

A PAPER UMBRELLA WHICH DISSOLVES IN THE RAIN? THE FUTURE FOR RESOLVING FISHERIES DISPUTES UNDER *UNCLOS* IN THE AFTERMATH OF THE SOUTHERN BLUEFIN TUNA ARBITRATION

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[The first decision of an annex VII arbitral tribunal in the Southern Bluefin Tuna Case (Australia and New Zealand v Japan) seemed to present a perfect opportunity for affirming the central importance of the compulsory dispute settlement regime, established by part XV of the United Nations Convention on the Law of the Sea, in resolving fisheries disputes. In negotiations for the UNCLOS, the compulsory procedures of part XV were seen to play a 'pivotal role' in maintaining the integrity of the regime and in reducing resort to unilateralism to resolve disputes. However, the Arbitral Tribunal in Southern Bluefin Tuna held that the compulsory dispute settlement regime of UNCLOS could be excluded if the parties had agreed to other means for dispute settlement in a regional fisheries convention, notwithstanding the fact that the dispute settlement provision of the regional agreement did not contain a binding procedure. This article examines the findings of the Arbitral Tribunal and analyses their broader impact on the continuing utility of the part XV procedures for resolving fisheries disputes. It surveys a range of regional fisheries agreements to determine if their dispute settlement provisions could be construed to exclude resort to the compulsory procedures under UNCLOS and analyses whether the provisions of the UN Fish Stocks Agreement (recently in force) provide a solution to the issue. The article concludes that the short term impact of the Tribunal's decision is likely to be acute, excluding resort to compulsory procedures in many cases where a dispute can be characterised as arising under both an existing regional fisheries agreement and UNCLOS. However, in the long term, the decision in Southern Bluefin Tuna may promote the adoption of more stringent dispute settlement procedures in new regional fisheries arrangements and facilitate widespread acceptance of the detailed regime for high seas fisheries management contained in the UN Fish Stocks Agreement.]

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I INTRODUCTION

The world over, fisheries are severely depleted. Coastal and high seas fishing states are increasingly competing for smaller and smaller shares of declining fish stocks.¹ Traditional arrangements for the management and conservation of such fish stocks, based on regional agreements amongst participating states, have

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¹ Food and Agriculture Organization, Fisheries Department, *The State of World Fisheries and Aquaculture 2000* (2000), pt 1. The Food and Agriculture Organization is hereafter referred to as 'FAO'.

largely been ineffective in improving the condition of the fisheries over which they have jurisdiction.² This is often attributed to weak compliance and enforcement provisions in regional fisheries agreements that allow states to opt out of management and conservation measures, and provide limited opportunities for other states to ensure sustainable levels of harvest.³ Frustration with the inadequacies of regional agreements in dealing with high seas fisheries significantly contributed to the collapse of the former law of the sea regime,⁴ codified in the 1958 *Law of the Sea Conventions*,⁵ and promoted unilateral (and often quite drastic) action by some states to protect fishing rights from what they saw as illegal overfishing by other states.⁶

In the negotiations leading up to the adoption of the current *United Nations Convention on the Law of the Sea* ('UNCLOS'),⁷ states signalled their desire for a new approach to fisheries management that would protect the fishing interests of all states and avoid unilateralism.⁸ The delicately balanced compromise embodied in the final text consisted of a number of elements. First was the extension of coastal state regulatory and enforcement competence over fishing to the entirety of the state's exclusive economic zone ('EEZ').⁹ A second component was the emphasis on specialised regional arrangements and

² S H Marashi, 'The Role of FAO Regional Fishery Bodies in the Conservation and Management of Fisheries' (1996) 916 *FAO Fisheries Circular* FIPL/C916. Marashi suggests that a number of measures are required in order to make regional fisheries organisations more effective, including the adoption of dispute settlement procedures.

³ David Ardia, 'Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment' (1998) 19 *Michigan Journal of International Law* 497, 532. This article points out the deficiencies of the Northwest Atlantic Fisheries Organization ('NAFO').

⁴ Bernard Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277, 288.

⁵ *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); and *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962).

⁶ For example, in March 1995 Canadian authorities boarded and seized a Spanish vessel on the high seas, which Canada alleged was fishing in violation of applicable fisheries conservation measures. The dispute eventually made its way to the International Court of Justice ('ICJ'), although the ICJ found that it lacked jurisdiction over the dispute: *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432. Similar unilateral action has characterised disputes between the United States and Canada over the conservation and management of Pacific salmon: see Jamison Colburn, 'Turbot Wars: Straddling Stocks, Regime Theory, and a New UN Agreement' (1997) 6 *Florida State University Journal of Transnational Law and Policy* 323; Michael Keiver, 'The Pacific Salmon War: The Defence of Necessity Revisited' (1998) 21 *Dalhousie Law Journal* 408; and Karol de Zwager Brown, 'Truce in the Salmon War: Alternatives for the Pacific Salmon Treaty' (1999) 74 *Washington Law Review* 605.

