a result of the lack of choice of the other 116 States, not exercising their rights, it can be deduced in my opinion the preference (*the choice*) in the practice, at least tacitly, by UNCLOS Annex VII arbitration as

[10] This flexibility is not "per se" an obstacle to the fulfilment of two formal requirements, namely: the declarations will be written and, pursuant to paragraph eighth of article 287, "shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties". Moreover, in accordance with the seventh paragraph, whether a State party makes "a new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree".

[11] The declarations of States parties in the United Nations Convention on the Law of the Sea as well as the status of this treaty can be consulted in the United Nations Treaty Collection (https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, last accessed on 27/05/2021).

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the compulsory means for the settlement of disputes. As a result, I deem that Annex VII arbitration is a fundamental procedure within the compulsory system of dispute settlement of the Convention and, in its condition of default mechanism, it is conceived as the most important means[12].

As discusses above, the system of settlement of disputes of Part XV is subject to the limitations and exceptions foreseen in its third section. Pursuant to these limitations and exceptions some categories of disputes are excluded (with automatic and/or facultative nature) from such a system of dispute settlement[13]. In addition, these limitations and exceptions may be interesting regarding the future BBNJ Agreement, since the topics that it will likely regulate will be related with some of those categories, in particular, the marine scientific research activities and fisheries, even though the activities in areas beyond national jurisdiction are not included.

Outside of these limitations, and also because of its relationship with the new agreement, it is relevant to mention the dispute settlement system that applies to the activities carried out in the Area, that is to say, in areas beyond national jurisdiction. In accordance with UNCLOS article 133, Area resources means "all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules". Consequently, these are non-living resources, the kind of resources that are the object of the new implementation agreement. Having said that, with regards to the disputes about Part XI, regulating the Area, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea will be the competent forum in accordance with the fifth section of Part XI[14].

On the other hand, within Part VIII of the 1995 Implementation Agreement, concerning the peaceful settlement of disputes, its article 30 clearly stands out. That article establishes primarily the application *mutatis mutandis* of the UNCLOS Part XV to the disputes between States parties in the 1995 Implementation Agreement concerning its interpretation or application, whether or not those States are parties in the 1982 Convention. Besides, its article 30 establishes the application for the determination of the dispute

[12] Casado Raigón, R., "Règlement des différends"... *cit.*, p. 333.

[13] García García-Revillo, M., *The contentious and advisory jurisdiction of the International Tribunal for the Law of the Sea*, Brill, Nijhoff, 2015, pp. 78 ss.

[14] *Ibidem*, pp. 102 ss.

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settlement means -and if the States have not declared its choice regarding the disputes related to the 1995 Agreement- of the declarations made by UNCLOS States parties pursuant to its article 287.1[15].

Within the framework of the system of settlement of disputes concerning the interpretation or application of this 1995 Implementation Agreement, it is particularly interesting the reception of the UNCLOS Part XV. As Casado Raigón points out, this reception was logic since it was an agreement for the implementation of the provisions of the Convention[16]. Moreover, article 4 of the 1995 Agreement establishes that this "Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention". Furthermore, as Casado Raigón recalls, this Agreement -as a result of its article 30- receives UNCLOS Part XV "on a large scale" due to the application *mutatis*

[15] Article 30, untitled "procedures for the settlement of disputes", establishes:

> 1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.
>
> 2. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.
>
> 3. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.
>
> 4. A State Party to this Agreement which is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party which is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with Annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in Annex V, article 2, Annex VII, article 2, and Annex VIII, article 2, for the settlement of disputes under this Part.
>
> 5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

[16] CASADO RAIGÓN, R., "Règlement des différends"... *cit.*, pp. 354 ss.

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mutandis of all its provisions to the settlement of the disputes concerning the interpretation or application of the 1995 Implementation Agreement. Moreover, it largely receives UNCLOS Part XV because of its application "to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties"[17].

