



# The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like It or Not

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*On August 4, 2000, an ad hoc Arbitral Tribunal decided that it lacked the jurisdiction to hear the merits of the Southern Bluefin Tuna dispute involving Australia/New Zealand and Japan. Several issues make the Southern Bluefin Tuna an extremely fertile case. This was the first time an arbitral tribunal was constituted under Part XV and Annex VII of UNCLOS. More importantly, the dispute brings forward several issues that are likely to be increasingly present in international litigation in future decades.*

*First, the applicants had a choice of judicial fora in which to initiate proceedings. As the number of international judicial bodies continues to expand, similar issues will likely take up the concerns of practitioners and scholars alike. Second, the Southern Bluefin Tuna dispute is one of the few cases in which arbitration has been initiated unilaterally. Third, the dispute raised certain fundamental issues about the structure and institutional architecture of the United Nations Convention on the Law of the Sea (UNCLOS). For instance, the Arbitral Tribunal considered whether the dispute settlement procedure contained in Part XV of UNCLOS prevailed over dispute settlement procedures in other sectorial and regional agreements, in which instances they prevailed, and to what extent. Finally, the Southern Bluefin Tuna dispute arose from the failure of a regional and sectorial fishing regime. It illustrates what happens when regimes fail to function and sheds some light on when and why they might crash.*

**Keywords** southern bluefin tuna, UNCLOS, Annex VII Arbitral Tribunal, ITLOS, international regimes, dispute settlement, arbitration, unilateralism, forum selection

## Introduction

On August 4, 2000, a five-member ad hoc Arbitral Tribunal, constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>1</sup> rendered its award on a dispute over the fishing of southern bluefin tuna (i.e., the *Southern Bluefin Tuna* dispute).<sup>2</sup> The Arbitral Tribunal rejected the case of Australia and New Zealand versus

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Japan on the basis of lack of jurisdiction. Twelve months before, the International Tribunal for the Law of the Sea (ITLOS) had prescribed interim measures enjoining the parties from taking actions which might aggravate or extend the dispute pending the constitution of the Arbitral Tribunal or prejudice the carrying out of any decision on the merits.<sup>3</sup>

In many regards, the *Southern Bluefin Tuna* dispute heralds several of the issues that are likely to characterize international litigation, and environmental litigation in particular, in future decades. First, the parties, or applicants, had a choice of judicial fora in which to initiate proceedings. While in the past, the alternative was between a large array of diplomatic means on the one hand and either arbitration or judicial settlement, possibly through the International Court of Justice (ICJ) on the other, in the *Southern Bluefin Tuna* case, complex questions of forum selection emerged.<sup>4</sup> As the number of international judicial bodies continues to expand, similar issues will likely take up the concerns of practitioners and scholars alike.

Second, the *Southern Bluefin Tuna* dispute is one of the few cases in which arbitration was initiated unilaterally.<sup>5</sup> Although there are multiple treaties, both bilateral and multilateral, containing compromissory clauses providing for unilateral activation of arbitral proceedings, states very rarely resort to them. Customarily, states try to defuse disputes by diplomatic means, and only as a last resort turn to adjudication. If arbitration is chosen, it is invariably on the basis of an ad hoc agreement. The *Southern Bluefin Tuna* dispute departs from this practice, marking a further step towards the “legalization of World politics.”<sup>6</sup>

Third, the dispute raises certain fundamental issues about the structure and institutional architecture of UNCLOS. Several of them are analyzed in this paper, but one that will require urgent action and close attention by decision makers is whether ad hoc tribunals possess the legitimacy to interpret fundamental aspects of UNCLOS.<sup>7</sup> UNCLOS does not have a judicial body that can authoritatively interpret its provisions, but rather, it has an array of bodies, ad hoc and permanent, with no hierarchical order. When UNCLOS was negotiated, there were sound reasons to draft the dispute settlement clauses in this way. In the case of disputes, no state wished to be bound to any particular adjudicative body. Yet, international adjudicative bodies, and in particular those endogenous to a given international regime, not only settle disputes but also interpret, clarify, and possibly evolve the law, and these key functions should not be left in the hands of transient arbitral panels.

Finally, the *Southern Bluefin Tuna* dispute arose from the failure of a regional and sectorial fishing regime.<sup>8</sup> International regimes have been widely praised for their capacity to manage, deflect, and defuse disputes between participating states without dangerous spillovers.<sup>9</sup> By combining lawmaking, law enforcement, and dispute settlement functions within the same institution, international regimes have developed into self-contained and self-regulating systems. The *Southern Bluefin Tuna* dispute is of interest because it illustrates what happens when regimes fail to function and thus sheds some light on when and why they might crash. As international regimes expand to cover an increasing number of international issues, they teach an important lesson: that under certain conditions autarchy can turn into autism.<sup>10</sup>

The first part of this article will provide the basic facts regarding southern bluefin tuna biology and the progression of the dispute. The second part will involve some speculation about the alternative, sketching the alternative fora Australia and New Zealand could have chosen. In particular, this article will try to explain the rationale for the selection of arbitration under different agreements and the implications of this choice. A discussion of the proceedings and the ruling of the ITLOS on the request for interim

measures will follow, with a few observations on the reasoning of the tribunal. The Arbitral Award will be explored in the second part of this article. In particular, this analysis will attempt to illustrate some of the legal and political considerations that led the arbitrators to their decision and to assess the impact of this ruling on international law and states' practice.

## Background

### *The Issue*

The southern bluefin tuna (*thunnus maccoyii*) lives in the southern hemisphere oceans. It can be found in waters between 30° and 50° south.<sup>11</sup> Since it is a long-distance swimmer and a highly migratory species, its occurrence area is large. It breeds south of the island of Java in the Indonesian exclusive economic zone (EEZ).<sup>12</sup> Juveniles migrate thousands of miles, first south along the west coast of Australia and subsequently along two migratory paths: west across the Indian Ocean towards South Africa and on into the Atlantic Ocean, or east along the south coast of Australia and New Zealand and into the Pacific Ocean.

Although there are significant uncertainties about its biology (including its mean age of maturity, the length of time it spends on spawning grounds, and whether it spawns every year), it is clear that southern bluefin tuna also possess some characteristics that expose it to severe depletion. First, it is an extremely valuable catch. A southern bluefin tuna can measure up to two meters in length and weigh up to 200 kilograms.<sup>13</sup> A single tuna can command the astonishing market figure of U.S. \$30,000–\$50,000.<sup>14</sup> It is considered a great delicacy in Japan, where 90% of the catch is consumed.<sup>15</sup> Second, it is slow growing and late maturing. It takes several years before it reaches spawning age (at the age of 8, according to Japanese scientists, and 12 according to Australians and New Zealanders).<sup>16</sup>

Southern bluefin tuna has been heavily fished since the early 1950s, with catches reaching about 80,000 tonnes (metric tons) in the early 1960s.<sup>17</sup> However, by the mid-1980s, serious depletion of the stock created the necessity of conservation.<sup>18</sup> Australia, Japan, and New Zealand—then, as today, the three major fishing states—started informally coordinating their fishing activities. In 1985 these states agreed to an annual total catch limit of 38,650 tonnes.<sup>19</sup> In 1989, this limit was reduced by about 70%, to 11,750 tonnes, with an allocation of 6,065 tonnes to Japan, 5,265 to Australia, and 420 to New Zealand.<sup>20</sup> Japan was required to reduce its catch by 74%.

In 1993, this voluntary management arrangement was formalized by the Convention for the Conservation of Southern Bluefin Tuna (the 1993 Convention).<sup>21</sup> In order to ensure “the appropriate management, the conservation and the optimum utilization of southern bluefin tuna,”<sup>22</sup> the 1993 Convention established the Commission for the Conservation of Southern Bluefin Tuna (the Commission).<sup>23</sup> The 1993 Convention did not break any new ground in international fishing regimes. As is the case of many other regional and sectorial agreements (i.e., agreements relating to the sustainable fishing of a given species), it laid down a simple scheme: The Convention establishes the skeleton of a regional organization and creates the basis for the coordinated study of the biology and scientific aspects of the species and their fishing.<sup>24</sup> Once, and if, it is determined how much of the species can be caught without endangering it, a total allowable catch (TAC) limit is fixed by the plenary and decision-making organ of the Convention by consensus. Finally, if an agreement is reached, the TAC is divided among participating states in national shares.

### *The Dispute*

Several elements eventually combined to short-circuit this simple, albeit time-tested and usually successful scheme, and to turn the 1993 Convention organization into the scene of an acrimonious dispute. First, the research carried out within the framework of the 1993 Convention could not dispel doubts concerning the southern bluefin tuna biology, the state of the stock, and its chances of repopulation. While Japanese scientists were optimistic about the recovery of the stock, those of Australia and New Zealand were much less so. As a consequence, Japan argued for an increase in the TAC, while Australia and New Zealand opposed it.<sup>25</sup> Second, the Convention hardened a system where the parties were polarized into suppliers (Australia and New Zealand) and a single buyer (Japan). As already noted, Japan consumes 90% of the southern bluefin tuna caught, while Australia and New Zealand export the greatest part of their catch to Japan. It is obvious that in these conditions, Australian and New Zealand fishermen, the suppliers, would be wary of any attempt by Japan, their main customer, to expand its own catch. Not only would this threaten the stock, but also any additional tuna caught by Japanese trawlers might reduce income for Australia and New Zealand.<sup>26</sup> In these conditions, commercial rivalry tainted scientific debate, making the search for a definitive and objective assessment on the state of the stock a pointless quest. Third and foremost, the 1993 Convention did not apply to all states fishing southern bluefin tuna, only to Australia, Japan, and New Zealand, which created an inducement for other states in the region to increase their unregulated catch to supply the strong demand in the Japanese market.<sup>27</sup>

It can be argued that it was the emergence of free-riders that eventually derailed the 1993 Convention. From the early 1990s, Indonesia, South Korea, and Taiwan, nonparties to the 1993 Convention, had increased their catch of southern bluefin tuna. In 1995, Tokyo sought an increase of 6,000 tonnes, or about 50% of the TAC, and proposed carrying out, within the framework of the 1993 Convention, a joint pilot plan for an experimental fishing program (EFP), testing the recovery of the stock at various places and stages of growth.<sup>28</sup> In Japan's view, the only way to lure nonparties into the regime was to establish scientifically the appropriate level of TAC for long-term conservation and optimum utilization and then offer a share to each country in exchange for their commitment to accept the 1993 Convention regime.<sup>29</sup> Logical as this seemed, the Japanese plan did not leave any margin for error. The EFP was based on the assumption that scientists were right about the state of the stock, even before adequate testing had been carried out. Australia and New Zealand were not so confident about the capacity of the stock to bear any extra fishing, even for research purposes and under controlled circumstances.<sup>30</sup>

Since Commission decisions were taken by unanimous vote,<sup>31</sup> neither Japan nor Australia and New Zealand could impose their views. After three years of ineffectual debate, in February 1998, at the Fourth Meeting of the Commission, Japan announced that, if Australia and New Zealand were not ready to assent, it was resolute to unilaterally begin what it described as an "experimental fishing program" as of June 1998.<sup>32</sup> In particular, Japanese authorities intended to test the recovery of the stock by catching no less than an additional 2,010 tonnes above its national quota annually for three years (a net increase of more than 30% above the last-agreed Japanese quota). At the same time, however, they pledged that, if the pilot EFP was shown to have an adverse effect on the stock, Japan's national allocation in subsequent years would be reduced to pay back the catch taken under the pilot plan.<sup>33</sup> Finally, to ensure the transparency of the research, Japan announced that it intended to deploy observers and enforcement vessels to pro-

duce research separate from commercial operations and to submit reports to the 1993 Convention Scientific Committee.<sup>34</sup>

Between March and June 1998, trilateral negotiations failed to resolve the disagreement over the Japanese initiative, which had also been proposed to the Commission, but, of course, not approved. To dissuade Japan from starting the program, Australia refused to sign a bilateral fishing agreement to permit Japanese vessels to fish for other species in the Australian EEZ or even to visit Australian ports.<sup>35</sup> Despite this, on June 1, 1998, Japan elaborated a revised proposal for a pilot program prior to the three-year program. The pilot EFP took place between July 10 and August 31, 1998, catching 1,464 tonnes in addition to that year's national quota.<sup>36</sup> The day the pilot EFP ended, Australia and New Zealand formally notified Japan of the existence of a dispute, challenging the program's legality under the 1993 Convention, the UNCLOS, and customary international law.<sup>37</sup>

At first, the dispute was tackled under the 1993 Convention regime. Negotiations were held and the matter was discussed at the fifth meeting of the Commission (February 22–26, and May 10–13, 1999).<sup>38</sup> An ad hoc working group on the possibility of carrying out a joint experimental fishing program was established. However, these means failed to resolve the dispute, and on June 1, 1999, Japan initiated the full-fledged EFP.

### Legal Tactics at Play

One of the most striking features of recent international law is the enormous expansion and transformation of the international judiciary. In the last decade of the 20th century, almost a dozen international judicial bodies have become active or have been extensively reformed.<sup>39</sup> Such a considerable and rapidly expanding array of fora has created unprecedented opportunities, opening the door to what has been sometimes called, uncomplimentarily and incorrectly, "forum shopping." At the same time, the number of states accepting the jurisdiction of these bodies, either implicitly or, when necessary, explicitly, has increased. The result is that states that have a progressive international judicial policy, and thus have submitted to a large and varied number of judicial and quasi-judicial bodies, may be exposed to litigation in different fora for any given dispute. In these circumstances, the choice of the battleground is usually left to the tactical considerations of the applicant.

In the *Southern Bluefin Tuna* dispute, Australia and New Zealand could have brought the dispute concerning Japan's unilateral actions to at least three fora:<sup>40</sup> an ad hoc Arbitral Tribunal constituted under Article 16 of the 1993 Convention, the ICJ, or the dispute settlement procedures of the UNCLOS. Each of these options had limitations, advantages, and drawbacks that are worth analyzing given that they cast an interesting light on the current development of international law.