⁷ Opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (1982) (entered into force 16 November 1994).

⁸ Oxman, above n 4, 286.

⁹ UNCLOS, above n 7, arts 56(1)(a), 61 and 62. In art 55 an EEZ is defined as 'an area beyond and adjacent to the territorial sea ... under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.'

organisations to translate the general conservation and management principles for marine resources of *UNCLOS* into specific legal measures.¹⁰ A third vital element of the compromise was the inclusion of part XV, establishing compulsory procedures for the settlement of disputes concerning the interpretation or application of *UNCLOS*, which would apply to fishing controversies arising in areas beyond the limits of coastal states' EEZs.¹¹ A significant reason for including compulsory jurisdiction over high seas fishing was apparently to afford states an alternative to unilateral action, especially in situations where the political process within regional organisations deadlocks.¹²

Even following the adoption of *UNCLOS* in 1982, the conservation and management of straddling and migratory stocks remained a contentious issue.¹³ Coastal states accused high seas fishing nations of failing to comply with applicable conservation and management measures, whereas high seas fishing states protested at attempts by coastal states to extend their jurisdiction over fisheries beyond the limits of their EEZs.¹⁴ This led to the adoption, in 1995, of the *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ('*UN Fish Stocks Agreement*'),¹⁵ which fleshes out the general provisions of *UNCLOS* relating to the conservation and management of such stocks.¹⁶ Significantly this Agreement, which has recently come into force, applies the compulsory dispute settlement procedures of part XV mutatis mutandis to any dispute between States Parties concerning either the interpretation or application of the Agreement, or the interpretation or application of any relevant subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks.¹⁷

Given this background, it might have been reasonable to expect that the first arbitral tribunal constituted to hear a fisheries dispute under part XV of *UNCLOS* would pay close attention to the 'pivotal role' of the compulsory dispute

¹⁰ Ibid arts 63–64.

¹¹ Ibid art 297(3)(a).

¹² Oxman, above n 4, 289.

¹³ A 'straddling stock' is a fish stock which occurs within the EEZs of two or more states or straddles a coastal state's EEZ and the high seas. Highly migratory species are those listed in annex I of *UNCLOS*, including the Southern Bluefin Tuna.

¹⁴ Christopher Joyner, 'Compliance and Enforcement in New International Fisheries Law' (1998) 12 *Temple International and Comparative Law Journal* 271, 272–3.

¹⁵ Opened for signature 4 December 1995, [2001] ATS 8, 34 ILM 1542 (1995) (entered into force 11 December 2001). In accordance with art 40(1), the Agreement came into force '30 days after the date of deposit of the thirtieth instrument of ratification or accession', being the ratification of Malta. See United Nations Division for Ocean Affairs and the Law of the Sea, 'Table Recapitulating the Status of the Convention and of the Related Agreements' (6 February 2002) <http://www.un.org/Depts/los/reference_files/status2002.pdf> at 30 April 2002.

¹⁶ *UNCLOS*, above n 7, arts 63–64.

¹⁷ *UN Fish Stocks Agreement*, above n 15, arts 30(1)–(2).

settlement procedures in the law of the sea regime established by *UNCLOS*.¹⁸ Instead, the Arbitral Tribunal in the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)*¹⁹ employed a narrow textual analysis of the *UNCLOS* provisions and gave priority to the arrangements for dispute settlement concluded by parties under regional agreements over the provisions of part XV. The Tribunal's decision suggests that *UNCLOS* parties can opt out of the part XV compulsory dispute settlement procedures by concluding regional implementing agreements with their own dispute resolution provisions, even though those provisions do not expressly exclude the operation of part XV. If broadly interpreted in subsequent cases, the Tribunal's decision has alarming implications for the future utility of the compulsory procedures under *UNCLOS* in resolving fisheries disputes. Potentially, a large number of fisheries disputes could be taken out of the reach of part XV, rendering the *UNCLOS* compulsory dispute settlement regime little more than 'a paper umbrella which dissolves in the rain.'²⁰

This article analyses the findings of the Arbitral Tribunal in *Southern Bluefin Tuna* and the implications of the decision for the interpretation and operation of the *UNCLOS* compulsory dispute settlement procedures in the context of fisheries disputes. Part II gives a brief history of the dispute between the parties before examining the Tribunal's interpretation of the competing dispute settlement provisions under *UNCLOS* and the regional fisheries agreement at issue in the case. Part III then surveys a range of regional fisheries agreements, with differing provisions for dispute settlement, and discusses how the Tribunal's ruling might be applied in any *UNCLOS* dispute between states which are also parties to these regional arrangements. Part IV turns to the provisions of the *UN Fish Stocks Agreement* and analyses the Tribunal's observation that the Agreement will go a long way towards ameliorating both the substantive issues that divided the parties and the 'procedural problems' that faced the Tribunal in the case.²¹ Finally, part V assesses the likely impact of the decision in terms of the continuing usefulness of the *UNCLOS* compulsory procedures as a means for resolving fisheries disputes, and the new considerations it raises for states negotiating regional fisheries arrangements.