Considering the *renvoi* made by article 30 of the 1995 Agreement, article 32 seems to be meaningless when it establishes that "article 297, paragraph 3, of the Convention applies also to this Agreement". Thus, as Casado Raigón upholds, it seems difficult to understand why the Agreement expressly establishes that the exceptions of article 297, paragraph 3, also applies to the Agreement considering the previous *renvoi* to the Part XV as a whole[18]. Nevertheless, it can also be argued that the automatic exceptions of article 297 directly related to fisheries are the exceptions of its paragraph three, but in applying this provision to the 1995 Implementation Agreement the result is exactly the same than the one in the Convention, namely: the disputes concerning the conservation and sustainable use of straddling fish stocks and highly migratory fish stocks related to the Exclusive Economic Zone (EEZ) are excluded of the jurisdiction of the court or tribunal; whereas the disputes arising in the high seas are subjected to the jurisdiction of the competent forum[19]. As Casado Raigón concludes in this regard, the kind of provision included in article 32 entails "a high risk of distortion in the appreciation of the rights of the coastal State and of the rights of another State for the fishing of straddling fish stocks and highly migratory fish stocks"[20].

Regarding the determination of the competent forum and considering the declarations made by the States parties pursuant to UNCLOS article 287, following the reasoning developed by professor García-Revillo of the 1995 Implementation Agreement in connection with the jurisdiction of ITLOS, at this time, among the 88 States parties both in the Convention and in the Agreement, only Canada has made a specific declaration concerning the

[17] Article 30, paragraph two, of the 1995 Agreement.

[18] Casado Raigón, R., "Règlement des différends"... *cit.*, pp. 354 ss.

[19] *Ibidem*, p. 359.

[20] *Ibidem*.

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1995 Agreement, choosing the UNCLOS Annex VII arbitration[21]. Taking into consideration the other 87 States parties in both international legal instruments, there are 32 States which have made declarations pursuant to UNCLOS article 287. Accordingly, to the determination of the competent forum those declarations shall apply[22]. For their part, the other 55 States parties in both treaties that have not made any declaration within the framework of the Convention are subject, as a result of its article 287 (paragraph three), to the default forum which is the Annex VII arbitration.

In accordance with the paragraph three of its article 30, the 1995 Implementation Agreement, as Casado Raigón and García-Revillo point out, projects its dispute settlement system (and, as such, the system of the 1982 Convention) to the disputes concerning the interpretation or application of other agreements referred to the straddling fish stocks and highly migratory fish stocks[23]. As both authors upholds, an interpretation that I agree with, this article is perfectly compatible with the UNCLOS Part XV and, in particular, with its article 288, paragraph two[24], aimed at a generalization *ratione materiae* and *ratione personae* of its dispute settlement system. Thus, it must be welcomed[25].

[21] García García-Revillo, M., "Declarations Pursuant to Article 287 of the UNCLOS", *China Oceans Law Review*, vol. 16, nº 3, 2020, pp. 37 ss.

[22] The 32 States parties referred are, in addition to Canada, the following: Australia, Austria, Bangladesh, Belgium, Chile, Croatia, Denmark, Ecuador, Estonia, Fiji, Finland, Germany, Ghana, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Norway, Oman, Portugal, Russian Federation, Saint Vincent and the Grenadines, Slovenia, Spain, Sweden, Thailand, Trinidad and Tobago, Ukraine, United Kingdom of Great Britain and Northern Ireland and Uruguay.

[23] Casado Raigón, R., "Règlement des différends"... *cit.*, pp. 358-360; and, García García-Revillo, M., *El Tribunal Internacional del Derecho del Mar: origen, organización y competencia*, Ministerio de Asuntos Exteriores y Cooperación, 2005, p. 452.

[24] Article 288, paragraph two, establishes: "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement".

[25] Among the agreements that receive the dispute settlement system of the 1995 Agreement and as a consequence the system of the UNCLOS Part XV, the following can be mentioned: 1) *Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific ("Galapagos Agreement")*, UN, DOALOS, *Law of the Sea Bulletin nº 45*, 2001, pp. 78-86); 2) *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 40 ILM 278*, 2001; 3) *Convention on the Conservation and Management of Fishery*

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III. THE POSSIBLE SETTLEMENT OF DISPUTES IN THE FUTURE BBNJ IMPLEMENTATION AGREEMENT

Along the intergovernmental conference, the negotiation about the provisions concerning the settlement of the disputes on the interpretation or application of this future implementation agreement is taking up limited time. Nevertheless, the different delegations share that it is necessary the inclusion of a clause for the settlement of these disputes[26].

