THE SOUTHERN BLUEFIN TUNA CASE
(Australia and New Zealand v Japan)

In August 2000, an arbitral tribunal created under the United Nations Convention on the Law of the Sea (UNCLOS) delivered their judgment on whether it had jurisdiction to hear the merits of the *Southern Bluefin Tuna Case*. A claim was brought by Australia and New Zealand against Japan relating to the Japanese "Experimental Fishing Programme" (EFP) of southern bluefin tuna, which they contended to be a breach of both the UNCLOS as well as the 1993 Convention for the Conservation of Southern Bluefin Tuna.

FACTS

Southern bluefin tuna is a migratory species of tuna that is listed as a highly migratory species in Annex I of the UNCLOS. The fish stocks are mostly found in the high seas and the territorial waters and exclusive economic zones of Australia, New Zealand and South Africa. The dominant market for southern bluefin tuna is Japan where it is considered a delicacy as sashimi.

Through the last century, the stocks of southern bluefin tuna have been in constant decline, the result of overfishing by the three Parties involved in this dispute, namely, Australia, New Zealand and Japan. In recognition of this, the three States voluntarily and informally fixed a global Total Allowable Catch (TAC) of the tuna in the 1980s. This was initially set in 1985 at 38,650 metric tons. In 1989, the Parties agreed to reduce this to 11,750 tons, with Japan sustaining the greatest cut. However, stocks continued to decline, partly as a result of other States beginning to fish the tuna as well.

In 1993, the Parties concluded the Convention for the Conservation of Southern Bluefin Tuna, creating a Commission that was to determine the TAC in an effort to preserve the stocks. Under Article 16 of the 1993 Convention, the Parties were required to choose a mechanism for resolving any dispute arising between them, and Article 16(2) provided that referrals to binding arbitration or to the International Court of Justice could only be done with the consent of the disputing Parties.

Since 1994, Japan had campaigned for an increase in its quota, which Australia and New Zealand opposed. For the past few years, the Commission had been in deadlock over the TAC determinations. As a consequence, Japan sought agreement on an EFP to gather data in the areas where fishing no longer took place. Japan asserted that this was done with the intention of reducing scientific uncertainty about the recovery of the stock. Australia and New Zealand opposed this and, with the negotiations reaching an impasse in the Commission, Japan announced unilaterally that it would begin its own EFP for three years beginning in 1998. This is the fundamental issue in their dispute.

Australia and New Zealand claimed that Japan had contravened both the 1993 Convention and the UNCLOS and they therefore sought the creation of an arbitral tribunal under Annex VII of the UNCLOS. While that was under way, they also sought provisional measures from the International Tribunal on the Law of the Sea (ITLOS) under Article 290. Japan, on the other hand, insisted that the dispute remained under the 1993 Convention and not under the UNCLOS. In essence, Japan asserted that the 1993 Convention was a *lex specialis* that precluded the application of an umbrella framework treaty or convention. Australia and New Zealand suggested that both agreements overlapped and continued to apply simultaneously to govern the issues at the heart of this dispute.

PROVISIONAL MEASURES

In 1999, the ITLOS in Hamburg began hearings on the provisional measures sought by Australia and New Zealand, to specifically restrain Japan from continuing with its EFP. In turn, Japan disputed the ITLOS' jurisdiction and instead sought an order requiring the Parties to continue negotiations. These negotiations terminated when Japan refused consistently to end its EFP, which Australia and New Zealand had imposed as a prerequisite to any further negotiations or mediation.

The Applicants' Case

In presenting the Applicants' case on the subject of jurisdiction, Mr Bill Mansfield submitted that all the Applicants had to do to satisfy the requirements of Article 290 of the UNCLOS was demonstrate that the arbitral tribunal created under Annex VII had *prima facie* jurisdiction.

Mansfield submitted that Japan had *prima face* breached Article 64 of the UNCLOS and therefore the ITLOS had jurisdiction to hear the case and award the provisional measures sought.

Mansfield contended that the UNCLOS was designed to be an overarching regime with implementation of some of its obligations by subsidiary agreements. Therefore, States should not be allowed to escape their obligations under the UNCLOS, including those for compulsory dispute settlement, simply by entering into a regional or bilateral arrangement. He argued that Article 282 reinforced this contention, requiring Parties to submit to the binding and compulsory dispute settlement mechanisms unless they chose to submit to an alternative procedure that was also compulsory and binding, such as the International Court of Justice.

Professor James Crawford SC also argued that unless reasonable scientific concerns were demonstrated and tipped the scales of risks and benefits, the Applicants should get the provisional measures sought. Since it was common ground that tuna stocks were at record low levels, Japan's EFP was commercial fishing in disguise. Crawford argued that the ITLOS did not have to discuss the merits of the rival scientific data furnished; it merely had to be convinced that there was a genuine scientific concern that outweighed the benefits of not granting the provisional measures sought.

Furthermore, Mr Henry Burmester QC pointed out that under Article 290 of the UNCLOS, the ITLOS had jurisdiction to grant provisional measures if they were "appropriate under the circumstances". The ITLOS did not have to make any findings of fact to conclude that the measures were "appropriate under the circumstances".[1] He argued that Article 290 allowed provisional measures "if the urgency of the situation so require[d]". In essence, all the Applicants had to do was show that by the time the arbitral tribunal began its deliberations, the measures would affect irrevocably the Parties' rights. The Applicants need not show "irreparable harm" but merely that the *status quo* would be destroyed if the measures were not prescribed.

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[1] See Nuclear Tests Case (Judgment) (Australia v France) [1974] International Court of Justice Reports 253, 457; Re United States Diplomatic and Consular Staff in Tehran (United States v Iran) [1979] International Court of Justice Reports 7.