¹⁸ A point stressed by the President of the Third Law of the Sea Conference, Ambassador Amerasinghe, in introducing an informal single negotiating text on the Settlement of Disputes in 1976. He remarked: 'Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently': *UNCLOS III, Official Records of the Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/WP.9/Add.1 (31 March 1976) [6].

¹⁹ (4 August 2000) 39 ILM 1359 (2000) ('*Southern Bluefin Tuna*').

²⁰ James Crawford, 'Transcript of the First Round Presentation of Australia and New Zealand', *Southern Bluefin Tuna* (8 May 2000) 96 <<http://www.worldbank.org/icsid/bluefintuna/0508icsi.pdf>> at 30 April 2002.

²¹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [71].

II ANALYSIS OF PART XV OF *UNCLOS*
IN *SOUTHERN BLUEFIN TUNA*A *Background*

Southern Bluefin Tuna concerned a dispute between Australia and New Zealand on the one hand, and Japan on the other, over the conservation and management of the Southern Bluefin Tuna ('SBT'), a highly migratory fish species which ranges widely throughout the oceans of the southern hemisphere. Commercial harvest of the species began in the 1950s, but by the 1980s severe overfishing had led to a rapid decline in the parental stock of SBT.²² In response, Australia, New Zealand and Japan began informally to manage the catch of SBT, formalising those arrangements in the *Convention for the Conservation of Southern Bluefin Tuna 1993* ('*CCSBT*').²³ The *CCSBT* established the Commission for the Conservation of Southern Bluefin Tuna to determine a total allowable catch ('TAC') for SBT which is allocated amongst the parties.²⁴ In May 1994 the Commission set a TAC at 11 750 tonnes, with national allocations of 6065 tonnes to Japan, 5265 tonnes to Australia and 420 tonnes to New Zealand.²⁵ In subsequent years Japan sought to increase the TAC and revise its allocation, but significant differences within the Commission's Scientific Committee over the exploitation status and prospects for recovery of the SBT stock prevented the parties from reaching any agreement on a new TAC or on revised allocations. Despite extended discussions, the disagreement continued and intensified when, at the Commission meeting in 1998, Japan announced its intention to commence a unilateral 'experimental fishing programme' ('EFP'), with a view to reducing scientific uncertainty over the recovery of the SBT stock.²⁶ Japan's implementation of an EFP in the summer of 1998 was strongly opposed by the other parties to the *CCSBT* as, in effect, it allowed Japan to catch SBT in excess of its annual allocation. Australia and New Zealand viewed Japan's EFP as a unilateral action endangering an already vulnerable stock. Their main objections related not so much to the concept of an EFP but to the design of the Japanese proposal.²⁷ Australia and New Zealand requested urgent consultations under the *CCSBT*, but no agreement on the design or tonnage of SBT taken in an EFP was forthcoming.²⁸

In June 1999, following the commencement of a second EFP by Japan, Australia and New Zealand restated their position that the dispute concerned Japan's obligations under *UNCLOS*, as well as those under the *CCSBT*.²⁹ Subsequently, Australia and New Zealand commenced compulsory dispute resolution under part XV of *UNCLOS* and sought provisional measures from the

²² Ibid [21]–[22].

²³ Opened for signature 10 May 1993, 1819 UNTS 359 (entered into force 20 May 1994).

²⁴ Ibid arts 6, 8.

²⁵ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [22], [24].

²⁶ Ibid [24]–[25].

²⁷ Ibid [26].

²⁸ Ibid.

²⁹ Ibid [27].

International Tribunal on the Law of the Sea ('ITLOS'),³⁰ pending the establishment of an arbitral tribunal in accordance with annex VII of *UNCLOS*.³¹ On 27 August 1999 ITLOS prescribed provisional measures which ordered the parties to

refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its national allocation[.]³²

The *Provisional Measures Order* remained in place until the decision of the Arbitral Tribunal on 4 August 2000.³³

B Findings of the Arbitral Tribunal

Two main issues faced the Arbitral Tribunal in *Southern Bluefin Tuna*: first, whether the dispute between the parties was properly characterised as a dispute arising only under the *CCSBT* (as argued by Japan) or as a dispute which also

³⁰ Pursuant to art 290(5) of *UNCLOS*, above n 7, the parties to a dispute may seek provisional measures from ITLOS pending the constitution of an arbitral tribunal. ITLOS may grant the measures sought only if satisfied that 'prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires'.