The positions of the different delegations in the four sessions of the intergovernmental conference until today can be summarized into four main proposals, that reflect the positions of different States[27]. These proposals are: 1) to maintain the current article 55 of the draft text (that will be developed later) presented in the third substantive session, which indeed receives the UNCLOS system[28]; 2) to modify the aforementioned article 55 in order to

Resources in the South-East Atlantic Ocean, *41 ILM 257*, 2002; 4) *Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries*, Report of the 23rd Annual Meeting of NEAFC, pp. 37-38 (Annex K, pp. 27-29); 5) *Southern Indian Ocean Fisheries Agreement*, https://www.apsoi.org/sites/default/files/documents/SIOFA%20AGREEMENT_EN.pdf; 6) *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, http://www.sprfmo.int/assets/Basic-Documents/Convention-web-12-Feb2018.pdf; 7) *Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean*, https://www.mofa.go.jp/policy/treaty/submit/session183/pdfs/agree-05_01.pdf; 8) *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission*, http://spcsrp.org/spcsrp/sites/default/files/csrp/documents/csrp2012/csrpCMA_version_originale_juin_2012_fr.pdf; or, 9) *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean. DOUE L* 73/3, 15/03/2019. All these webs last accessed on 28/05/2021.

[26] Mossop, J., "Dispute settlement in the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction", *The blog of the Norwegian Centre for the Law of the Sea,* https://site.uit.no/nclos/2019/12/23/dispute-settlement-in-the-new-treaty-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/, last accessed on 27/05/2021, pp. 1-2.

[27] In this sense, I will follow Yubing Shi in his article "Settlement of disputes in a BBNJ agreement: options analysis", *Marine Policy*, vol. 122, 2020, pp. 104 ss. Besides, in order to summarize these proposals I have researched the following webs: https://www.un.org/bbnj/content/documents, https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf, https://enb.iisd.org/oceans/bbnj/igc1/, https://enb.iisd.org/oceans/bbnj/igc2/, https://enb.iisd.org/oceans/bbnj/igc3/, all last accessed on 28/05/2021.

[28] In the fourth substantive session a *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

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strengthen the position of ITLOS by means of different formulas, that will be discussed later[29]; 3) to maintain the current wording of article 55 even though on a voluntary application basis[30]; and, 4) to consider that this kind of disputes have a technical nature, and as such these disputes must be submitted to special arbitral tribunals of experts chosen by the States parties[31].

The distinct proposals to strengthen the position of ITLOS as a means for the settlement of the disputes concerning this future implementation agreement can be summarized also in the following five proposals. Firstly, to turn the Tribunal into the default mechanism, being primarily necessary to adapt UNCLOS article 287[32]. Secondly, to create an *ad hoc* chamber in the Tribunal competent to deal with the disputes related to the future BBNJ agreement[33]. Thirdly, to make the already existing Seabed Disputes Chamber competent over the hypothetical disputes concerning the new implementation agreement[34]. Fourthly, to allow the Tribunal to render advisory opinions about the interpretation or application of the new agreement[35]. Fifth and lastly, to establish a new judicial organ using ITLOS as a model or to increase the jurisdiction of ITLOS that (according to the proposing State) lacks it in order to deal with the disputes concerning the new treaty still in negotiation[36].

biological diversity of areas beyond national jurisdiction)was presented, even though this article 55 (and also the article 54, that will be developed later) has the same wording than the previous draft text.

[29] This position is defended by the European Union and its Member States, New Zeland, Australia, Iceland, Switzerland, Morocco, the CARICOM (in favour of highlighting the already existing possibility according to UNCLOS article 290 for the States to request the adoption of provisional measures), South Africa and Fiji.

[30] In favour of this position are Turkey, China and Colombia.

[31] The Latin American Like Minded States (with States like Argentina, Brazil or Chile) uphold this possibility.

[32] This possibility has been supported by States like Nigeria or Sri Lanka.

[33] This proposal has been suggested, among others, by the group of Pacific Small Island Developing States (PSIDS).

[34] Although it is a proposal that has been discussed in the negotiations, there has not been a State particularly interested in its inclusion.