### Arbitration under the 1993 Convention

If the parties could agree, the dispute could have been submitted to an ad hoc Arbitral Tribunal established under the 1993 Convention. Article 16 of the Convention provides that:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by

negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the Arbitral Tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

Arbitration has a long and successful record, especially in the environmental, territorial sovereignty, and equitable maritime boundary fields. *The Lac Lanoux*,<sup>41</sup> *Trail Smelter*,<sup>42</sup> *Bering Sea Fur Seals*,<sup>43</sup> and *Canada-France Filleting*<sup>44</sup> arbitrations are examples of the positive role Arbitral Tribunals can play in the settlement of environmental disputes. With time, the awards rendered by those tribunals have become *loci classici* of international law. The causes for the effectiveness of consensual arbitration in resolving environmental problems and settling environmental disputes are varied.<sup>45</sup> Some reasons can be traced to the different nature of consensual arbitration and compulsory judicial settlement, while others pertain exclusively to the peculiarity of environmental problems.

Although resorting to arbitration under the 1993 Convention would have been the most logical way to proceed, the least questionable, and probably the most effective option, under Article 16 of the Convention the express consent of all parties was required in order to submit the *Southern Bluefin Tuna* dispute to arbitration. Consultations about possible third-party involvement did take place, but, although Japan was ready to subject the dispute to mediation and eventually by common agreement to arbitration, it was not willing to conform to Australia's and New Zealand's condition that it cease its fishing program before proceedings were initiated.<sup>46</sup> Hence, this path was temporarily precluded.

### *The International Court of Justice*

Another option was the submission of the dispute to the ICJ. This was a possibility since Australia, New Zealand, and Japan had filed rather open-ended optional declarations accepting jurisdiction under Article 36(2) of the Court's Statute. The Australian declaration of March 17, 1975 recognized

as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice. . . . The Government of Australia further declares that this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement.<sup>47</sup>

On September 22, 1977, New Zealand accepted

as compulsory, ipso facto, and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice . . . over all

disputes other than . . . disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement; . . . disputes arising out of, or concerning, the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>48</sup>

On September 9, 1958 Japan recognized:

as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes . . . with regard to situations or facts . . . which are not settled by other means of peaceful settlement. This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement.<sup>49</sup>

Had the case been submitted to the ICJ on the basis of these protocol declarations, the Court's jurisdiction would probably have been challenged by Japan.<sup>50</sup> With the hindsight offered by the ruling of the Arbitral Tribunal, it is probable that the jurisdictional issues that the Annex VII Arbitral Tribunal eventually scrutinized would not have been substantially different from those that the ICJ would have had to analyze. Specifically, the Court would have had to analyze whether it was barred from exercising jurisdiction because Article 16 of the 1993 Convention amounted to an agreement to have recourse to another method of peaceful settlement.

Although any speculation on how the ICJ might have ruled is moot, there is an interesting precedent. In the 1930s, the predecessor of the ICJ, the Permanent Court of International Justice, tackled a similar issue in the *Electricity Company of Sofia and Bulgaria*.<sup>51</sup> In that case, the Court was confronted with two different sources of jurisdiction: the Belgian-Bulgarian Treaty of Conciliation, Arbitration and Judicial Settlement of June 23, 1931, and two optional protocol declarations made by Belgium and Bulgaria on March 10, 1926 and August 12, 1921, respectively. As in the *Southern Bluefin Tuna* case, the Belgian declaration excluded cases where the parties had agreed to "have recourse to another method of pacific settlement." Eventually the Court decided it had jurisdiction, rejecting Bulgarian objections. Two passages of that judgment are of particular significance. In the first, the Court observed that

the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.<sup>52</sup>

In the second, the Court remarked that

in concluding the Treaty of Conciliation, Arbitration and Judicial Settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes

which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty.<sup>53</sup>

Litigation before the ICJ was an option in the *Southern Bluefin Tuna* case. Why did Australia and New Zealand not select the ICJ? One can only speculate. Some insight on the issue is offered by the pleading of Henry Burmester QC, Counsel for Australia, who stated that the reason why Australia and New Zealand chose not to bring the case to the ICJ was that they were not convinced, given the terms of the relevant optional clause declarations by the three countries, that the ICJ would have jurisdiction. Indeed, all three parties have conditions excluding compulsory jurisdiction for disputes where there is provision to use alternative methods of settlement.<sup>54</sup> Another consideration may have been the unsatisfactory environmental case law of the ICJ, which recommended against its selection.<sup>55</sup>

Other cogent and pragmatic considerations may have been at play. First, at no time has the ICJ distinguished itself for its swiftness, especially not in environmental cases. At the end of 1999 the ICJ was facing its most crowded docket ever, with the cluster suit filed by Yugoslavia against 10 NATO members taking a large share of it.<sup>56</sup> A judgment on the merits could have taken years, perhaps too late for the southern bluefin tuna. Even getting an interim injunction, assuming this was achievable, would have taken some time. Since Japanese fishing vessels had set to sea on July 1, 1999 to implement the EFP, the speedy acquisition of an injunction in the form of provisional measures was a paramount requirement.

Second, although Australia and New Zealand could request from the ICJ an interim injunction in the form of provisional measures, certain considerations advised against proceeding along this route. For instance, it was not clear whether interim measures "indicated" by the ICJ are binding on the parties.<sup>57</sup> The issue has been the object of an intense debate since the Statute of the Permanent Court of International Justice was drafted.<sup>58</sup> To make the issue even more ambiguous, the ICJ had never itself pronounced on the legal consequences of noncompliance with provisional measures.<sup>59</sup> Moreover, even if scholars were unanimous in holding interim measures of the World Court binding, the record does not leave much hope to applicants. Since the ICJ's inception, compliance by the states with provisional measures has been minimal at best.<sup>60</sup> (On this point, see author's post scriptum at page 366.)

Finally, and perhaps of decisive importance regarding recourse to the ICJ, Australia and New Zealand could by no means be considered satisfied customers of the court, as the 1974 *Nuclear Tests* cases<sup>61</sup> were still very much alive in the public's mind.

### ***Part XV of the Law of the Sea Convention***

The third option available to Australia and New Zealand was the dispute settlement procedure of UNCLOS.<sup>62</sup> UNCLOS contains one of the longest and most intricate dispute settlement clauses ever drafted. It is the result of lengthy negotiations and attempts to strike a delicate balance between states that argued in favor of a judicial and binding dispute settlement procedure and those that preferred diplomatic and nonbinding means.<sup>63</sup> As this was the procedure eventually chosen by Australia and New Zealand to tackle the dispute, it is necessary to sketch the main principles and numerous exceptions within it.



Part XV of UNCLOS is divided into three sections: “1: General Provisions,” “2: Compulsory Procedures Entailing Binding Decisions,” and “3: Limitations and Exceptions to Applicability of Section 2” comprising Articles 279–299. Articles 279 and 283 stipulate that states have a general duty to peacefully settle disputes concerning the application of the Convention. To do so, they are free at any time to agree on any means they choose, ranging from negotiations to judicial settlement.<sup>64</sup> However, if settlement is not reached by means of the procedure chosen by the parties, and no other procedure has been explicitly excluded by the parties, then either party is entitled to trigger the compulsory dispute settlement procedure of the UNCLOS, Part XV.<sup>65</sup> Moreover, if through a general, regional, or bilateral agreement or otherwise (e.g., by way of optional protocol declarations under Article 36(2) of the ICJ Statute), the parties have agreed that their dispute can, at the request of any party, be submitted to a procedure that entails a binding decision, that procedure is to apply in lieu of the one contained in Part XV.<sup>66</sup> Finally, provided they agree to it, the parties can also submit the dispute to conciliation under Annex V, Section 1 of the Convention.<sup>67</sup>

Under Section 2, a party can refer any dispute concerning the interpretation or application of the Convention that cannot be settled by the consensual means set out in Section 1 to compulsory and binding settlement.<sup>68</sup> There are four possible fora for such settlement: the ICJ, the International Tribunal for the Law of the Sea, an Arbitral Tribunal constituted in accordance with Annex VII of the Convention, and a special Arbitral Tribunal constituted in accordance with Annex VIII of the Convention.<sup>69</sup> If the parties to a dispute have made an optional declaration under Article 287 specifying their choice of forum, and their choices coincide, that body will automatically be chosen as the forum for the settlement of the dispute.<sup>70</sup> If their choices do not coincide, the forum for settlement will be an Arbitral Tribunal constituted under Annex VII.<sup>71</sup>

Another important provision of Section 2 is Article 290. Article 290(1) stipulates that: “[I]f a dispute has been duly submitted to a court or tribunal . . . , th[at] court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.” Moreover, “[p]ending the constitution of an Arbitral Tribunal to which a dispute is being submitted . . . , any court or tribunal agreed upon by the parties or, failing such agreement, the International Tribunal for the Law of the Sea . . . , may prescribe . . . provisional measures.”<sup>72</sup> Although the history of ITLOS is short, and the number of cases submitted to it few, it is likely that indicating provisional measures will become one of its major sources of work.<sup>73</sup>

Finally, Section 3 contains a list of exceptions to the applicability of Section 2. First, when signing, ratifying, or acceding to the UNCLOS, or anytime thereafter, states have the possibility of opting out of Section 2 procedures for dispute resolution concerning sea boundary delimitations, historic bays or titles, military and law enforcement activities, and issues relating to the maintenance of peace and security that are being dealt with by the UN Security Council.<sup>74</sup> Second, in addition to excluding certain disputes arising out of the exploration and exploitation of the seabed, Article 297 excludes from the reach of Section 2 disputes concerning coastal states’ sovereign rights with respect to the living resources in their EEZ.<sup>75</sup>

There are some clear tactical reasons why Australia and New Zealand selected the dispute settlement procedure contained in Part XV of UNCLOS. First, once all negotiations had been exhausted, adjudication could be triggered unilaterally.<sup>76</sup> Japan would not be able to invoke any of the limitations and exceptions contained in Section 3.

Second, unlike in the case of the ICJ, the language of UNCLOS leaves no doubt as to the binding nature of provisional measures. The parties must comply promptly with any provisional measures prescribed, and this was of considerable importance to Australia and New Zealand.<sup>77</sup> Finally, in contrast to what was likely to occur in the World Court, ITLOS's docket was open and the Tribunal could be convened to hear the request for provisional measures on short notice.

Accordingly, on July 15, 1999, Australia and New Zealand sent notifications to Japan requesting an Arbitral Tribunal be constituted under Annex VII of UNCLOS to declare that Japan had breached its obligations under Article 64 and Articles 116–119 of UNCLOS. They wanted the Tribunal to declare that Japan had:

1. failed to adopt the necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the southern bluefin tuna stock to levels at which it could produce the maximum sustainable yield;
2. carried out a unilateral EFP from 1998 to 1999, which had or would result in exceeding its previously agreed quota;
3. allowed its nationals to catch additional tuna in the course of the program in a way that discriminated against Australian and New Zealand fishermen;
4. failed to act in good faith by cooperating with each of the applicants with a view to ensuring the conservation of the stock; and,
5. failed to carry out its obligations under the Convention “in respect of the conservation and management of southern bluefin tuna, having regard to the requirements of the precautionary principle.”<sup>78</sup>

In particular, the Arbitral Tribunal was asked to adjudge and declare that Japan had to refrain from authorizing or conducting any further experimental fishing without Australia's and New Zealand's consent. The Arbitral Tribunal was asked to instruct Japan to negotiate and cooperate in good faith with Australia and New Zealand for the purpose of agreeing on future conservation measures and an appropriate TAC level for the maintenance and restoration of the tuna stock to the maximum sustainable yield levels. The Arbitral Tribunal was asked to ensure that Japanese nationals and other persons subjected to Japan's jurisdiction did not take tuna in excess of its national allocation of the TAC until such time as an agreement was reached on an alternative level of catch. Finally, the Arbitral Tribunal was asked to declare that Japan had to restrict its catch in any given fishing year to its national allocation as last agreed by the Commission, subject to a reduction by the amount of tuna taken by Japan in the course of its unilateral program in 1998–1999.<sup>79</sup> The applicants also requested that Japan pay all the litigation costs.<sup>80</sup>

## **ITLOS and the Provisional Measures**

### *The Pleadings*

Australia and New Zealand's request for the establishment of an Annex VII Arbitral Tribunal was necessary before they could request that ITLOS prescribe interim measures. On July 30, 1999, two weeks after the diplomatic notes requesting the establishment of the Arbitral Tribunal were sent to Tokyo, Australia and New Zealand filed their request for interim measures with the Registry of ITLOS.<sup>81</sup> They asked the Tribunal to order that Japan immediately cease its unilateral program and restrict its catch for any given fishing year to its national allocation as last agreed by the Commission (subject to

a reduction of such catch by the amount of tuna taken by Japan in the course of its fishing program in 1998–1999).<sup>82</sup> Moreover, they sought an order for all parties to act consistently with the precautionary principle in fishing for southern bluefin tuna pending a final settlement of the dispute. The goal was to ensure that no action be taken that might aggravate, extend, or render more difficult a solution to the dispute submitted to the Annex VII Arbitral Tribunal. Similarly, Australia and New Zealand wanted to prevent Japan from taking action that could prejudice their rights in the event of a decision on the merits.<sup>83</sup> These requests were based on the claim that Japan's unilateral program and lack of cooperation in the conservation and management of tuna had the potential to cause serious prejudice to their rights under UNCLOS. This prejudice might deny them an adequate remedy in any subsequent decision of the Arbitral Tribunal.

Japan's "Statement in Response"<sup>84</sup> highlighted arguments that would have a crucial impact on the subsequent development of the dispute. In particular, Tokyo claimed that the dispute did not depend on the interpretation and application of UNCLOS, as claimed by Australia and New Zealand, but rather on the interpretation and application of the 1993 Convention.<sup>85</sup> Second, contrary to the requirements of Article 286 of UNCLOS, a settlement had not been genuinely sought prior to the activation of the arbitration mechanism and consultations and negotiations had been conducted in bad faith and were not adequately terminated.<sup>86</sup> Tokyo asked ITLOS to deny Australia and New Zealand's request for interim relief. Japan counterrequested that if ITLOS were to find that the Arbitral Tribunal had *prima facie* jurisdiction, then Japan should be granted provisional relief in the form of an order that Australia and New Zealand restart, urgently and in good faith, negotiations with Japan for a period of six months to reach an agreement on a protocol for an experimental fishing program, the determination of a new TAC, and national allocations for the year 2000.<sup>87</sup> In the alternative, if these negotiations were to fail after the expiration of the six month period, then Japan asked the Tribunal to prescribe that the dispute be settled by a panel of independent scientists.<sup>88</sup>

Hearings were held expeditiously. The end of the 1999 season of the Japanese EFP was rapidly approaching (scheduled for August 31). On August 16, 1999, before hearings began and after consultation with the parties, and taking into consideration that Australia and New Zealand's requests coincided, the Tribunal joined the proceedings in the two cases. Moreover, while Japan had a national, Judge Soji Yamamoto, on the bench, Professor Ivan Shearer was sworn in as an *ad hoc* judge for Australia and New Zealand.