³¹ Art 287 of *UNCLOS* provides that when signing, ratifying or acceding to *UNCLOS* or at any time thereafter, states may submit a written declaration, selecting one or more of the following means for the settlement of disputes concerning the interpretation or application of *UNCLOS*:

- (a) ITLOS;
- (b) the ICJ;
- (c) an arbitral tribunal constituted in accordance with annex VII; or
- (d) a special arbitral tribunal constituted in accordance with annex VIII.

Where no selection is made by a State Party, it is deemed to have accepted arbitration in accordance with annex VII. As Australia, New Zealand and Japan had not selected a forum for dispute settlement under art 287, the default option of arbitration by a tribunal constituted in accordance with annex VII of *UNCLOS* applied.

³² *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Requests for Provisional Measures)* (27 August 1999) 38 ILM 1624 (1999), [90(1)(d)] ('*Provisional Measures Order*'). For analyses of the provisional measures order made by ITLOS, see Kristina Leggett, 'The *Southern Bluefin Tuna Cases*: ITLOS Order on Provisional Measures' (2000) 9 *Review of European Community and International Environmental Law* 75; Robin Churchill, 'The Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan): Order for Provisional Measures of 27 August 1999' (2000) 49 *International and Comparative Law Quarterly* 979; Simon Marr, 'The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation of Fish Resources' (2000) 11 *European Journal of International Law* 815; and Barbara Kwiatkowska, 'Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan), Order on Provisional Measures (ITLOS Cases Nos 3 and 4)' (2000) 94 *American Journal of International Law* 150.

³³ The *Provisional Measures Order* was revoked by the Tribunal as a consequence of the finding that it lacked jurisdiction to hear the merits of the parties' dispute: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [66]. The Tribunal stressed that the revocation of the *Provisional Measures Order* did not mean that the parties were free to disregard the effects of the order or their own decisions made in conformity with it. The Tribunal went on to discuss measures the parties could take to resolve their dispute, emphasising that the prospects for a successful settlement would be promoted by the parties abstaining from any unilateral act that might aggravate the dispute: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [68]–[70].

arose under *UNCLOS* (as argued by Australia and New Zealand),³⁴ and secondly, if the dispute also arose under *UNCLOS*, whether the provision for dispute settlement in the *CCSBT* excluded the operation of the compulsory procedures under part XV of *UNCLOS*.

In relation to the first issue, Japan contended that *UNCLOS* was a 'framework or umbrella convention that looks to implementing conventions to give it effect'.³⁵ It argued that any relevant principles and provisions of *UNCLOS* concerning the conservation and optimum utilisation of SBT had been 'subsumed, discharged and eclipsed' for the parties by the conclusion of the *CCSBT* as the *lex specialis*.³⁶ The Tribunal rejected this central contention of Japan, stating that

it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.³⁷

As a result, the Tribunal concluded that the dispute between the parties, while centred in the *CCSBT*,³⁸ also arose under *UNCLOS*.³⁹

This holding, however, was not dispositive of the case.⁴⁰ The Tribunal then turned to an examination of article 16, the dispute settlement clause in the *CCSBT*, to determine whether this provision excluded resort to the compulsory procedures of part XV of *UNCLOS* and hence barred the Tribunal's jurisdiction. The basis for this consideration was article 281(1) of *UNCLOS* which provides that:

³⁴ Australia and New Zealand invoked several provisions of *UNCLOS* which they alleged Japan had breached by implementing a unilateral EFP for SBT: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [27]. Those provisions were art 64 (highly migratory species); art 116 (right to fish on the high seas); art 117 (duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas); art 118 (cooperation of states in the conservation and management of living resources); and art 119 (conservation of the living resources of the high seas). See *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [34], [38] for Japan's counterarguments.

³⁵ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [51].

³⁶ *Ibid*.

³⁷ *Ibid* [52]. As Barbara Kwiatkowska observes, the Tribunal's 'exposition of the paramount doctrine of substantive and procedural parallelism between the umbrella [*UNCLOS*] and many compatible special treaties makes an unquestioned contribution ... to the evolution of [the] peaceful settlement of disputes in the international law of the sea': Kwiatkowska, 'The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' (2001) 16 *International Journal of Marine and Coastal Law* 239, 284. This finding is of significance not only in the law of the sea context, but also in the environmental field generally where recent treaty-making shows a trend towards initial conclusion of a framework convention, supplemented by more specific subsequent protocols: Philippe Sands, *Principles of International Environmental Law* (1995) vol 1, 106.