[35] This proposal has been defended by New Zeland or Jamaica.

[36] This proposal has been only argued by Micronesia.

In spite of the very different proposals suggested, it seems that the system of dispute settlement of the Convention is a model followed in practice that the negotiators of new BBNJ agreement are taking into account for the establishment of the dispute settlement system in the forthcoming agreement. In fact, considering the provisions in this regard included in the latest draft text, it seems feasible to sense that, in a certain way, the future system for the settlement of the disputes concerning the interpretation or application of the future agreement will follow, *mutatis mutandis*, the dispute settlement system of the UNCLOS, probably in a similar manner as it is done by the Part VIII of the 1995 Implementation Agreement.

As a result of the technologic and scientific progress in addition to the potential resources placed in areas beyond national jurisdiction, the possibility of arising in medium term disputes in this matter is very likely. As such, the importance of its dispute settlement system can be reckoned. Despite this intuition, it is true that it is still to be seen such a system. For the time being, the latest *draft text* of this possible multilateral treaty can be analysed: 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*, presented in November 2019[37]. In this regard, this draft text includes a Part IX concerning the *settlement of disputes*, that has two possible provisions.

On the one hand, the draft article 54, titled *Obligation to settle disputes by peaceful means* and that has the following content: "States Parties have the obligation to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". From the interpretation of this potential provision, it can be deduced that it is just a generic provision in accordance to which the future States parties "have the obligation to settle their disputes" throughout the means of peaceful settlement provided by the International Law. These means have been developed since the 1899 Convention for the Pacific Settlement of International Disputes, adopted in the framework of the First Hague Peace Conference[38].

[37] As referred above, the revised draft text can be consulted in https://undocs.org/en/a/conf.232/2020/3, last accessed 28/05/2021.

[38] Baker, B., "Hague Peace Conferences (1899 and 1907)", in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, 2009.

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Since the principle of peaceful settlement of international disputes is part of the General International Law and has an *erga omnes* obligation -as it is expressly proclaimed by the Declaration on the Principles of International Law adopted by the Resolution 2625 (XXV) of the United Nations General Assembly and the Manila Declaration on the Peaceful Settlement of International Disputes[39]- it can be redundant the express inclusion of such a provision. Nonetheless, the analysis of other dispute settlement systems in Law of the Sea (the first section of UNCLOS is a clear example) points out that it is usual for them to establish a first article in this regard. This provision, in the case of the new implementation agreement, would result in the priority of the will of the States parties over the treaty, whose system of dispute settlement would apply when, having chosen a non-jurisdictional procedure, the parties would have not been able to reach a settlement[40].

On the other hand, it is much more interesting in my view the draft text of the article 55, titled "procedures for the settlement of disputes", that foresees the application, *mutatis mutandis*, of the provisions included in UNCLOS Part XV, whether or not the States parties in that dispute are also parties to the Convention. Particularly, according to its first paragraph, the "provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention". Thus, it can be deduced that this provision is almost identical to the first paragraph of the article 30 of the 1995 Implementation Agreement. Accordingly, it would be a broad reception, also "on a large scale", of the dispute settlement system of the Convention.

Analogously to the 1995 Implementation Agreement and UNCLOS, it is possible that a State would be party to this new implementation agreement and not to UNCLOS (one may think in the United States of America). Accordingly, the second and third paragraphs of the draft article 55 would enable the States to make declarations for the forum choice (pursuant to UNCLOS article 287) and also to nominate -for the purposes of conciliation

[39] Resolution 37/10 adopted by the General Assembly of 15 November 1982.

[40] Among other, it can be mentioned the article 15, paragraph one, of Nairobi International Convention on the Removal of Wrecks, adopted on 18 May 2007 and entered into force on 14 April 2015 (https://www.imo.org/en/About/Conventions/Pages/Nairobi-International-Convention-on-the-Removal-of-Wrecks.aspx, last accessed 31/05/2021).

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and arbitration- "conciliators, arbitrators and experts" for the settlement of the disputes concerning this new BBNJ agreement[41].