During the three days of oral pleadings, Australia and New Zealand put great effort into building a case for the urgency of the measures, particularly in light of the uncertainty surrounding the factual situation of the southern bluefin tuna stock and the precautionary principle.<sup>89</sup>

### *The Order*

On August 27, 1999, one week after the end of hearings and four days before the end of the Japanese experimental fishing program, the Tribunal delivered its order. By a large majority, the judges of the Tribunal prescribed six provisional measures and took two decisions concerning their implementation. By 20 votes to 2, they ordered all parties to ensure that no action was taken that might aggravate or extend the dispute pending the constitution of the Arbitral Tribunal or that would prejudice the carrying out of any decision on the merits.<sup>90</sup> By the same majority, the Tribunal held that all the parties should refrain from conducting an EFP unless there was consensus and unless the

experimental catch was subtracted from national annual allocations.<sup>91</sup> By 18 votes to 4, the Tribunal ordered that none of the parties were to exceed the annual national allocations of the TAC fixed since 1989 at 11,750 tonnes (6,065 tonnes to Japan, 5,265 to Australia, and 420 to New Zealand).<sup>92</sup> Yet, in calculating the annual catch for 1999 and 2000, and without prejudice to what the Arbitral Tribunal might decide, account should be taken of the catch during 1999 as part of an EFP.<sup>93</sup> Finally, by 21 votes to 1, the Tribunal recommended that negotiations be resumed without delay in order to reach an agreement on the conservation and management of the southern bluefin tuna.<sup>94</sup> In addition, the Tribunal held, by 20 votes to 2, that further efforts be made to extend the regime to other states not party to the 1993 Convention regime.<sup>95</sup>

With respect to the implementation of the orders, the Tribunal decided, 21 votes to 1, that each party should submit a report no later than October 6, 1999 detailing the steps taken or proposed in order to ensure prompt compliance with the measures prescribed and that the measures prescribed be notified by the Registry to all parties to the UNCLOS engaged in fishing southern bluefin tuna.<sup>96</sup> The interim measures prescribed by the ITLOS were to be valid up to the time that the Arbitral Tribunal decided whether it had jurisdiction and, if so, whether it would continue, modify, or revoke any or all of them.<sup>97</sup>

### *Some Observations on the ITLOS Order Prescribing Interim Measures*

In order to prescribe interim measures, ITLOS had to first assure itself that the Annex VII Arbitral Tribunal had *prima facie* jurisdiction.<sup>98</sup> The difference between a finding of *prima facie* jurisdiction and a determination of jurisdiction by an Arbitral Tribunal is profound.<sup>99</sup> In the case law of the ICJ, to have a finding of *prima facie* jurisdiction, it is simply necessary that lack of jurisdiction not be manifest. Thus, in the present case, if the lack of jurisdiction was not manifest to ITLOS (and it was not), that does not mean that the Arbitral Tribunal, after thorough examination, could not find that it had no jurisdiction (as it did). The threshold of *prima facie* jurisdiction is much lower than the one that must be cleared in the merits phase. The proceedings leading to the determination of jurisdiction are very different in the two instances. In the *prima facie* case, proceedings are rapid and without full examination of the facts concerning the merits.<sup>100</sup>

All judges of the Tribunal, including Japanese Judge Yamamoto, agreed that the Arbitral Tribunal had *prima facie* jurisdiction and consequently that ITLOS had the power to prescribe interim measures. The ITLOS judges debated the existence of the prerequisites for the prescription of provisional measures—urgency, and preservation of the rights of the parties and/or prevention of serious harm to the environment—more intensely than they did the issue of jurisdiction. In the end, no consensus was reached on whether interim measures requested had the necessary urgency.<sup>101</sup>

On the question of jurisdiction, the Tribunal brushed aside the Japanese objection that the dispute was scientific rather than legal and therefore nonjusticiable. The Tribunal pointed out, *inter alia*, that besides relying on scientific data, the dispute also concerned points of law.<sup>102</sup> By observing that negotiations and consultations had indeed taken place to no avail under both the 1993 Convention and UNCLOS, the Tribunal disposed of the claim that dispute settlement had not been genuinely sought before resorting to arbitration.<sup>103</sup> According to ITLOS, Australia's and New Zealand's notification that they did not intend to continue negotiations was enough to move on to adjudication because no state is obliged to pursue negotiations or other dispute

settlement procedure when it concludes that the possibilities of settlement have been exhausted.<sup>104</sup>

A larger hurdle was the fact that, although the dispute originated under the 1993 Convention, it was brought before the ITLOS (and *in primis* before the Arbitral Tribunal) as a dispute under UNCLOS. On this issue, ITLOS made several findings for the sole purpose of establishing its competence to prescribe provisional measures.<sup>105</sup>

The Tribunal was able to construe the case as a dispute pertaining to the implementation of UNCLOS by making two important findings. First, it observed that under Article 64 of UNCLOS, read together with Articles 116 and 199, states have a duty to cooperate directly or through appropriate international organizations to ensure the conservation and optimum utilization of highly migratory species such as southern bluefin tuna.<sup>106</sup> According to the Tribunal, the conduct of the parties within the 1993 Convention regime, as well as their relations with nonparties, was relevant to an evaluation of states' compliance with UNCLOS.<sup>107</sup> Lack of cooperation under the 1993 regime could lead to a violation of UNCLOS.<sup>108</sup> Second, the ITLOS judges found that the fact that the 1993 Convention applied to the parties did not exclude their right to invoke the provisions of UNCLOS.<sup>109</sup> In other words, ITLOS interpreted UNCLOS and the 1993 Convention as Chinese boxes, where the former includes the latter; the exegesis of the latter can only be done within the framework of the former.<sup>110</sup>

Furthermore, the Tribunal found that the linkage between UNCLOS and the sectorial regime could not be limited to its normative content, but also necessarily extended to its procedural aspects. Contrary to Japan's claim, the fact that the 1993 Convention applied to the parties did not preclude them from recourse to the dispute settlement procedures of UNCLOS.<sup>111</sup> Only in the event that Australia, New Zealand, and Japan could agree to submit the dispute to arbitration under Article 16 of the 1993 Convention would the UNCLOS dispute settlement procedure be overridden.<sup>112</sup> Because they could not come to such agreement, the Tribunal concluded that Australia and New Zealand were not precluded from unilaterally resorting to the Annex VII Arbitral Tribunal.<sup>113</sup>

The second issue on which ITLOS dwelled at length, and which constitutes the most debatable part of the order, was the Japanese claim that the prerequisites for the prescription of provisional measures—urgency, and need to preserve the rights of the parties and/or prevention of serious harm to the environment—did not exist. Not only did the ITLOS judges find this to be the key question, but the agents and counsels of the parties also focused their pleadings on this. Much of the hearings revolved around the question of whether the Japanese EFP could endanger the stock of southern bluefin tuna.

It was understood by Australia and New Zealand that an interim measures order from ITLOS might have only a limited effect. This situation arose since the application to ITLOS came in July/August and the 1999 season of the Japanese EFP was scheduled to end on August 31, 1999. Once constituted, the Arbitral Tribunal could issue interim measures orders regarding the 2000 and 2001 components of the Japanese program.<sup>114</sup> Pursuant to Annex VII of UNCLOS, the Arbitral Tribunal had to be established within 104 days of the proceedings having been instituted,<sup>115</sup> thus ITLOS's interim measures would only cover about eight weeks. There was hardly anything ITLOS could prescribe that the Arbitral Tribunal, once constituted, could not do without prejudice to the rights to be protected.<sup>116</sup> Yet, there were reasons for requesting ITLOS to prescribe interim measures. First, while Japan's EFP consisted of three annual programs in 1999, 2000 and 2001, Japan had made no commitment regarding any experimental fishing programs after 1999.<sup>117</sup> An interim measure could inhibit an extension of the EFP beyond 1999.

Second, while the EFP season was to end on August 31, normal fishing would continue beyond then, and the purpose of the measures sought was to curtail that fishing by requesting that any tuna caught during the EFP be subtracted from Japan's annual quota.

Ultimately, the Tribunal decided that the condition of the southern bluefin tuna stock warranted a broader approach, extending beyond the 1999 EFP season. Significantly, although Australia and New Zealand asked the Tribunal to order that Japan immediately cease the unilateral program, the operative part of the order did not mention Japan's EFP.<sup>118</sup> Rather, the parties were ordered to refrain from conducting experimental fishing programs unless they were either conducted with the agreement of the other parties or the experimental catch was subtracted from the annual national allocation.<sup>119</sup> In the end, the Tribunal simply ordered the parties to stop any further fishing above and beyond the last agreed quota regardless of the flag borne by the fishing vessels. In other words, by assessing the urgency of the prescription of provisional measures in light of prudence and caution, the Tribunal essentially resorted to the "precautionary approach." Nonetheless, quite regrettably, ITLOS stopped short of calling the principle or approach by its name.<sup>120</sup>

During the hearings the parties were asked to provide information on the schedule and duration of their annual fishing for southern bluefin tuna under the framework of the 1993 Convention. The Tribunal wanted to know more about the time of the year when the fishing commences and the length of the fishing season, whether that time is the same for all parties or whether it varies among individual parties. The Tribunal observed that catches made by nonparties to the 1993 Convention were on the rise<sup>121</sup> and that commercial fishing was expected to continue through the rest of 1999 and beyond.<sup>122</sup> The Tribunal found that there was no disagreement between the parties respecting the stock being severely depleted and that it was at its historically lowest level,<sup>123</sup> but that at the same time there were significant scientific uncertainties regarding the measures to be taken and the effectiveness of the measures that had been taken to date.<sup>124</sup> In those circumstances the Tribunal felt that, although it could not conclusively assess the scientific evidence presented, the parties should act ". . . with prudence and caution . . ." and take measures "as a matter of urgency."<sup>125</sup>

The "precautionary approach" adopted by the Tribunal, in the words of Judge Treves in his Separate Opinion, was "a logical consequence of the need to ensure that, when the Arbitral Tribunal decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to [b]e inherent in the very notion of provisional measures."<sup>126</sup> In Treves's opinion, although there was no danger of the stock's collapse in the months before the Arbitral Tribunal was instituted, urgency required the halting of a "trend towards such collapse" since each step in such deterioration could be seen as prejudicial because of its cumulative effect.<sup>127</sup>

While urgency is part of the character of provisional measures, for them to be urgent the situation must be such that, to use the words of Article 290(1) of UNCLOS, the respective rights of the parties would not be preserved or serious harm to the marine environment not be prevented should they not be prescribed. Urgency is not an absolute concept, but must be appraised in light of the magnitude of the damage that needs to be averted, and different instruments can fix different thresholds. In the case of UNCLOS, the prevention of "serious harm" (or "significant, substantial or major harm") seems to be the appropriate standard, and this was applied by ITLOS. However, had the case been brought under the 1995 Straddling Stocks Agreement, the standard would have been even lower, since Article 31(2) speaks merely of the prevention of "damage to the stocks in question. . . ."<sup>128</sup>

## The Arbitral Tribunal

### *The Proceedings and the Pleadings*

The same day that Australia and New Zealand filed the request for provisional measures with the Registry of the ITLOS, they designated Sir Kenneth Keith, a judge on the Court of Appeals of New Zealand, counsel for New Zealand in the *Nuclear Tests* cases<sup>129</sup> and arbitrator in the *Rainbow Warrior* dispute,<sup>130</sup> as arbitrator. On August 13, 1993, Japan chose Chusei Yamada, a member of the International Law Commission and Professor at the Waseda University School of Law in Tokyo. The parties agreed to the appointment as arbitrators: Florentino Feliciano (Philippines), a member of the Appellate Body of the World Trade Organization; Per Tresselt (Norway), a diplomat and member of Norway's delegation to the Third UN Conference on the Law of the Sea; and Stephen Schwebel (U.S.), President of the ICJ.<sup>131</sup> Judge Schwebel was also eventually appointed President of the Arbitral Tribunal.