³⁸ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [52].

³⁹ *Ibid* [51].

⁴⁰ *Ibid* [53].

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

The question for the Tribunal was whether the parties, through the mechanism of the dispute settlement provision in the *CCSBT*, had reached an agreement 'to seek settlement of the dispute by a peaceful means of their own choice' which excluded 'any further procedure'.⁴¹ The relevant provision of the *CCSBT* is article 16 which provides:

- 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.

Japan argued that article 16 of the *CCSBT* fitted precisely into article 281(1) of *UNCLOS*.⁴² The parties to the *CCSBT* had agreed to settle the dispute by peaceful means of their own choice, being whichever of the methods listed in article 16 they agreed to pursue.⁴³ Japan contended that such agreement excluded any further procedures, including compulsory dispute settlement under part XV of *UNCLOS*, since the parties had made it clear in article 16(2) that 'no dispute [should] be referred to the International Court of Justice or to arbitration without their consent'.⁴⁴ In support of this argument counsel submitted a voluminous annex 47 to Japan's memorial, listing 107 special bilateral and multilateral treaties with a bearing on the law of the sea. Each of these had a self-contained dispute resolution clause with no compulsory element. Japan argued that the agreements in annex 47 amounted to 'a very large body of State practice' that had to be taken into account in the interpretation of part XV of *UNCLOS*.⁴⁵ The parties to the treaties had specifically included non-compulsory, non-binding dispute settlement provisions, clearly never considering that these provisions

⁴¹ *UNCLOS*, above n 7, art 281(1).

⁴² *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [38(h)].

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ Sir Elihu Lauterpacht, 'Transcript of the Second Round Presentation of Japan', *Southern Bluefin Tuna* (10 May 2000) 45 <<http://www.worldbank.org/icsid/bluefintuna/0510icsi.pdf>> at 30 April 2002.

‘could be regarded as incompatible with or derogating from their UNCLOS obligations.’⁴⁶ Consequently, Japan argued that if the Tribunal were to find that part XV procedures applied in the present dispute in place of article 16, the effect of its ruling would be to render nugatory the parties’ expressed intention to opt for non-compulsory procedures not just in the *CCSBT*, but also in all the annex 47 agreements.⁴⁷

Australia and New Zealand, in contrast, stressed the comprehensive character of the *UNCLOS* regime and its provisions for compulsory dispute settlement.⁴⁸ They pointed to elements of the *travaux préparatoires* which indicated the pivotal role served by part XV in securing agreement on the final text of *UNCLOS*,⁴⁹ arguing that the Tribunal ‘should sustain the effectiveness and comprehensive character of the *UNCLOS* dispute settlement regime, and reject arguments lending themselves to evasion of its provisions’.⁵⁰ Australia and New Zealand maintained that the appropriate basis for determining the relationship between article 16 and the provisions of part XV was article 282, rather than article 281.⁵¹ Article 282 provides that, if there is a procedure open to the parties under a regional agreement that entails a binding decision, that procedure shall apply in lieu of the *UNCLOS* procedures unless the parties otherwise agree. Article 16 did not entail a binding decision and so could not be said to derogate from the compulsory procedures in part XV of *UNCLOS*.⁵²

In response to Japan’s argument that article 16 precluded application of article 281(1) of *UNCLOS*, Australia and New Zealand contended that the *CCSBT* dispute resolution clause was not an ‘agreement’ on any particular peaceful means of settlement but merely a ‘menu’ of dispute settlement options.⁵³ Moreover the terms of article 16 did not exclude further recourse to part XV, a precondition which had to be interpreted strictly.⁵⁴ In Australia and New Zealand’s view, article 281(1) was intended to deal with situations where ‘the Parties to a dispute ... agree on an ad hoc basis to appoint a single arbitrator and to abide by his or her decision’, but in circumstances where the parties agree to mediate and the negotiations are unsuccessful, recourse to further procedures

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* 42–3.

⁴⁸ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [41(b)].

⁴⁹ See, eg, the statement of the first President of the Third Law of the Sea Conference, Ambassador Amerasinghe, above n 18. Various extracts from the *travaux*, indicating the importance of compulsory dispute settlement to the *UNCLOS* regime, were cited by Sir Kenneth Keith in his Separate Opinion: *Southern Bluefin Tuna*, 39 ILM 1359 (2000) (Separate Opinion of Sir Kenneth Keith), [24]–[29].

⁵⁰ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [41(b)].

⁵¹ ‘Reply on Jurisdiction of Australia and New Zealand’, *Southern Bluefin Tuna* (31 March 2000) [90]–[91] <<http://www.worldbank.org/icsid/bluefintuna/replyonjurisdictionofANZ.PDF>> at 30 April 2002 (‘Reply on Jurisdiction of Australia and New Zealand’). This argument was a reiteration of that advanced before ITLOS at the provisional measures stage which was apparently accepted by that Tribunal: *Provisional Measures Order*, 38 ILM 1624 (1999), [54]–[55].