The Respondent's Case

In reply, Mr Robert Greig, arguing for Japan, contended that there was a need to increase the TAC in order to entice other States into the 1993 Convention. Since the Commission could not review the TAC and it had not occurred since 1994, the EFP was the only means of revision.

Also, Professor Nisuke Ando asserted that there was no breach of Article 64 of the UNCLOS because this provision merely required the Parties to cooperate. Since Japan had not breached the UNCLOS, the dispute fell under the 1993 Convention only. In any case, Article 286 required the exhaustion of all other means of settling the dispute by non-adversarial means. Japan believed that such means had not been exhausted since it was the Applicants that broke off the negotiations. Ando further asserted that the standard required for provisional measures was that, if denied, it would nullify the final decision provided by the arbitral tribunal. In the *Pakistani Prisoners of War Case,*[2] Pakistan sought to postpone a request for interim measures. In this case, the International Court held that if it was possible to do so, then the interim measures were clearly unnecessary.

In the end, the ITLOS found that it had jurisdiction to award provisional measures because the dispute was a legal rather than a purely scientific one.[3] Consequently, the ITLOS ordered that catches were to be limited and the Parties could not conduct any EFP.

ARBITRAL TRIBUNAL

Through diplomatic channels, Australia then sought to have the merits of the dispute heard by the ITLOS rather than the arbitral tribunal, a move that was, not surprisingly, objected to by Japan. In May, the arbitral tribunal was created with Schwebel J, former president of the International Court, presiding. Again, Japan challenged the jurisdiction of the tribunal and the fundamental issue at the preliminary stage was whether the tribunal had jurisdiction to hear the dispute.

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[2] [1973] International Court of Justice Reports 328.

[3] See Mavrommatis Palestine Concessions (Judgment No 2) [1924] Permanent Court of Justice Reports Series A, No 2, page 11; South West Africa Cases (Preliminary Objections) [1962] International Court of Justice Reports 328.

Japan's Arguments

Japan contended that the UNCLOS was simply a framework agreement and specific issues should be referred to the specific agreements, not the UNCLOS. In effect, Japan argued that the 1993 Convention was a *lex specialis* that "subsumed, discharged and eclipsed any provisions of the UNCLOS that [bore] on the conservation and optimum utilisation" of the tuna.[4] Australia and New Zealand, on the other hand, asserted that both treaties applied and Japan had breached both of them.

The Arbitral Tribunal's Findings

The arbitral tribunal rejected the *lex specialis* argument because there were often situations in international practice where an area was covered by more than one treaty. The tribunal considered the dispute as arising under both the 1993 Convention and the UNCLOS, a view that was consistent with Article 30(3) of the 1969 Vienna Convention on the Law of Treaties. The tribunal then prescribed two criteria before the compulsory settlement mechanism under the UNCLOS could apply. First, the Parties should have agreed to reach settlement by some alternative means and that these means had failed. Secondly, any such agreement could not exclude further procedures, including referral to compulsory settlement under the UNCLOS.

The arbitral tribunal found that the first criterion was satisfied as the Parties had entered into negotiations as required by Article 16 of the 1993 Convention. However, Article 16(2) stated that the dispute could not be referred to arbitration or adjudication without the consent of both sides. The tribunal held that this excluded any referral to compulsory dispute settlement under the UNCLOS.[5] As a result, the tribunal ruled that it lacked the jurisdiction to hear the dispute.

Dissenting Opinion

Sir Kenneth Keith, appointed as Judge *ad hoc* by Australia and New Zealand, wrote a separate dissenting opinion. In his view, if parallelism existed in international law and more than one treaty applied to a

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[4] Judgment of the Arbitral Tribunal at para 51.
[5] Ibid para 57.

dispute, there was no reason why the Parties should be denied the application of provisions in one treaty as a result of terms placed in another. In other words, there was no reason why the arbitration tribunal should not have jurisdiction if there was a dispute claimed properly under the UNCLOS. After all, "it would be surprising were procedures for settlement of disputes *concerning that Convention* to be able to apply to disputes arising beyond it".[6]

REFLECTIONS

Many in the Australian international law community were surprised and dismayed with the decision of the arbitral tribunal. This was hardly surprising since Australia lost. However, the reasoning of the tribunal provides some room for scrutiny and, perhaps, criticism.

It is strange that the arbitral tribunal denied itself jurisdiction when it found that there was a dispute under the UNCLOS. As Keith J *ad hoc* observed, it seemed bizarre that such a dispute would be resolved by reference to the 1993 Convention. Further, applying Article 30(3) of the 1969 Vienna Convention, as the tribunal purported to have done, an earlier treaty applied over a later treaty only to the extent that they were consistent. The UNCLOS had entered into force *after* the 1993 Convention and therefore the UNCLOS was the *later* treaty and the 1993 Convention the *earlier* treaty. Therefore, where Article 16(2) of the 1993 Convention required the consent of all Parties, this requirement was inconsistent with the compulsory dispute settlement mechanism under the UNCLOS, to which all three States were Parties.

As Professor Ryszard Piotrowicz pointed out, the tribunal was too cautious in allowing compulsory settlement mechanisms to be imposed on a State that was determined not to appear before it.[7] As such, this would defeat fundamentally the purpose of having compulsory settlement mechanisms in the UNCLOS. In the end, the *Southern Bluefin Tuna Case* has caused the international community to suffer a significant setback in its efforts to promote the rule of law.

Ricky J Lee

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[6] Ibid, Separate Opinion of Sir Kenneth Keith at para 15.

[7] Piotrowicz R, "The Australia/New Zealand-Japan fisheries dispute: tuna back on the menu" (2000) 74 Australian Law Journal 650, 652.