In January 2000, the parties met with the President of the Tribunal to agree on necessary procedural matters, timelines for the filing of pleadings, and dates for oral hearings. The International Centre for the Settlement of Investment Disputes (ICSID) agreed to act as Registry of the Tribunal. As it was clear that Japan would contest the Tribunal's jurisdiction, during February and March the parties exchanged memorials and counter-memorials on Japanese preliminary objections.<sup>132</sup> Japan insisted that the dispute be settled by consensual arbitration, as per Article 16 of the 1993 Convention, rather than compulsory arbitration as stipulated by UNCLOS. The importance of this issue was highlighted by a curious disagreement: the parties could not agree on the title of the case. While Australia and New Zealand proposed the title "*Southern Bluefin Tuna Cases*," Japan insisted on "*Case concerning the Convention for the Conservation of Southern Bluefin Tuna*" or the alternative "*Australia and New Zealand v. Japan*." Eventually they settled for the Solomonic "*Southern Bluefin Tuna Case Australia and New Zealand v. Japan*."<sup>133</sup>

Hearings on jurisdiction took place from May 7 through May 11, 2000 at the World Bank headquarters in Washington, D.C. Japan advanced several reasons why the Tribunal lacked jurisdiction. Japan insisted that the dispute was one concerning the interpretation and implementation of the 1993 Convention and not UNCLOS. Japan contended that this was patent by the factual history of the dispute and the fact that the UNCLOS had only entered into force for the three states in 1996.<sup>134</sup> Its advent could not have increased the density of treaty relations between the parties in respect of southern bluefin tuna in a manner as radical as the applicants asserted.<sup>135</sup> Moreover, Japan pointed out that the applicants had not brought cases against South Korea, Taiwan, and Indonesia, thus revealing that the applicants believed the only legal link between them and Japan on the issue was the 1993 Convention.<sup>136</sup>

Japan argued that if the Tribunal intended to treat UNCLOS as the umbrella agreement and the 1993 Convention as a regional agreement merely implementing certain provisions of UNCLOS, then there were several reasons why the dispute settlement procedure of the 1993 Convention prevailed over those of UNCLOS. First, the 1993 Convention was to be considered not only *lex posterior* but also as *lex specialis vis-à-vis* the UNCLOS and therefore should override it.<sup>137</sup> Second, Article 281 of UNCLOS allowed parties to confine the applicability of compulsory procedures to cases where all the parties to the dispute had agreed to submit the dispute to those procedures. A large number of international agreements regarding maritime issues, postdating as well as antedating the conclusion of UNCLOS, exclude, with varying degree of explicitness,

unilateral referring of a dispute to compulsory adjudicative or arbitral procedures. Article 16 of the 1993 Convention purported to do just that because it provided that no dispute should be referred to the ICJ or arbitration without the consent of the parties.<sup>138</sup>

This interrelationship argument was important. The risk was that, with the entry into force of UNCLOS, disputes arising out of the implementation of regional or sectorial agreements potentially could be subject to a dispute settlement mechanism that, more often than not, would be substantially different and more coercive than the one originally provided for in the “lesser” agreements. For example, while the International Convention for the Regulation of Whaling,<sup>139</sup> concluded in 1946, does not contain a dispute settlement provision, according to the interrelationship argument accepted by ITLOS in the interim measures award,<sup>140</sup> compulsory procedures of UNCLOS would apply.<sup>141</sup>

Alternatively, had the Tribunal found that the dispute was one concerning UNCLOS, Japan argued that it should nevertheless decline to adjudicate the dispute because the applicants had failed to meet the conditions governing recourse under Part XV of UNCLOS, specifically exhaustion of diplomatic means.<sup>142</sup> Finally, even if the Tribunal declared it did have jurisdiction, Japan encouraged it to nevertheless dismiss the case as inadmissible because the dispute was scientific rather than legal,<sup>143</sup> given that the applicants had failed to identify a cause of action,<sup>144</sup> and because the dispute had become moot since Japan had accepted a catch limit of 1,500 tonnes for its EFP as requested in 1999 by Australia.<sup>145</sup>

Australia and New Zealand’s arguments in support of the Tribunal’s jurisdiction started with a reminder that ITLOS had unanimously found the existence of prima facie jurisdiction and then proceeded to rebut all the Japanese objections. The most interesting part of Australia’s and New Zealand’s position was the way they depicted UNCLOS and its relationship with sectorial and regional agreements. According to their argument, UNCLOS established a comprehensive and universal legal regime for all maritime spaces.<sup>146</sup> Like the regime established by the General Agreement on Tariffs and Trade (GATT),<sup>147</sup> subsequently revised, expanded and deepened by the agreements establishing the World Trade Organization (WTO),<sup>148</sup> UNCLOS was proclaimed as “one of the great regulatory treaties of our time.”<sup>149</sup> Australia and New Zealand argued that UNCLOS was to be interpreted as the framework within which regional and sectorial conventions expand and elaborate upon the principles laid down by it. The regional and sectorial agreements were not alternative legal regimes that cover and eclipse the obligations contained in the UNCLOS. This was not only because Article 311 of UNCLOS itself provides for the supremacy of UNCLOS over any other agreement incompatible with it or that “affect the enjoyment by other States Parties of their rights or the performance of their obligations under [UNCLOS],” but also because the idea that a sectorial convention might displace a general one was unknown to international law.<sup>150</sup> Indeed, Australia and New Zealand argued that international law develops not by erosion and reduction, but by accretion and accumulation of obligations.<sup>151</sup> Thus, according to international practice and doctrine, even if the 1993 Convention completely covered the normative ground occupied by the UNCLOS, the 1993 Convention would not supersede UNCLOS. There would simply be parallel obligations. Only in the case of manifest inconsistency between two treaties could questions of exclusion, *lex specialis* and *lex posterior* considerations, arise.<sup>152</sup> Echoing the ruling of the Permanent Court of International Justice (PCIJ) in the *Electricity Company of Sofia and Bulgaria* case,<sup>153</sup> Australia and New Zealand argued that, just as there may be more than one treaty among the same states relating to the same subject matter, there may be compromissory clauses in more than one treaty



that are not necessarily inconsistent. Such jurisdictional clauses do not cancel out one another; rather, they accumulate and coexist.<sup>154</sup>

Australia and New Zealand argued that, as in the case of the GATT/WTO regime, including in the UNCLOS, an effective and binding dispute settlement procedure had been essential to stabilize and maintain the necessary compromises for the attainment of the regime's goals.<sup>155</sup> When the UNCLOS's negotiators wanted to exclude any provisions of UNCLOS from the scope of compulsory dispute settlement under Part XV, or give the parties the possibility of doing so, they did so expressly.<sup>156</sup>

Australia and New Zealand argued that UNCLOS gives to the parties freedom to agree to resort to dispute settlement procedures outside the framework of the Convention at any time. This option exists even if a procedure under the UNCLOS—arbitration, conciliation, or judicial settlement—has commenced. Nonetheless, when those alternative procedures have failed to settle the dispute and the parties have not agreed to exclude any further procedure, then either party is entitled to begin the UNCLOS binding procedures.<sup>157</sup> In this case, it was asserted that no settlement had been reached by negotiations within the 1993 Convention framework and the terms of Article 16 of the 1993 Convention did not exclude recourse to UNCLOS Part XV. Indeed, it was argued that Article 16 of the 1993 Convention was not a procedure for peaceful settlement, but rather a menu of options. Far from excluding all other procedures, it did not exclude any alternative procedure.<sup>158</sup>

Australia and New Zealand also argued that if the Arbitral Tribunal upheld Japan's interpretation of Article 16, then the whole structure of UNCLOS, based on a compulsory dispute settlement procedure, would have been pierced.<sup>159</sup> If that were the case, Australia and New Zealand poetically opined that "the provisions of UNCLOS for mandatory dispute settlement are a paper umbrella which dissolves in the rain."<sup>160</sup> It was argued that this was not something that the negotiators of UNCLOS would have intended, because the only way parties to a regional and sectorial agreement could avoid Part XV procedures was to agree on another form of settlement entailing a binding decision.<sup>161</sup> Second, it was argued that if Japan's interpretation of Article 16 were upheld, this would create a paradoxical situation whereby parties to regional and sectorial agreements, lacking a binding and compulsory procedure, would be shielded from litigation under the particular agreement and UNCLOS, but would be exposed to compulsory procedures activated by other states parties to UNCLOS but not to the sectorial regime. In other words, any state party to UNCLOS with interests in the southern bluefin tuna stock (e.g., South Korea or Indonesia) that was not bound by the 1993 Convention could begin Part XV proceedings against Japan for allegedly violating its obligations for the conservation of southern bluefin tuna stock (under Articles 64 and 116-199 of UNCLOS). However, Australia and New Zealand would be prevented from doing so based solely on the fact that they were party to the 1993 Convention.<sup>162</sup>

### *The Award*

On August 4, 2000, the Arbitral Tribunal rendered the award on the *Southern Bluefin Tuna* dispute. It reversed the prima facie jurisdiction finding of ITLOS, deciding, four judges to one, that it lacked jurisdiction to hear the case on its merits.<sup>163</sup> The Tribunal's decision was surely surprising to the applicants and will not fail to stir legal commentators,<sup>164</sup> but, as will be explained, it was not void of its own logic and wisdom.

First, the Tribunal disposed of the Japanese objection that the case had become moot because Japan was ready to limit its EFP to 1,500 tonnes as asked by Australia in

1999. It observed that the Australian proposal was no longer on the negotiating table and that, in any event, the dispute was as much on the quantity of tuna to be caught during the EFP as on the quality of the program itself (i.e., the design and modalities for its execution).<sup>165</sup>

Turning to the question of jurisdiction, the Tribunal analyzed whether the dispute arose under the 1993 Convention, under the UNCLOS, or under both.<sup>166</sup>

Relying on ICJ jurisprudence, the Tribunal observed that “in any . . . case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point,”<sup>167</sup> and that it was up to the Tribunal “to decide whether the real dispute between the Parties does or does not reasonably . . . relate to the obligations set forth in the treaties whose breach is alleged.”<sup>168</sup> Since there was no disagreement between the parties over the fact that the dispute arose and fell within the provisions of the 1993 Convention, the issue was to determine whether it also fell within UNCLOS.<sup>169</sup> Rejecting Japan’s arguments, the Tribunal found that “it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute . . . [and that] . . . there is no reason why a given act of a State may not violate its obligations under more than one treaty.”<sup>170</sup> In agreement with what Australia and New Zealand had pleaded, the Tribunal recognized that the current range of international legal obligations is the result of a process of accretion and accumulation, not of erosion and exclusion. In states practice, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. In particular, UNCLOS “may be viewed as extending beyond the reach of the 1993 Convention.”<sup>171</sup> For this reason the Tribunal concluded that, while centered in the 1993 Convention, the dispute also arose under UNCLOS.<sup>172</sup> In other words, it was not a case of two disputes but of a single dispute arising under both conventions.<sup>173</sup> The Tribunal commented that to find that the dispute arising under the Law of the Sea Convention was distinct from the dispute that arose under the 1993 Convention would be artificial.<sup>174</sup>

The Tribunal had to investigate whether UNCLOS, and in particular Part XV, conferred jurisdiction upon it. The question had to be answered in light of the exceptions to compulsory jurisdiction contained in UNCLOS Part XV, specifically Article 281(1). That section states that the dispute settlement procedures of Part XV of the UNCLOS (i.e., compulsory procedures entailing binding decisions) apply only when no settlement has been reached by recourse to peaceful means and if the parties have not excluded any other procedures. Up to this point, the reasoning of ITLOS and the Arbitral Tribunal was virtually identical. It was self-evident that settlement had not been reached.<sup>175</sup> However, the two tribunals differed as to the crucial issue of whether Article 16 of the 1993 Convention made recourse to judicial settlement conditional upon the consent of all parties and thus excluded the procedures for compulsory settlement contained in the Law of the Sea Convention.<sup>176</sup> While ITLOS did not find in Article 16 an agreement to exclude compulsory dispute settlement procedures,<sup>177</sup> the Arbitral Tribunal held that “the absence of an express exclusion of any procedure . . . [wa]s not decisive.”<sup>178</sup> The Tribunal determined that the fact that Article 16 made referrals to binding settlement conditional upon agreement between the parties made it clear that it was the intent of the parties to the 1993 Convention to remove proceedings from the reach of compulsory procedures of any kind, including the compulsory procedures of UNCLOS.<sup>179</sup> For this reason, the Arbitral Tribunal held that Article 16 of the 1993 Convention excluded further procedures, and consequently, jurisdiction had to be declined.

The Arbitral Tribunal unanimously revoked the provisional measures prescribed by ITLOS.<sup>180</sup> The Arbitral Tribunal also declared that this revocation did not mean that the parties could disregard the effects of those measures or their own decisions made in conformity with them and that the prospects for a successful settlement of the dispute would be promoted by the parties' abstaining from any unilateral act that could aggravate the dispute.<sup>181</sup>

### *Some Observations on the Arbitral Award*

The Tribunal started the crucial section of its award by reminding itself that it was the first Arbitral Tribunal to be constituted under Part XV and Annex VII of UNCLOS.<sup>182</sup> As such, it was fully aware that it was not only called to settle the dispute on the fishing of southern bluefin tuna, but also, and perhaps more importantly, to determine to what extent the dispute settlement procedure contained in Part XV of UNCLOS prevailed over dispute settlement procedures in other sectorial and regional agreements, in which instances it would prevail, and to what extent. In the words of the Tribunal, these are issues "of high importance not only for the dispute that divides [the parties] but for the understanding and evolution of the processes of peaceful settlement of disputes embodied in the UNCLOS and in treaties implementing or relating to provisions of that great law-making treaty."<sup>183</sup> Based on these considerations, it is apparent that the Tribunal used a teleological approach<sup>184</sup> in the interpretation of the dispute settlement procedures in both the 1993 Convention and the UNCLOS.

In the case of Article 16 of the 1993 Convention, the Tribunal asked whether the parties intended to exclude binding dispute settlement procedures outside the framework of the Convention. It answered this in the affirmative.<sup>185</sup> This is perhaps the least convincing part of the Award. Paragraph 2 of Article 16 recites that "any dispute . . . not . . . resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration." Far from being an agreement to exclude further proceedings, as required by Article 281 of UNCLOS, this provision is merely an agreement to agree, eventually but not necessarily. As such, it cannot be considered a dispute settlement procedure in itself, but rather a diplomatic ambition far from having the ability to translate itself into a binding procedure. How this "programmatic clause" could obscure and derogate from the compulsory dispute settlement regime set up by UNCLOS is unclear.

According to the Tribunal, "UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions" due to the exceptions contained in Section 3 of Part XV, and because Article 281(1) allows parties to confine the applicability of compulsory procedures to cases where all parties to the dispute have agreed to submit their dispute to compulsory procedures.<sup>186</sup> As the Tribunal pointed out, a large number of international agreements regarding maritime issues, before and after the conclusion of UNCLOS, exclude unilateral reference to compulsory adjudicative or arbitral procedures of a dispute. But it is the opinion herein that it would be stretching interpretive tools beyond their logical limits if what was inferred was that the negotiators of UNCLOS did not intend to create an overarching regime for compulsory and binding dispute settlement that could also include all regional and sectorial conventions.