⁵² Reply on Jurisdiction of Australia and New Zealand, above n 51, [91].

⁵³ *Ibid.* [161].

⁵⁴ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [41(j)].

under part XV would not be precluded.⁵⁵ Australia and New Zealand argued that while article 16 and the provisions cited by Japan in annex 47 might well evince an intention on the part of States Parties to avoid compulsory procedures in relation to disputes under those agreements, they did ‘not contain anything to suggest an intention to exclude reference to the compulsory and binding settlement procedures under *UNCLOS* itself.’⁵⁶ Australia and New Zealand pointed out that some of the agreements listed in annex 47 had no link

⁵⁵ Henry Burmester, ‘Transcript of the Second Round Presentation of Australia and New Zealand’, *Southern Bluefin Tuna* (11 May 2000) 37–8 <<http://www.worldbank.org/icsid/bluefintuna/0511icsid.pdf>> at 30 April 2002.

⁵⁶ ‘Questions of the Arbitral Tribunal for the Parties, Answers by Australia and New Zealand’, *Southern Bluefin Tuna*, (2000) [9.1] <http://www.worldbank.org/icsid/bluefintuna/qna_australia.pdf> at 30 April 2002 (‘Answers by Australia and New Zealand’). This point was taken up by Sir Kenneth Keith in his Separate Opinion. His Honour considered that art 16 and dispute settlement provisions like it (which he did not regard in any case as amounting to an ‘agreement’ on a peaceful means of settlement) ‘do not exclude means to which the parties have separately agreed in respect of disputes concerning the interpretation or application of *other* treaties’: *Southern Bluefin Tuna*, 39 ILM 1359 (2000) (Separate Opinion of Sir Kenneth Keith), [15] (emphasis in original). Sir Kenneth Keith agreed with Australia and New Zealand that ‘clear wording’ in the dispute settlement provision of the implementing agreement was needed in order to exclude the obligation to submit to compulsory procedures under *UNCLOS*: at 19.

Sir Kenneth Keith’s Separate Opinion receives apparent support from the recent decision of ITLOS in the *MOX Plant Case (Ireland v. United Kingdom) (Provisional Measures)* 41 ILM 405 (2002) (‘*MOX Plant Case*’). At [44] the UK argued that an annex VII tribunal would not have prima facie jurisdiction over the dispute, since the main elements of the dispute were covered by the compulsory dispute settlement procedures of a number of relevant regional agreements, namely the *Convention for the Protection of the Marine Environment of the North-East Atlantic*, opened for signature 22 September 1992, 32 ILM 1069 (1992) (entered into force 25 March 1998) (‘*OSPAR Convention*’); *European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community*, 37 ILM 56 (1998) (‘*EC Treaty*’); and *Treaty Establishing the European Atomic Energy Community*, opened for signature 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958) (‘*Euratom Treaty*’). ITLOS found that the dispute settlement procedures under the regional agreements dealt with disputes concerning the interpretation or application of those agreements and not with disputes arising under *UNCLOS*: at [49]. While recognising that the regional agreements contained similar provisions to those in *UNCLOS*, the Tribunal held at [50] that ‘the rights and obligations under those agreements have a separate existence from those under the Convention’ and, moreover, might be interpreted differently given differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires* of the treaties: at [51]. It is important to note that in the *MOX Plant Case* the ITLOS was not considering the application of art 281, but rather that of art 282 of *UNCLOS*, which excludes the pt XV compulsory procedures where the parties have agreed ‘through a general, regional or bilateral agreement or otherwise’ to resolve the dispute by a procedure that entails a binding decision. While both arts 281 and 282 speak of ‘a dispute concerning the interpretation or application of this Convention’, they serve different functions, a point noted by Judge Treves in his Separate Opinion in the *MOX Plant Case*. Art 281 sets out an obstacle to the possibility of resorting to compulsory dispute settlement in general and it may be relevant in this context to consider the general presumption that states may not be assumed to accept submission to adjudication without their consent. In contrast, art 282 expresses a ‘preference between different means of compulsory adjudication that would otherwise be applicable’: *MOX Plant Case*, 41 ILM 405 (2002) (Separate Opinion of Judge Treves), [4]. Thus it is not clear whether the Tribunal’s interpretation of art 282 in the *MOX Plant Case* is equally applicable to art 281.

whatsoever to *UNCLOS*,⁵⁷ and others contained saving clauses indicating that their provisions did not affect rights and obligations under other treaties.⁵⁸ They also invoked the practice of the World Trade Organization which, like *UNCLOS*, provides for mandatory dispute resolution and fosters specialised arrangements and regional agreements.⁵⁹