Regarding the declarations made pursuant to article 287 by the States parties to UNCLOS and the hypothetical declarations that could be made by the States parties in this agreement still in negotiation and not in the 1982 Convention, it must be understood that (as it occurs with the declarations made in accordance with the 1995 implementation agreement) in the cases where States parties have made a declaration according to this provision, the applicable forum choice would be the one made pursuant to article 55 of the future BBNJ Agreement.

Otherwise, whether two States parties to a dispute concerning this agreement have not made a declaration for the choice of the forum or these declarations do not match (either under UNCLOS or under the agreement), it follows that the dispute will be submitted to an arbitration pursuant to UNCLOS Annex VII. In this sense, the hypothesis suggested at the intergovernmental conference consisting of the change of the condition of default mechanism -from an Annex VII arbitration to the ITLOS- seems to have been forgotten. In accordance with the current wording of the revised draft text of agreement, by means of the reception of the system of dispute settlement foreseen in UNCLOS Part XV, the Annex VII arbitration would continue being the default mechanism as a result of the UNCLOS article 287. Furthermore, this dispute settlement system will be, in my opinion and in the case of its adoption in its current terms, a new broad reception of the UNCLOS compulsory system of settlement of disputes.

[41] The second and third paragraphs of the draft text of article 55 establish: "2. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part. 3. A State Party to this Agreement that is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party that is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in annex V, article 2, annex VII, article 2, and annex VIII, article 2, for the settlement of disputes under this Part".

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In a nutshell, since the BBNJ agreement has not yet been adopted and there is still room for a further revision of the current revised draft text, I would like to suggest (*de lege ferenda*) the following possibility. At the beginning of the negotiation of this agreement, as mentioned above, there was a proposal for the stronger role of the ITLOS at the expense of the Annex VII *general* arbitration. In my view, behind this proposal there was, in addition to the dilemma between arbitration and permanent tribunals, the bigger specialization in this kind of disputes of ITLOS or even its own organization (it must be noted, for instance, the existence of the aforementioned Seabed Dispute Chamber). Due to the technical particularities and to the importance of the scientific issues of the disputes concerning the marine biodiversity beyond natural jurisdiction, I consider that the role of the special arbitration foreseen in UNCLOS Annex VIII (competent to deal with the disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research, or navigation) could be explored, as a result of the special relation of the three first kinds of disputes with the object of the future implementation agreement[42]. Therefore, an arbitral tribunal with these characteristics, made of experts, could be the specialized competent forum to deal with the disputes concerning the interpretation or application of the future BBNJ agreement.

IV. CONCLUSIONS

This article has tried to reflect on the possible dispute settlement system that could be included in the future third implementation agreement of the Convention whether it is finally adopted.

Undoubtedly, the substantive rules of the legal framework to the marine biodiversity existing in areas beyond national jurisdiction of the coastal States will be significant as a result of the development of this relevant field of international law. Having said that, as the Third United Nations Conference on the Law of the Sea pointed out, the provisions relating the dispute settlement are as important for the negotiating States of a treaty as the substantive provisions. In that case, until the States did not agree the renowned "Montreux formula" for the settlement of disputes, it was not possible to move forward in the regulation of the other several issues in negotiation.

[42] Article first of the UNCLOS Annex VIII.

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The Convention establishes a compulsory system of settlement of disputes with certain degree of flexibility, both concerning the choice of the competent forum and concerning the existence of some limitations and facultative exceptions to the compulsory jurisdiction. This system was largely received by the Part VIII of the second UNCLOS implementation agreement. In this sense, it appears that this option will be finally followed by the future third implementation agreement of the Convention on BBNJ.

In my view, the possibility to give the predominant role (as a result of the condition of default mechanism) to a jurisdictional means more specialized than the Annex VII *general* arbitration, either of a judicial nature (ITLOS) or of an arbitral nature (throughout the strengthening of the never constituted special arbitration pursuant to UNCLOS Annex VIII), would make sense considering the highly scientific and technical implications of the issues related to the marine biological diversity beyond national jurisdiction. Although, the complexity of these negotiations and the resulting difficulty to reach a consensus in this regard -as a consequence of the importance of the interests at hand and to the current status of the international relations- seem to make the negotiating States to receive once again and without significant changes the system of disputes settlement of the UNCLOS Part XV.

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