International law does not have any immediate solution to the dilemma of a state having accepted compulsory jurisdiction in one treaty and refusing compulsory jurisdiction in another related treaty. The key factor is the relationship of the treaties, since

without such a relationship the compulsory jurisdiction clauses are independent. Where the treaties are interlinked, as was the case with UNCLOS and the 1993 Convention, the judicial body before which the matter of conflicting commitments to compulsory adjudication is pending will have to weigh the cogency of the declaration of acceptance of jurisdiction against the manifestation of opposition to that acceptance. In the absence of clear principles and in light of scarce and inconsistent practice, when confronted by a similar dilemma each judicial body and the judges within each of them will decide according to their own strategic considerations. In the case of the PCIJ, the Court decided to uphold jurisdiction.<sup>187</sup> It probably did this in an attempt to reinforce the delicate sprouts of the then-nascent phenomenon of compulsory jurisdiction. In the multiplicity of agreements concluded that accepted compulsory jurisdiction, the Court saw evidence that the contracting parties intended to open up new ways to access international jurisdictions. In the case of ITLOS, the desire to affirm the normative and procedural supremacy of the UNCLOS over sectorial and regional agreements won over the whole bench. However, in the case of the Arbitral Tribunal other considerations prevailed.

One of those considerations that appears to have influenced the Arbitral Tribunal can be found directly in the text of the Award and has much to do with fairness and justice.<sup>188</sup> Article 297(3) of UNCLOS provides that:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 [i.e. compulsory procedures entailing binding decisions], except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

In other words, while UNCLOS places all states on an even footing on the high seas, making them all equally subject to compulsory adjudication, one of the many rights given to coastal states within the EEZ is the privilege of not being obliged to accept adjudicative settlement with respect to biological resources. Undoubtedly, the case that diplomats negotiating this had in mind was the *Icelandic Fisheries Jurisdiction* dispute.<sup>189</sup> Coastal states at the UNCLOS negotiations were not willing to subject their newly found EEZ rights to international accountability. Therefore, the exclusion of binding compulsory jurisdiction was deliberate and, in the interest of consensus, necessary.<sup>190</sup> Yet, if coastal states had been shielded from compulsory submission to procedures entailing binding decisions, all other states had not. The paradox is evident. In the *Southern Bluefin Tuna* dispute, Australia and New Zealand are coastal states and Japan is not. Article 297(3) protects the former to the detriment of the latter. Had Japan attempted to counterclaim that it was the fishing practices of Australia and New Zealand that endangered the stock, not its own or the EFP, and/or that it was their lack of cooperation that should be sanctioned instead of its own, the Arbitral Tribunal could not have exercised jurisdiction due to the Article 297(3) exception.<sup>191</sup> The Arbitral Tribunal postulated that the negotiators of UNCLOS did not intend to create such an imbalance between the rights and obligations of coastal and noncoastal states with respect to the settlement of disputes arising from events occurring within EEZs and on the high seas and ruled accordingly.<sup>192</sup>

Another concern is metajudicial. Sometimes history and diplomatic considerations weigh as much as strictly legal considerations in international tribunals. Despite the existence of a large number of treaties providing for judicial proceedings to be initiated unilaterally, their actual use is very rare. Even when proceedings can be initiated unilaterally, states commonly seek the consent of the other party.<sup>193</sup> In more than two centuries of modern international arbitrations, there are few instances in which arbitral proceedings have been triggered unilaterally on the basis of a compromissory clause contained in a treaty. In addition to the *Southern Bluefin Tuna* case, there was the *Radio Orient* case between Egypt and the states of the Levant under French Mandate.<sup>194</sup> In that case, a compromissory clause contained in the 1932 Telecommunication Convention<sup>195</sup> provided that in the event of a disagreement concerning the execution of the Convention and the annexed regulations, the dispute was to be submitted to arbitration. Even though the Egyptian Government objected to the Tribunal's jurisdiction on the ground, *inter alia*, that no *compromis* had been concluded between the two parties, it participated in the proceedings. The Tribunal eventually rejected Egypt's objections and ruled against it on the merits.<sup>196</sup>

In practice, compromissory clauses providing for compulsory litigation are mainly aimed at avoiding disputes, not settling them.<sup>197</sup> The certainty that if things turn nasty there will be a formal procedure to question parties' reasons, and possibly expose them to third-party scrutiny, will induce parties to settle the issue confidentially among themselves or to avert confrontation by modifying their behavior. In this age of international judicial fora proliferation and increased use, it is easy to forget that in the international system, as in the domestic one, litigation is a last resort. For centuries, beginning international proceedings has been a weighty decision of much diplomatic consequence. It would be interesting to investigate whether the diffusion of procedures for interim relief has created, or will eventually create, an incentive for states to break the time-honored rule of comity that proscribes compulsory arbitration.

Japan has generally viewed compulsory adjudication unfavorably. Since World War II, the policy of Japan has been that, unless disputes are resolved through negotiations, they should be submitted to adjudication, but always and only by consensus.<sup>198</sup> Although Japan has a liberal attitude towards the acceptance of international courts' and tribunals' jurisdiction and is one of the few states that has deposited a declaration of acceptance of ICJ jurisdiction without major reservations attached, it has regularly managed to avoid litigation by way of diplomatic negotiations.

In sum, if Japan was justifiably dragged into litigation (legally speaking) in the *Southern Bluefin Tuna* case, arguably it was inconsistent with expectations of international comity. These expectations, though non-legal, may have influenced the Arbitral Tribunal in deciding against exercising jurisdiction. These were probably some of the considerations that convinced the Arbitral Tribunal to decline jurisdiction. Again, in similar cases deciding in favor of or against the exercise of jurisdiction, it is much a matter of judicial policy.

Is an ad hoc Arbitral Tribunal the proper forum to decide such a momentous issue as the relationship between the dispute settlement regime created by UNCLOS and those of the various regional and sectorial conventions? Hardly. The arbitrators of the *Southern Bluefin Tuna* case may have missed the point because they ruled, not as an ad hoc arbitral panel convened only to settle a given dispute between the parties, but as a judicial body called upon to interpret certain key provisions of a universal law-making regime. Evidence of this is the fact that the Tribunal felt the need to stress that "there might be instances in which the conduct of a state Party to UNCLOS and to a fisheries

treaty implementing it would be so egregious, and risk consequence of such gravity, that a Tribunal might find that the obligations of the UNCLOS provide basis for jurisdiction, having particular regard to the provisions of article 300 [i.e., good faith and abuse of rights].<sup>199</sup> In other words, having undermined the UNCLOS dispute settlement regime, the Arbitral Tribunal felt the need to warn that reliance on exceptions contained in dispute settlement clauses of regional and sectorial agreements will not be total. Such admonitions are more effective if made by a permanent judicial body, where judges sit for long periods of time and rely, with varying degrees of consistency, on past judgments. Should a case similar to the *Southern Bluefin Tuna* dispute arise again, it is unlikely that a future Arbitral Tribunal would feel the need to rule consistently with its predecessor. Ad hoc Tribunals can make ad hoc justice. While this may be useful to preserve international peace, it is not necessarily beneficial to the preservation of the international legal order.

The preservation of the integrity of the edifice of the Law of the Sea Convention against the erosion by judgments made by ad hoc tribunals was not a concern of the negotiators. Unlike in the case of several other international regimes, where there is a judicial body at the center of the legal system intended to preserve it,<sup>200</sup> in the case of UNCLOS, ITLOS is only one of four possible means available for parties to settle disputes. It is as if the power to interpret the UN Charter had been given not only to the ICJ, but also to another permanent judicial body foreign to the Charter, and two ad hoc arbitral panels, and it was left up to the parties which one to choose. Under UNCLOS, ITLOS is not even the default mechanism in case a state has not selected any of the four available fora. In that case, states are deemed to have selected arbitration under Annex VII.<sup>201</sup> If UNCLOS is to play the paramount role in the maintenance of world peace and sustainable development of marine resources that its negotiators had hoped, it needs to be interpreted consistently, and ITLOS is the natural candidate for that role.<sup>202</sup>

## Conclusions

The Award delivered by the Arbitral Tribunal and the ITLOS Order in themselves did not settle the dispute regarding the southern bluefin tuna. However, what they did accomplish was to help break the diplomatic impasse the parties had been in since the mid-1990s.

In April 2001, following the report of an independent scientific panel that experimental fishing did not protect the species, Australia, New Zealand, and Japan voted to stop experimental fishing of southern bluefin tuna.<sup>203</sup> Shortly thereafter, on May 29, 2001, the dispute was finally closed. First, Australia announced the end of its ban on Japanese tuna fishing vessels visiting Australian ports, which had been introduced in 1998 after talks in the Commission over Japan's request for an increased quota broke down.<sup>204</sup> Second, the parties committed to a Scientific Research program endorsed by the Commission to replace Japan's EFP which will enable a stock assessment to be undertaken and a new TAC to be set. Finally, while Japan claimed that it was legally entitled to fish an extra 711 tons above its quota (the quantity that it was prevented from catching in 1999–2000 because of the subsequently annulled ITLOS order), the three states agreed that Japanese fishing vessels could harvest half that amount, or 356 tons above the national quota, on a one-off basis.<sup>205</sup>

As for the consequences of the ITLOS and Arbitration decision on the cooperative regime for southern bluefin tuna fishing, scholars of international regimes will undoubtedly find in the *Southern Bluefin Tuna* dispute interesting study material and a lesson on

mistakes to avoid. The Japanese unilateral EFP was the immediate *casus belli* of the dispute, but not its underlying reason, and this also explains why the program's eventual findings do not really matter. Even if it had revealed that there is plenty of tuna for all, it would have been very unlikely that Australia and New Zealand could accept the findings as a basis for raising the TAC because the program was carried out unilaterally. That is why Japan eventually agreed to shelve the EFP and to carry out a new trilateral research program under the aegis of the Commission. From a regime perspective, the problem with the 1993 Convention was that it did not incorporate all states that fish for southern bluefin tuna. Despite a multilateral façade, the 1993 Convention was essentially a trilateral (or perhaps a de facto bilateral) arrangement where the party with the greatest interests at stake, Japan, was also invariably outvoted.<sup>206</sup> Japan could either bury the 1993 Convention by withdrawing from it<sup>207</sup> or double its efforts, jointly with Australia and New Zealand, to bring all other fishing states into the regime.<sup>208</sup> Either way, the southern bluefin tuna cannot be effectively conserved and managed without Tokyo's cooperation, for Japan is both its main harvester and consumer.<sup>209</sup> In the end, reason has prevailed and negotiations are ongoing to extend the 1993 Convention regime to include Indonesia, South Korea, and Taiwan.<sup>210</sup>

Yet, if the *Southern Bluefin Tuna* dispute can be considered resolved, at least for the time being, it has created new and much larger issues that are here to stay. The contrasting interpretations given by ITLOS and by the Arbitral Tribunal pertaining to the relationship between the dispute settlement mechanisms of UNCLOS and that of the 1993 Convention will have significant consequences in the years to come. The questions concerning the relationship between the dispute settlement procedures under regional and sectorial agreements and that of UNCLOS will only become more relevant. At the beginning of the 21st century, there are dozens of regional fishing agreements, encompassing almost all known fisheries. At the same time, adherence to UNCLOS is global. Some or all states participating in sectorial or regional regimes will also be parties to the UNCLOS. For this reason, the doubt and uncertainty created by the dissonant judgments must be dispelled as soon as possible.

One effect of the *Southern Bluefin Tuna* case has been to highlight the obligations contained in UNCLOS relating to the conservation of high seas living resources. Although couched in general terms, these obligations have real meaning and can be given effective content in particular cases. Moreover, the judgment rendered by ITLOS and the Arbitral Award signal that regional and special fisheries agreements cannot override the obligations under UNCLOS, but instead serve to complement them. States must act consistently with these broad obligations at all times or risk being called to account for their violation before international judicial bodies, even in those cases where they opted for a less trenchant dispute settlement procedure.

Regarding international judicial considerations, the *Southern Bluefin Tuna* dispute is likely to make history for two reasons. First, it is a remarkable exception to the long-respected custom of only resorting to arbitration by mutual agreement. Second, it is one of the first cases, following the entry into force of UNCLOS, in which the parties were confronted with actual forum-selection issues. While the former record seems to be merely an anomaly, the latter is likely to become a prominent issue of debate in the near future.

Indeed, it did not take long for both issues to emerge again in a similar fishing dispute, although with a few extra complications. During the fall of 2000, a dispute over swordfish harvesting in the Southeast Pacific, which has divided Chile and the European Community since 1991, was referred to two different judicial bodies.<sup>211</sup> While the EC requested and obtained the establishment of a WTO dispute settlement panel to

determine whether Chilean action on preventing EC vessels from transshipping swordfish in Chilean ports had violated, inter alia, GATT's articles V and XI,<sup>212</sup> Chile referred the matter to ITLOS, alleging a violation of the provisions in UNCLOS relating to the protection of the marine environment and high seas fishing.<sup>213</sup>

First, it should be observed that, while Chile could have emulated Australia and New Zealand by unilaterally requesting the establishment of an ad hoc Arbitral Tribunal to decide the dispute with the EC over swordfishing, it opted instead for a more cooperative approach. The case was submitted by common agreement to a five-judge Special Chamber of ITLOS. The chamber was to decide, among other things, not only whether the EC was in breach of its obligations to ensure the conservation of swordfish under UNCLOS, but also whether Chile had violated UNCLOS by extending its own conservation measures to swordfishing on the high seas.<sup>214</sup>

Second, the dispute was split into two completely different and arguably antithetical cases. Each party selected the forum that would apply what it perceived to be the most favorable body of law to the particular aspects of the dispute. To the EC, Chile's banning of transshipment was trade related and should be decided in light of international trade law. Chile considered aspects of the dispute pertaining to the protection of an endangered marine species to be an environmental problem that should be decided in light of the Law of the Sea.

In any event, on January 25, 2001, the EC and Chile reached an agreement to resolve the dispute that covered both access for EC fishing vessels to Chilean ports and bilateral and multilateral scientific and technical cooperation on conservation of swordfish stocks. As a result, and pending ratification of the agreement, the EC requested a suspension of panel proceedings in the WTO, and Chile and the EC asked ITLOS to suspend proceedings.<sup>215</sup>

To conclude, the absence of formal coordination among the various international judicial bodies, which could address issues of *litis pendens* in an organic way, and, more significantly, the worrisome phenomenon of segmenting international law into specialized, self-contained, and ultimately conflicting regimes, will be a problem in the future. Moreover, forum-selection issues may arise not only in relation to the choice of the mechanism to decide the merits of the dispute, but also on interim relief. If the ICJ were ever to consider ITLOS as a competitor for the same pool of cases, the *Southern Bluefin Tuna* dispute would be a cautionary tale that could force the ICJ to tackle the long-debated issue of the legal force of its provisional measures.<sup>216</sup>

## Post Scriptum

On June 27, 2001, the ICJ rendered its judgment in the *LaGrand* case. Paragraph 109-110 of the judgment read: "In sort, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect . . . The . . . Order of 3 March 1999 . . . was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States." *LaGrand* (Germany v. United States), Judgment, 27 June 2001. The text of the judgment can be found on the Court's website: <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (site last visited September 15, 2001).