The Tribunal's analysis of the relationship between article 16 and the provisions of part XV focused on article 281(1), which it saw as establishing two requirements for the exclusion of compulsory procedures under *UNCLOS*: failure to reach a settlement of the dispute by recourse to the means chosen by the parties in their 'agreement'; and exclusion of 'any further procedure' by that agreement.⁶⁰ The Tribunal accepted article 16 of the *CCSBT* as an agreement by the parties to seek settlement of their dispute by peaceful means of their own choice.⁶¹ It did so on the basis that the parties were not grappling with two separate disputes, one under the *CCSBT* and the other under *UNCLOS*, but with what was in reality a single dispute arising under both conventions. The Tribunal maintained that to consider the *UNCLOS* dispute as distinct from the dispute which arose under the *CCSBT* would be artificial.⁶²

The Tribunal noted that the parties had had recourse to means for dispute resolution set out in article 16 and that negotiations had been 'prolonged, intense

⁵⁷ Answers by Australia and New Zealand, above n 56, [9.4]–[9.6]. Examples of agreements listed by Japan in annex 47 which Australia and New Zealand argued had 'no link whatever' to *UNCLOS* included: *United States — Netherlands Memorandum of Understanding Concerning Measures to Be Taken for the Transfer, Security and Safeguarding of Technical Information, Software and Equipment to the Ministry of Defence to Enable Industry to Establish North Sea ACMI Range Display and Debriefing System Facilities in The Netherlands*, opened for signature 6 July 1992, TIAS 12354 (entered into force 6 July 1992); and *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Long-Term Financing of the Co-Operative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe*, opened for signature 28 September 1984, 1491 UNTS 168, 24 ILM 484 (1985) (entered into force 28 January 1988).

⁵⁸ Answers by Australia and New Zealand, above n 56, [9.7]–[9.17]. Australia and New Zealand noted that a number of the agreements listed by Japan in annex 47 contained non-derogation clauses, making it clear that those agreements were not intended to derogate from other agreements previously concluded, such as *UNCLOS*, above n 7, [11]. Examples of such agreements cited by Australia and New Zealand included: *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, opened for signature 24 March 1983, 1506 UNTS 157 (entered into force 11 October 1986); *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, opened for signature 9 July 1992, 32 ILM 136 (1993) (entered into force 20 May 1993); *Final Act and Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area*, opened for signature 24 November 1996, 36 ILM 777 (1997) (entered into force 1 June 1997); *Agreement between the United States and Chile Concerning Marine Scientific Research Activities of the Research Vessel Hero*, opened for signature 1 June 1983, TIAS 10825 (entered into force 1 June 1983); *United States of America and the European Economic Community: Agreement Concerning Fisheries off the Coast of the United States*, opened for signature 15 February 1997, 1087 UNTS 226 (entered into force 9 June 1997); *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, opened for signature 25 November 1986, 26 ILM 38 (1987) (entered into force 22 October 1990); and *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 30 ILM 800 (1991) (entered into force 10 September 1997).

⁵⁹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [41(1)].

⁶⁰ *Ibid* [53].

⁶¹ *Ibid* [54].

⁶² *Ibid*.

and serious'.⁶³ It acknowledged that every means listed in article 16 had not been tried, and that article 16(2) provided that failure to reach agreement on reference of a dispute to the ICJ or to arbitration did not absolve the parties from their responsibility to continue to pursue resolution of their dispute by peaceful means. However, the Tribunal considered that this provision did not require the parties to continue fruitless negotiations indefinitely.⁶⁴

Having concluded that the first requirement of article 281(1) had been met, the Tribunal considered the second requirement, namely that the agreement between the parties did not exclude any further procedure. The Tribunal observed that article 16 did not expressly exclude the compulsory procedures of part XV of *UNCLOS*,⁶⁵ but asserted that 'the absence of an express exclusion of any procedure in article 16 is not decisive'.⁶⁶ The Tribunal analysed the requirements of article 16(2), noting 'the consensual nature of any reference of a dispute to either judicial settlement or arbitration'⁶⁷ under the clause. In the Tribunal's view, that implied that the intent of article 16 was

to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of *UNCLOS*, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute.⁶⁸

That interpretation was said to be supported by article 16(3), which contemplated an autonomous and consensual arbitration in accordance with the *CCSBT* annex, rather than a compulsory arbitration under part XV of *UNCLOS*.⁶⁹ The Tribunal observed that article 16, like article XI of the *Antarctic Treaty*⁷⁰ in which it has its 'essential origins', was obviously meant to exclude compulsory jurisdiction.⁷¹ The Tribunal thus concluded that 'Article 16 of the 1993 Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of *UNCLOS*'.⁷²

The Tribunal sustained its conclusion by reference to two further considerations. The first was the exceptions to compulsory dispute settlement under *UNCLOS* set out in section 3 of part XV. The Tribunal highlighted article 297, which it said provides 'significant limitations on the applicability of compulsory procedures in so far as coastal States are concerned',⁷³ including the exemption of disputes relating to a coastal state's sovereign rights or the exercise of those rights with respect to the living resources in its EEZ.⁷⁴ Complementing

⁶³ *Ibid* [55].