## Notes

1. United Nations Convention on the Law of the Sea, concluded in Montego Bay on December 10, 1982, *ILM*, Vol. 21 (1982), at 1261 and UN Doc. A/CONF 62/122.
2. *Southern Bluefin Tuna Case—Australia and New Zealand v. Japan*, Arbitral Award of August 4, 2000 (hereafter: *Award*). The text of the *Award*, together with the written pleadings and the transcripts of the hearings, can be found at the ICSID website <<http://www.worldbank.org/icsid/bluefintuna/main.htm>> (site last visited August 15, 2000). Because of the recentness of the *Southern Bluefin Tuna* dispute, literature is still scarce. Among the few reviews, see B. Kwiatkowska, "The Southern Bluefin Tuna Cases," *International Journal of Marine and Coastal Law*, Vol. 15 (2000), pp. 1–36; B. Kwiatkowska, "Southern Bluefin Tuna Case," *American Journal of International Law*, Vol. 94 (2000), pp. 150–154; R. R. Churchill, "The Southern Bluefin Tuna Cases: Order for Provisional Measures of 27 August 1999," *International and Comparative Law Quarterly*, Vol. 49 (2000), pp. 979–990; S. Rosenne, "International Tribunal for the Law of the Sea: Survey for 1999," *International Journal of Marine and Coastal Law*, Vol. 15 (2000), pp. 443–474, at 464–474; M. Hayashi, "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea," *Tulane Environmental Law Journal*, Vol. 13 (2000), at 361–385; C. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (London, Kluwer, 2000), at 196–217 and 397–398 and M. Salvadori, "Il caso *Southern Bluefin Tuna* e problemi di giurisdizione internazionale," in R. Ferrara and P. Vipiana, eds., *La tutela dell'ambiente tra diritto interno e diritto comunitario* (Cedem, Padova, 2001) (forthcoming).
3. *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (Provisional Measures), Order of August 27, 1999 (hereafter: *Provisional Measures Order*). Text reproduced in *ILM*, Vol. 38 (1999), pp.1624–1655.
4. *Infra*, section entitled "Legal Tactics at Play."
5. *Infra*, section entitled "Some Observations on the Arbitral Award."
6. On the issue, see the papers collected in the special issue "Legalization and World Politics," *International Organization*, Vol. 54, No. 3 (2000).
7. *Infra*, section entitled "Some Observations on the Arbitral Award," last two paragraphs.
8. *Infra*, section entitled "The Dispute."
9. See P. Birnie and A. Boyle, *International Law and the Environment* (Oxford, Clarendon Press, 1992), at 160–163; G. Handl, "Compliance Control Mechanisms and International Environmental Obligations," *Tulane Journal of International and Comparative Law*, Vol. 5 (1997), pp. 29–49, at 37; G. Handl, "Controlling Implementation of Compliance with International Environmental Commitments: The Rocky Road from Rio," *Colorado Journal of Environmental Law and Policy*, Vol. 5 (1994), pp. 305–331, at 329; and S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), at 39–44. See also, in general, T. Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems," *Yearbook of International Environmental Law*, Vol. 1 (1990), pp. 35–56; and B. Simma, "Consent: Strains in the Treaty System," in R. St. J. McDonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (The Hague, Nijhoff, 1983), pp. 485–511.
10. *Infra*, section entitled "The Dispute."
11. Commission for the Conservation of Southern Bluefin Tuna, *Fact Sheet*, "What are Southern Bluefin Tuna?," <http://www.home.aone.net.au/ccsbt/facts.html#what> (site last visited January 20, 2000); *Southern Bluefin Tuna cases*, Verbatim Record (August 18, 1999), ITLOS/PV.99/20, intervention of Mr. Campbell (Hereafter: Campbell Intervention); and T. Ayling, *Collins Guide to the Sea Fishes of New Zealand* (Auckland, Collins, 1982), at 292.
12. This is the only known breeding area and as such is the reason why the southern bluefin tuna is studied and managed as a single stock. Commission for the Conservation of Southern Bluefin Tuna, *Fact Sheet*, *supra* note 11.
13. *Ibid.*
14. *ITLOS Press Release*, No. 27, August 26, 1999, at 2.
15. *Ibid.*

16. *Ibid.*

17. *Award*, supra note 2, para. 22.

18. Currently, southern bluefin tuna are fished either by longline or by purse seine netting. In most fisheries longline is employed. Most of the longline fishing is done by Japanese vessels, either on the high seas or under license in the EEZ of Australia and New Zealand. Conversely, fish farming is a significant component of the Australian fishery. The industry is mainly based in Port Lincoln, South Australia, where it began in 1990. Young tuna under six months old are caught en route to their Southern Ocean feeding ground in purse seine nets and towed to port, where they are held in large circular holding nets and fattened up for sale in the Japanese market. At present, Port Lincoln has one of the highest per capita income levels of all Australia.

19. *Award*, supra note 2, para. 22.

20. *Ibid.*

21. The 1993 Convention for the Conservation of Southern Bluefin Tuna, *U.N. Law of the Sea Bulletin*, No. 26, 1994, p. 57. The 1993 Convention entered into force on May 20, 1994 shortly before the entry into force of the UNCLOS.

22. The 1993 Convention, supra note 21, Article 3.

23. *Ibid.*, Article 6.

24. For a review of the various regional and sectorial organizations, agreements, and arrangements, see S. H. Marashi, "Summary Information on the Role of International Fishery and Other Bodies with regard to the Conservation and Management of Living Resources of the High Seas," *FAO Fisheries Circular No. 908*, FIPL/C908, Rome, 1996, pp. 60–80 (Annex I); and E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-sustainable Nature of High Seas Fisheries," *Ocean Development and International Law*, Vol. 25 (1994), pp. 255–344.

25. *Award*, supra note 2, para. 24.

26. Of course, whether an increase in Japanese catch would translate into a reduced market share for Australia and New Zealand depends ultimately on elasticity of demand for southern bluefin tuna. While there is indication that increased supply would satisfy increased demand, it is also obvious that, if all the extra supply comes from Japanese trawlers, it is Japan and not Australia and New Zealand which would benefit from the extra revenue.

27. This is exactly what happened more than one century ago in the case of another famous international environmental dispute, The *Bering Sea Fur Seals* dispute. See Romano, supra note 2, pp. 133–150, at 144–147.

28. *Award*, supra note 2, para. 24.

29. *Southern Bluefin Tuna cases*, Verbatim Record (August 19, 1999), ITLOS/PV.99/22, intervention of Mr. Togo.

30. In 1998, Indonesia, South Korea and Taiwan fished about 5,000 tonnes, an amount equivalent to 40% of the TAC under the 1993 Convention, and about the share allocated to Australia and Japan. At the same time, the parental stock was estimated to have declined to 7% to 15% of the 1960 level. Intervention of Mr. Togo, *ibid.*

31. The 1993 Convention, supra note 21, Article 7.

32. Report of the Resumed Fourth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna, Canberra, Australia, February 19–21, 1998, Agenda Item 3. [Http://www.home.aone.net.au/ccsbt/4-3contents.html](http://www.home.aone.net.au/ccsbt/4-3contents.html) (site last visited, January 22, 2000). For an explanation about why Japan eventually resorted to unilateral action, see J. S. Barkin and E. R. DeSombre, "Unilateralism and Multilateralism in International Fisheries Management," *Global Governance*, Vol. 6 (2000), pp. 339–360.

33. *Ibid.*

34. *Ibid.*

35. "Response of the Government of Japan to Request for Provisional Measures and Counter-Request for Provisional Measures," para. 17. Mimeo copy on file with the author.

36. *Award*, supra note 2, para. 25.

37. *Ibid.*, para. 27.

38. Report of the Fifth Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna, Tokyo, February 22–26, 1999, <http://www.home.aone.net.au/ccsbt/5-1Mainfull.html#5-1REPT> (site last visited January 22, 2000) and Report of the Fifth Annual Meeting, Second Part, May 10–13, 1999, Tokyo, <http://www.home.aone.net.au/ccsbt/5-2Main.html#5-2Report> (site last visited January 22, 2000) .

39. For an overview of the astonishing growth in the number of international judicial bodies, see the symposium issue of the *NYU Journal of International Law and Politics*, Vol. 31 (1999), entitled “The Proliferation of International Tribunals: Piecing Together the Puzzle” and J. Charney, “Is International Law Threatened by Multiple International Tribunals?,” *Collected Courses of the Hague Academy of International Law*, Vol. 271 (1998), 105–381.

40. States are always free to choose whatever peaceful method they want to settle disputes, including diplomatic means. The principle of the free choice of means is enshrined in Article 33 of the UN Charter.

41. *Lake Lanoux Arbitration* (French Text), *UNRIAA*, Vol. 12 (1957), pp. 281–317; (English Text), *International Law Reports*, Vol. 24 (1957), pp. 101–142. On the *Lac Lanoux* dispute, see Romano, *supra* note 2, at 219

42. *Trail Smelter Arbitration*, *UNRIAA*, Vol. 3 (1949), pp. 1903–1982. On the *Trail Smelter* dispute, see Romano, *supra* note 2, at 261.

43. *Pacific Fur Seals Arbitration*, 15 August 1893, in J. B. Moore, *A Digest of International Law* (Washington, Government Printing Office, 1906, Vol. I), at 890. On the *Bering Sea Fur Seals* dispute, see Romano, *supra* note 2, at 133.

44. *Canada-France Arbitration on the Dispute concerning Filleting within the Gulf of St. Lawrence* (Award of July 17, 1986), reprinted in French in *Revue générale de droit international public*, Vol. 90 (1986), at 713. On the arbitration, otherwise known as *La Bretagne* Arbitration from the name of a factory trawler operating in the disputed area, see T. McDorman, “The Canada-France Maritime Boundary Case: Drawing a Line around St. Pierre and Miquelon,” *American Journal of International Law*, Vol. 84 (1990), pp. 157–189, at 162–165; T. McDorman, “French Fishing Rights in Canadian Waters: the 1986 *La Bretagne* Arbitration,” *International Journal of Estuarine and Coastal Law*, Vol. 4 (1989), at 52; and W. Burke, “A Comment on the *La Bretagne* Award of July 17, 1986: The Arbitration between Canada and France,” *San Diego Law Review*, Vol. 25 (1988), at 495.

45. On this point, see Romano, *supra* note 2, at 321–338.

46. *Award*, *supra* note 2, para. 28.

47. Australian Declaration of March 17, 1975, *ICJ Yearbook*, 1994–1995, at 80. See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#aust> (site last visited March 21, 2001).

48. New Zealand Declaration of September 22, 1977, para. 2, 2.2 and 2.3, *ibid.*, at 104. See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#nzl> (site last visited March 21, 2001).

49. Japanese Declaration of September 15, 1958, *ibid.*, at 95. See <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#japo> (site last visited March 21, 2001).

50. *Award*, *supra* note 2, para. 39 (c), last sentence. See also the statement made by Prof. Rosenne, pleading for Japan, May 7, 2000. <http://www.worldbank.org/icsid/bluefintuna/main.htm> (site last visited March 21, 2001). In this regard, it should be noted that Prof. Rosenne went as far as to argue that, if Australia and New Zealand take the position that the 1993 Convention cannot exclude compulsory procedures, and that the UNCLOS procedures can exist side by side, then under Article 282 of UNCLOS, the Applicants should have resorted to the ICJ first.

51. *Electricity Company of Sofia and Bulgaria*, Judgment, [1939], *P.C.I.J.*, Series A/B, No. 77, p. 64.

52. *Ibid.*, at 76. The decision was not unanimous. Judge Van Eysinga concluded that, because of the existence of this reservation in the Belgian declaration, the declaration was “intended to be subsidiary; it is not to apply when and insofar as another method of pacific settlement has been established” and “the Treaty of 1931 does in fact establish another method for the pacific

settlement,” *ibid.*, at 111. Judge Hudson, concurred with the latter point and concluded that “the reciprocal declarations . . . are not to be applied as a source of jurisdiction in this case, and the Court’s jurisdiction may be sought only in the 1931 Treaty,” *ibid.*, at 124.

53. *Ibid.*, at 76.

54. See the statement made by H. Burmester, Counsel for Australia, May 8, 2000. [Http://www.worldbank.org/icsid/bluefintuna/main.htm](http://www.worldbank.org/icsid/bluefintuna/main.htm) (site last visited March 21, 2001).

55. See Romano, *supra* note 2, at 151, 177, 246, 279, and 307.

56. “Report of the International Court of Justice,” August 1, 1998 to July 31, 1999, United Nations, New York, 1999, UN Doc. A/54/4.

57. Article 41(1) of the ICJ Statute reads: “The Court shall have the power to indicate . . . provisional measures which ought to be taken. . . .” The ambiguous wording of the ICJ Statute does not allow for any definitive conclusion. Indeed, the Court has a “power.” But that power is only “to indicate” provisional measures, not to order or to prescribe, such as in the case of Article 25 of the Statute of the ITLOS. Yet, the Statute describes those measures as measures that “ought to be taken,” which suggest that they are not binding.

58. To roughly summarize the debate, one could say that those who deny that provisional measures are binding tend to rely on the wording of the Statute and its drafting history. Conversely, those who hold provisional measures to be binding resort to a functional or teleological approach. On the point, see J. B. Elkind, *Interim Protection: A Functional Approach* (The Hague, Nijhoff, 1981), pp. 153–166.

59. The closest the ICJ has come to stating that provisional measures are indeed binding has been in connection with the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 13 September 1993, *ICJ Reports 1993*. In that case, two requests for provisional measures were filed by Bosnia. The Court indicated them a first time and when prompted with a second request it noted that “[th]e present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court’s order of 8 April 1993...but an immediate and effective implementation of those measures.” Hopefully, the ICJ will pronounce itself on whether the interim measures it indicates are binding or not-binding in the currently pending *LaGrand* case (Germany v. United States of America). Although, in a unanimously adopted Order dated 3 March 1999, the Court, ruling *ex officio* in view of the urgency of the case, called on the United States to “take all measures at its disposal” to ensure that Walter LaGrand was not executed pending a final decision in the proceedings instituted by Germany, Mr. LaGrand was nonetheless executed by the authorities of the State of Arizona.

60. Elkind, *supra* note 58, at p. 164 has written: “Since the *Anglo-Iranian* case in 1951 none of the States against whom interim measures have been directed have complied with them.”

61. *Nuclear Tests* (Australia v. France), Judgment, *ICJ Reports 1974*, pp. 253–455 and *Nuclear Tests* (New Zealand v. France), Judgment, *ICJ Reports 1974*, pp. 457–528.

62. Australia ratified UNCLOS on October 5, 1994; Japan on June 20, 1996; and New Zealand on July 19, 1996. [Http://www.un.org/Depts/los/los94st.htm](http://www.un.org/Depts/los/los94st.htm) (site last visited, January 22, 2000).

63. On the negotiating history of the dispute settlement mechanism of the Law of the Sea Convention, see A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Dordrecht, Nijhoff, 1987) and M. H. Nordquist, *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Dordrecht, Nijhoff, 1985), Vol. 5, pp. 3–146.

64. UNCLOS, Article 280.

65. *Ibid.*, Article 281.

66. *Ibid.*, Article 282.

67. *Ibid.*, Article 284–285.

68. *Ibid.*, Article 286 and 296.

69. *Ibid.*, Article 287(1).

70. *Ibid.*, Article 287(4).

71. *Ibid.*, Article 287(5).

72. *Ibid.*, Article 290(5).

73. To date, ITLOS has considered five disputes: The *M/V Saiga*, the *Camouco*, the *Monte Confurco*, *The Grand Prince*, and the *Southern Bluefin Tuna* cases. In the *M/V Saiga* and the *Southern Bluefin Tuna* cases, the Tribunal was asked to prescribe interim measures, while in the *Camouco*, *The Grand Prince*, and the *Monte Confurco* cases it was requested to order the prompt release of the vessel under Article 292 of the UNCLOS. The only dispute in which the Tribunal has decided on the merits is the *M/V Saiga*. The ITLOS website is: [www.un.org/Depts/los/ITLOS/ITLOSHome.htm](http://www.un.org/Depts/los/ITLOS/ITLOSHome.htm). For a recent analysis of the *M/V Saiga* case, see L. de La Fayette, "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute" *International Journal of Marine and Coastal Law*, Vol. 15 (2000), pp. 355–392.

74. UNCLOS, Article 298.

75. *Ibid.*, Article 297(3)(a). On the consequences of this exception on the *Southern Bluefin Tuna* dispute, see *infra* section entitled "Some Observations on the Arbitral Award."

76. *Ibid.*, Article 286. When contesting the Arbitral Tribunal's jurisdiction, Japan claimed that dispute resolution means had not been exhausted under the UNCLOS because negotiations had been held under the 1993 Convention. However, as Judge ad hoc Shearer pointed out in his Separate Opinion, it would be: "highly artificial to separate into two different baskets a dispute under the Convention and a dispute under the CCSBT. The two instruments are inherently interlinked. There had been lengthy negotiations between the parties within the framework of the latter instrument. These negotiations had not resulted in a conclusion, nor in a choice of appropriate third party dispute resolution procedures. It was no more likely that these negotiations would have been successful had they been conducted expressly with reference to the United Nations Convention on the Law of the Sea. Yet, negotiations under UNCLOS were no more likely to succeed than those already held under the 1993 regime." Shearer, Separate Opinion, *Provisional Measures Order*, *supra* note 3, at 1649.

77. UNCLOS, Article 290(6) states: "The parties to the dispute shall comply promptly with any provisional measures prescribed under this article." See also Article 25 of the Statute of the ITLOS, and Article 95(1) of the Rules of the Tribunal. The Statute of the ITLOS is contained in Annex VI of the UNCLOS. The Rules of the Tribunal can be found at: [Http://www.un.org/Depts/los/ITLOS/Rules-Tribunal.htm](http://www.un.org/Depts/los/ITLOS/Rules-Tribunal.htm) (site last visited January 22, 2000).

78. *Provisional Measures Order*, *supra* note 3, para. 28.1.

79. *Ibid.*, para. 28.2.

80. *Ibid.*, para. 28.3.

81. UNCLOS, Article 290(5) reads: "Pending the constitution of an Arbitral Tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, *failing such agreement within two weeks from the date of the request for provisional measures*, the International Tribunal for the Law of the Sea. . ." [emphasis added].

82. *Provisional Measures Order*, *supra* note 3, para. 31–32.

83. *Ibid.*

84. Japan, "Statement in Response," *supra* note 35.

85. *Provisional Measures Order*, *supra* note 3, para. 33.

86. *Ibid.*

87. *Ibid.*

88. *Ibid.*

89. To this end, Australia and New Zealand introduced an expert witness, Dr. John Beddington, Professor of Applied Population Biology at Imperial College, London. The expert was subject to a type of *voir dire* procedure—he was questioned by the attorneys of the other party to determine his qualification. It is interesting to note that examination of parties' experts is extremely unusual in international proceedings. The only other known instance of a preliminary examination of an expert witness to determine competence and independence dates back to the *South West Africa* cases, litigated in the 1960s before the ICJ. ICJ Pleadings, *South West Africa*, Vol. X, at 340. The

incident is reported by: S. Rosenne, *The Law and Practice of the International Court (1920–1996)* (The Hague, Nijhoff, 1997, Vol. III), at 1358. Much as in that case, in the *Southern Bluefin Tuna* case the President of the Tribunal, under whose control the examination takes place (ITLOS Rules, Rule 80), was strict in limiting the examination to the witness's expertise and not to allow it to extend to the witness's views on the matter. After the voir dire, the expert was examined and cross-examined. *Southern Bluefin Tuna* cases, Verbatim Record (August 18, 1999), ITLOS/PV.99/20.

90. *Provisional Measures Order*, supra note 3, orders 1.a and 1.b, Judges Vukas and Eiriksson dissenting. Judge Eiriksson was not able to concur with the order not to take aggravating measures, because, in his opinion, it is a "general policy guiding States in international relations" and the parties do not need to be reminded of it. Eiriksson, Dissenting Opinion, *ibid.*, at 1655. On the same issue see also Vukas, Dissenting Opinion, *ibid.*, at 1654–55, para. 6.

One could argue that the duty to ensure no action be taken which might aggravate or extend the dispute pending the constitution of the Arbitral Tribunal and which might prejudice the carrying out of any decision on the merits implies also the lifting of the closure of the Australian EEZ and ports to Japanese vessels. Nowhere in the Tribunal's order is there explicit mention of the ban. According to Judges Yamamoto and Park in the operative part of the order where the parties were required to refrain from conducting an EFP, the Tribunal should have also required Australia to terminate the measures taken against Japan in 1998, because "in the absence of the cause that gave rise to the need for the measures, the measures themselves would have no raison d'être." Yamamoto and Park, Separate Opinion, *ibid.*, at 1646. On the same point see also Eiriksson, Dissenting Opinion, *ibid.*, at 1655, para. 3.

91. *Ibid.*, order 1.d, Judges Yamamoto and Vukas dissenting.

92. *Ibid.*, order 1.c, Judges Zhao, Yamamoto, Vukas and Warrioba dissenting.

93. *Ibid.* In particular, Judge Warrioba objected that, since the Tribunal admitted that it cannot conclusively assess the scientific evidence presented by the parties, it had no basis of prescribing an order that sets a TAC and therefore that the issue should have been left to the Arbitral Tribunal to determine. Warrioba, Separate Opinion, *ibid.*, at 1638.

94. *Ibid.*, order 1.e, Judge Vukas dissenting.

95. *Ibid.*, order 1.f, Judges Vukas and Warrioba dissenting. Judge Warrioba objected that the order of the Tribunal should have been confined to issues that were the subject matter of dispute before it. The relationship of the parties to the dispute does not include nonparties to the 1993 Convention. Warrioba, *ibid.*, at 1638.

96. *Ibid.*, orders 2 and 3, Judge Vukas dissenting.

At the beginning of October 1999, the Japanese Fisheries Agency declared that in the first nine months of 1999 (i.e., after the end of the EFP), Japan caught 6,621 tonnes of southern bluefin tuna. "Japan's Bluefin Tuna Catch Already Tops 1999 Quota," *Japan Weekly Monitor*, October 11, 1999, available on Lexis. The catch consisted of 4,423 tonnes caught commercially and 2,198 tonnes under the EFP. Overall, despite the EFP, in 1999 Japan exceeded its quota by 9 percent, or 556 tonnes, rather than the 2,010 tonnes announced. The Fisheries Agency declared that "continued commercial fishing for the rest of the year means Japan's excess catch is certain to grow, but the margin will be deducted from its quota next year."

97. See Treves, Separate Opinion, *ibid.*, at 1644, para. 4 and Laing, Separate Opinion, *ibid.*, at 1639, para. 6.

98. UNCLOS, Article 290(1).

99. See Rosenne, "ITLOS: Survey of 1999," supra note 2, at 467–468.

100. For a general understanding of the issue of *prima facie* determinations of jurisdiction in the ICJ, see the 10 cases filed by the Federal Republic of Yugoslavia against 10 members of NATO in 1999. *Legality of Use of Force* (Yugoslavia v. Belgium); (Yugoslavia v. Canada); (Yugoslavia v. France); (Yugoslavia v. Germany); (Yugoslavia v. Italy); (Yugoslavia v. Netherlands); (Yugoslavia v. Portugal); (Yugoslavia v. United Kingdom); (Yugoslavia v. Spain); (Yugoslavia v. United States of America) (1999). The cases against Spain and the U.S. were rejected because the Court found it manifestly lacked jurisdiction. The cases against the other eight States

were allowed to stand, although the request by Yugoslavia of provisional measures was rejected. These eight cases are currently pending before the ICJ. Hearings will be held on preliminary objections raised by the respondents on the existence of the Court's jurisdiction. <http://www.icj-cij.org/icjwww/idocket.htm> (site last visited, March 21, 2000). On findings of prima facie jurisdiction in the practice of the ICJ, see S. Rosenne, *The Law and Practice of the International Court: 1920–1996* (Nijhoff, Dordrecht, 1997, Vol. 3), at 1425, 1443–1462.

101. Although Judge Vukas voted against all measures, he recognized the existence of the Arbitral Tribunal's prima facie jurisdiction. See Vukas, Dissenting Opinion, *Provisional Measures Order*, supra note 3, at p. 1654, para. 2. Judge ad hoc Shearer went even further stating that "the demonstration of the jurisdiction of the Annex VII Arbitral Tribunal in the present case goes beyond the level of being merely prima facie; that jurisdiction is to be regarded as clearly established." Shearer, Separate Opinion, *ibid.*, at 1647.

102. *Ibid.*, para. 42–44. Rosenne defined the way the ITLOS motivated the rejection of this particular Japanese objection "lapidary but ambiguous." Rosenne, "ITLOS: Survey of 1999," supra note 2, at 468.

103. *Ibid.*, para. 56–57.

104. *Ibid.*, para. 60.

105. Rosenne, "ITLOS: Survey of 1999," supra note 2, at 468–469.

106. *Provisional Measures Order*, supra note 3, para. 48–49. Southern bluefin tuna is listed in Annex I of UNCLOS as a highly migratory species.

107. *Ibid.*, para. 50.

108. As Judge ad hoc Shearer remarked, the rationale of the 1993 Convention was to give effect to the obligations of the parties under the UNCLOS with respect to southern bluefin tuna as a highly migratory species. Shearer, Separate Opinion, *ibid.*, at 1648. Judge Shearer also quoted Churchill and Lowe who wrote that the 1993 Convention is "the first agreement signed since the adoption of the Law of the Sea Convention to give effect to the principles of article 64." See R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester, Manchester University Press, 1999, 3rd ed.), 313–314.

Article 64 of UNCLOS provides that ". . . The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. . . ." Southern bluefin tuna is listed as a highly migratory species in Annex I to the Convention. The Commission set up under the 1993 Convention is an "appropriate organization" for the purposes of Article 64, and also for the purposes of Articles 118 and 119, which relate to high seas fisheries in general. Australia, Japan, and New Zealand ratified the United Nations Convention on the Law of the Sea shortly after the conclusion of the CCSBT (on 4 October 1994, 20 June 1996, and 19 July 1996, respectively).

109. *Ibid.*, para. 51.

110. It should be noted that both ITLOS, and, eventually, the Annex VII Arbitral Tribunal, did not analyze the dispute between the parties over the nature of the obligations involved and the relationship of their obligations under the UNCLOS and the 1993 Convention respectively. Had the two tribunals dwelled upon the issue, then arguably disputes concerning the interpretation and implementation of the 1993 Convention are excluded from compulsory jurisdiction, while the wider UNCLOS-related issues arguably, are not. On the point see Hayashi, supra note 2, at 383.

111. *Provisional Measures Order*, supra note 3, para. 55.

112. UNCLOS, Article 282 reads: "if the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a *binding decision*, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree. . . ."

113. *Provisional Measures Order*, supra note 3, para. 54.

114. UNCLOS, Article 290(5).

115. UNCLOS Annex VII, Article 3(d) and (e).

116. By and large this is the reason why Judge Vukas voted against all the orders. Vukas, Dissenting Opinion, *Provisional Measures Order*, supra note 3, at p. 1654

117. Ibid., para. 82 and 84.

118. As Judge Laing observed in his Separate Opinion, the Tribunal did not order the immediate cessation of the EFP because it held that premature interruption would impair the program's scientific validity and diminish the value of data collected to date. Laing, Separate Opinion, *ibid.*, at 1640, para. 10. In the view of the Tribunal, if damage had been caused, at least something should be learned from it.

119. Ibid., Order, para. 90.1.d.

120. Although the precautionary principle has been at the front and center of international environmental law since the mid-1980s, its exact meaning and status in international law are still unresolved. On the precautionary principle, see P. Sands, *Principles of International Environmental Law* (Manchester, Manchester University Press, 1995), 208–213. On the precautionary principle, see in general T. O' Riordan and J. Cameron, *Interpreting the Precautionary Principle* (London, Earthscan, 1994), pp. 262–283; H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (London, Graham and Trotman, 1994) and D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation* (Boston, Kluwer, 1995). The extreme time pressure under which the Tribunal worked could be one explanation of why the judges preferred avoiding determining whether the precautionary principle has finally become customary international law, particularly when the World Court in the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgement, *I.C.J. Reports 1997*, pp. 1–72, with months at its disposal, could do no better.

121. *Provisional Measures Order*, supra note 3, para. 76. See also the Joint Declaration by Judges Wolfrum, Caminos, Marotta Rangel, Yankov, Anderson, Eiriksson, *ibid.*, at 1637–1638.

122. Ibid., para. 75.

123. Ibid., para. 71.

124. Ibid., para. 79.

125. Ibid., para. 80.

126. Treves, Separate Opinion, *ibid.*, at 1645, para. 9.

127. Treves, Separate Opinion, *ibid.*, at 1645, para. 8.

128. The 1995 Agreement for the Implementation of the Provisions of the UNCLOS relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *ILM*, Vol. 34 (1995), at 1547. On the dispute settlement provisions of the 1995 Straddling Stocks Agreement, see, T. Treves, "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995," in A. Boyle and D. Freestone, eds. *International Law and Sustainable Development* (Oxford, Oxford University Press, 1999), pp. 253–269, in particular 265–267.

129. *Nuclear Test* cases, supra note 61.

130. See *Ruling on the Rainbow Warrior Affair between France and New Zealand*, *ILM*, Vol. 26 (1987), at 1346 and *Rainbow Warrior* (New Zealand v. France), International Arbitration Award, *International Law Reports*, Vol. 82 (1990), at 499.

131. It is noteworthy that only one (per Tresselt) of the five arbitrators was chosen from the lists of arbitrators drawn up by states parties under UNCLOS Annex VII, Article 2. Had the appointment of one or more of the arbitrators or of the Tribunal's President needed to be made, according to Article 3(e) of Annex VII, by default the ITLOS President would have been obliged to make use of those lists. It is also noteworthy that although under Annex VII arbitrators need not be lawyers, but need only be "experienced in maritime affairs," four out of the five individuals chosen are renowned international legal publicists.

132. *Award*, supra note 2, para. 10–13.

133. Ibid., para. 11.

134. Ibid., para. 38.a. See supra note 62.

135. Ibid., para. 38.b.



136. *Ibid.*, para. 38.d. At the time proceedings had been filed against Japan, of those states the Republic of Korea had ratified the UNCLOS on January 29, 1996 and Indonesia ratified on February 3, 1986.

137. *Ibid.*, para. 38.c.

138. *Ibid.*, para. 38.g, h, and j.

139. International Convention for the Regulation of Whaling, Washington, December 2, 1946, *UNTS*, Vol. 161, at 72.

140. See *Provisional Measures Order*, supra note 3, para. 51 and text accompanying supra notes 109–110.

141. The argument was put as follows: “[t]he Whaling Convention contains no dispute settlement provision. If the A/NZ approach is correct, the substantive provisions of UNCLOS relating to the conservation of marine resources would not be excluded by the terms of the Whaling Convention, and it would, therefore, be open to any party to UNCLOS to bring proceedings against a whaling States under UNCLOS Part XV alleging that some breach of the Whaling Convention was also a breach of some provision of UNCLOS. It is improbable that this possibility would have come to the minds of the [1993] Convention parties when they became parties to UNCLOS.” Statement made by Prof. E. Lauterpacht, Counsel for Japan, May 7, 2000, <http://www.worldbank.org/icsid/bluefintuna/main.htm> (site last visited March 21, 2001). See also the pleading of Ms. Rebecca Irwin, Counsel for Australia, on May 8, 2000 and the reply by E. Lauterpacht of May 10, 2000, *ibid.*

142. *Award*, supra note 2, para. 39.b and d.

143. *Ibid.*, para. 40.a

144. *Ibid.*, para. 40.b.

145. *Ibid.*, para. 40.c.

146. *Ibid.*, para. 41.b.

147. General Agreement on Tariffs and Trade, 1947, *UNTS*, Vol. 55, at 308.

148. Marrakech Agreement Establishing the World Trade organization, 1994, *ILM*, Vol. 33 (1994), at 1144.

149. *Award*, supra note 2, para. 41.k.

150. *Ibid.*, para. 41.g.

151. *Ibid.*, para. 41.k.

152. *Ibid.*, para. 41.g.

153. *Electricity Company of Sofia and Bulgaria*, supra note 51 and see text accompanying supra notes 51–52.

154. *Award*, supra note 2, para. 41.h.

155. *Ibid.*, para. 41.b.

156. *Ibid.*, para. 41.b

157. *Ibid.*, para. 41. f and j.

158. *Ibid.*, para. 41.k.

159. *Ibid.*, para. 41.k.

160. *Ibid.*, para. 41.k.

161. *Ibid.*, para. 41.k.

162. *Ibid.*, para. 41.k.

163. Sir Kenneth Keith was unable to concur with the conclusions of the majority. He attached a Separate Opinion.

164. See, for example, J. M. Van Dyke, “Louis B. Sohn and the Settlement of Ocean Disputes,” *George Washington International Law Review*, Vol. 33 (2000), at 31.

165. *Award*, supra note 2, para. 45–46.

166. *Ibid.*, para. 47 ff.

167. *Ibid.*, para 48 citing *Case Concerning Oil Platforms* (Islamic Republic of Iran vs. United States of America), Preliminary Objections, Judgment, *ICJ Reports* (1996), para. 16.

168. *Ibid.*, para. 48, citing *Fisheries Jurisdiction Case* (Spain v. Canada), Preliminary Objections, Judgment, *ICJ Reports* (1998), para. 30–31.

169. *Ibid.*, para. 50.

170. *Ibid.*, para. 52

171. *Ibid.*, para. 52.

172. *Ibid.*, para. 52 (towards the end) .

173. *Ibid.*, para. 54.

174. *Ibid.*, para. 52.

175. *Ibid.*, para. 55.

176. *Ibid.*, para. 57.

177. Provisional Measures Order, *supra* note 3, para. 57.

178. *Award*, *supra* note 2, para. 57.

179. *Ibid.*, para. 59.

180. *Ibid.*, para. 66. On this point Sir Kenneth Keith voted with the majority. Indeed, revocation of interim measures is just the corollary of the decision to decline jurisdiction.

181. *Ibid.*, para. 67–68.

182. *Ibid.*, para. 44.

183. *Ibid.*, para. 44.

184. The teleological approach is just one of the possible ways of interpreting treaties. In general, there is a fundamental opposition between two schools on treaty interpretation. The teleological school asserts that the primary task in the interpretation of treaties is to ascertain the real or presumed intention of the parties and give it effect. The textual school assigns greater importance to the determination of the meaning of the text according to the ordinary or apparent signification of its terms. See generally, E. Jiménez de Aréchaga, "International Law in the Past Third of a Century," *Collected Courses of the Hague Academy of International Law*, Vol. 159 (1978), 42–48; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984); and A. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1986).

In Article 33 of the Vienna Convention on the Law of Treaties, UNTS, Vol. 1155, at 331, the approaches are combined, although it can be argued that the textual school prevailed since Article 33 reads, in part: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and* in the light of its object and purpose . . ." (emphasis added).

The textual interpretation approach is only a first and necessary step. If the textual interpretation does not make clear which was the will of the parties, then the teleological interpretation can shed light on the intention of the parties.

185. *Award*, *supra* note 2, para. 55.

186. *Ibid.*, para. 62.

187. *Electricity Company of Sofia and Bulgaria*, *supra* note 51, and see text accompanying *supra* notes 51–52.

188. See *Award*, *supra* note 2, para. 60–61.

189. *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, *ICJ Reports* (1974), pp. 3–173 and *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, *ICJ Reports* (1974), pp. 175–251.

190. A. Boyle, "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks," *International Journal of Marine and Coastal Law*, Vol. 14 (1999), pp. 1–25, at 11.

191. This situation implies, in the words of Boyle, *ibid.*, at 12–13, manifest "lack of equivalence in the due process rights of high seas and coastal states" by subjecting to compulsory jurisdiction the high seas fishing states in a situation where the actions of the coastal states themselves may be affecting the very same stock. As any adjudicative body called upon to settle the dispute could not disentangle the aspects of the case relating to the high seas from those pertaining the EEZ, Boyle suggests that the court or tribunal may refuse to hear claims brought by coastal states unless they are willing to agree to jurisdiction over any counterclaim made by the respondent long-distance fishing State with regard to the stock in dispute. *Idem*, at 12–13.

192. “[A] balance the Tribunal must assume was deliberately established by the States Parties to UNCLOS.” *Award*, supra note 2, para. 62 (last sentence).
193. Ph. Pazartzis, *Les engagements internationaux en matière de règlement pacifique des différends entre Etats* (Paris, Librairie générale de droit et de jurisprudence, 1992, XXIV), at 190.
194. *Radio Orient* case, *UNRIAA*, Vol. 3, at 1873.
195. Telecommunication Convention, concluded in Madrid on December 9, 1932, *LNTS*, Vol. 151, at 8.
196. See L. B. Sohn, “Settlement of Disputes Relating to the Interpretation and Application of Treaties,” *Hague Academy of International Law, Collected Courses*, Vol. 150 (1976), at 236–237.
197. J. G. Merrills, *International Dispute Settlement* (London, Sweet and Maxwell, 1984), at 106 states that “a provision for compulsory arbitration, by its very existence, can discourage unreasonable behavior.” See also C. Gray, and B. Kingsbury, “Developments in Dispute Settlement: Inter-State Arbitration since 1945,” *British Yearbook of International Law*, Vol. 63 (1992), at 100.
198. K. Yokota, “International Adjudication and Japan,” *Japanese Annual of International Law*, Vol. 17 (1973), at 20.
199. *Award*, supra note 2, para. 64.
200. For instance, the ultimate custodian of the legal interpretation of the UN Charter is the International Court of Justice. The WTO is endowed with a quasijudicial mechanism (the Dispute Settlement Body and the Appellate Body) to settle disputes over the interpretation of the WTO agreements.
201. UNCLOS, Article 287(5).
202. On the issue, see, in general, B. Vukas, “Possible Role of the International Tribunal for the Law of the Sea in Interpretation and Progressive Development of the Law of the Sea,” in D. Vidas and W. Østreg, eds., *Order for the Oceans at the Turn of the Century* (Kluwer, The Hague, 1999), pp. 95–104.
203. L. Glendinning, “Japan Gives In On Bluefin Tuna,” *The Age*, April 19, 2001.
204. See text accompanying supra notes 35–37. Before the ban was introduced, Japanese fishing vessels made around 290 calls per year to Australian ports, spending an estimated A\$40 million (about \$21.2 million) on supplies. “Australia Ends Ban on Japanese Tuna Boats,” *Japan Economic Newswire*, May 29, 2001. Available on Lexis/Nexis.
205. “Japan’s 2001 Catch Quota of Bluefin Tuna to Rise 356 Tons,” *Japan Economic Newswire*, May 29, 2001. Available on Lexis/Nexis.
206. See text accompanying supra notes 25–31.
207. “Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.” The 1993 Convention, supra note 21, Article 20.
208. “After the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it. This Convention shall become effective for any such other State on the date of deposit of that State’s instrument of accession.” *Ibid.*, Article 18.
209. As Judge Laing remarked: “It is ironic that these disagreements about science and natural resources should result in judicial proceedings when the Respondent consumes the overwhelming majority of the harvest of southern bluefin tuna and is therefore the ultimate financial resource. . . .” Laing, Separate Opinion, *Provisional Measures Order*, supra note 3, at 1643, para. 22.
210. Indonesia announced in December 2000 that it plans to join the 1993 Convention, while South Korea announced the same in November of the same year. “South Korea to Join Convention to Help Southern Bluefin Tuna,” *Japan Economic Newswire*, November 17, 2000, available on Lexis/Nexis; “Indonesia to Join Pact to Preserve Southern Bluefin Tuna,” *ibid.*, December 10, 2000.

211. On the case see, *BRIDGES Weekly Trade News Digest*, Vol. 4, No. 35, September 19, 2000, <http://www.ictsd.org/html/weekly/story2.19-09-00.htm> (site last visited, January 12, 2001) .

212. *Chile—Measures Affecting the Transit and Importation of Swordfish*, complaint by the European Communities (WT/DS193/1). This request, dated 19 April 2000, concerns the prohibition on unloading of swordfish in Chilean ports established on the basis of Article 165 of the Chilean Fishery Law (Ley General de Pesca y Acuicultura), as consolidated by the Supreme Decree 430 of 28 September 1991, and extended by Decree 598 of 15 October 1999. The EC asserts that its fishing vessels operating in the South East Pacific are not allowed under Chilean legislation to unload their swordfish in Chilean ports either to land them for warehousing or to transship them onto other vessels. The EC considers that, as a result, Chile makes transit through its ports impossible for swordfish. The EC claims that the above-mentioned measures are inconsistent with the GATT 1994, and in particular Articles V and XI thereof. On 6 November 2000, the EC requested the establishment of a panel. At its meeting of 17 November 2000, the DSB deferred the establishment of a panel. At its meeting of 12 December 2000, the DSB established a panel. Australia, Canada, Ecuador, India, Norway, Iceland, and the United States reserved their third-party rights. See “Overview of the State-of-Play of WTO Disputes,” [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (site last visited, January 12, 2001) .

213. ITLOS/Press 43, December 21, 2000.

214. ITLOS/Press 43, December 21, 2000. The Special Chamber will consist of the President of ITLOS, Chandrasekhra Rao (India), Judges Caminos (Argentina), Yankov (Bulgaria) and Wolfrum (Germany), and ad hoc Judge Orrego Vicuña (Chile).

215. See [http://europa.eu.int/comm/fisheries/news\\_corner/press/inf01\\_05\\_en.htm](http://europa.eu.int/comm/fisheries/news_corner/press/inf01_05_en.htm) (site last visited, March 21, 2001).

216. See text accompanying *supra* notes 57–60.