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* [57].

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ Opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

⁷¹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [58].

⁷² *Ibid* [59].

⁷³ *Ibid* [61].

⁷⁴ See *UNCLOS*, above n 7, art 297(3)(a) which provides:

the 'limitative' provisions of article 297, the Tribunal noted the optional exceptions to the compulsory procedures established by article 298.⁷⁵ These exceptions cover various types of disputes concerning maritime boundary delimitation, military activities and law enforcement activities of a coastal state. Curiously, none of the exceptions mentioned by the Tribunal has direct significance for high seas fisheries disputes like that in *Southern Bluefin Tuna*.⁷⁶ Nevertheless the Tribunal considered that the exceptions in section 3 of part XV demonstrated 'that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions.'⁷⁷

The second general consideration that the Tribunal took into account was the significant number of post-*UNCLOS* agreements with maritime elements that 'exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures.'⁷⁸ The Tribunal observed that:

Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and consultation or other method acceptable to the parties to the dispute or by arbitration or recourse to the International Court of Justice by common agreement of the parties to the dispute. Other agreements preclude unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures, but also, as in Article 16 of the 1993 Convention, by requiring the parties to continue to seek to resolve the dispute by any of the various peaceful means of their own choice.⁷⁹

In the Tribunal's view these agreements constituted a body of treaty practice, both postdating and antecedent to the adoption of *UNCLOS*, which 'tends to confirm the conclusion that States Parties to *UNCLOS* may, by agreement, preclude subjecting of their disputes to [compulsory] procedures in accordance with Article 281(1).'⁸⁰ This is in clear agreement with Japan's arguments in respect of annex 47. The Tribunal considered that to hold that disputes implicating obligations under both *UNCLOS* and an implementing treaty were subject to the compulsory procedures of part XV would 'deprive of substantial

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, 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.

⁷⁵ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [61].

⁷⁶ Dean Bialek, 'Australia and New Zealand v Japan: *Southern Bluefin Tuna Case*' (2000) 1 *Melbourne Journal of International Law* 153, 159.

⁷⁷ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [62]. While the Tribunal emphasised the exceptions to compulsory dispute settlement, it ignored the significance of the inclusion of compulsory procedures in *UNCLOS* in the first place, a rarity in multilateral international agreements. See Oxman, above n 4, 286.

⁷⁸ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [63].

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.⁸¹

In summary, the Tribunal's findings in respect of the relationship between article 16 and the compulsory procedures of part XV of *UNCLOS* can be resolved into three propositions:

- 1 That the dispute between the parties concerning the interpretation and application of *UNCLOS* was the same dispute as that which arose under the *CCSBT*;
- 2 That the provisions of Article 16 of the *CCSBT*, notwithstanding that they are expressed to apply only to disputes concerning the *CCSBT*, amount to an agreement for the settlement of the same dispute arising under *UNCLOS*; and
- 3 That despite the absence of any express exclusion of part XV procedures, article 16 impliedly excludes resort to compulsory procedures under *UNCLOS* because it contemplates judicial or arbitral settlement of the dispute only with the consent of all parties.⁸²

If narrowly interpreted so as to confine their application to subsequent cases with a similar factual basis, the findings of the Arbitral Tribunal may have a limited impact on states' resort to *UNCLOS* compulsory dispute settlement procedures to resolve fisheries disputes in the future.⁸³ However, the Tribunal's sweeping reference to other law of the sea agreements that 'exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures'⁸⁴ opens the door to a broader interpretation of the decision, which threatens to undermine the compulsory dispute settlement regime of *UNCLOS*. Part III of this article analyses a range of dispute settlement clauses in regional fisheries agreements to determine the extent to which they might, like article 16 of the *CCSBT*, be construed to exclude resort to part XV compulsory procedures for the resolution of high seas fishing disputes.

III SURVEY OF REGIONAL FISHERIES AGREEMENTS

Regional fisheries agreements establishing fisheries organisations or other arrangements for the management and conservation of regional fisheries have a wide variety of dispute settlement provisions.⁸⁵ In fact, the majority of regional fisheries agreements adopted prior to *UNCLOS* make no provision for dispute settlement at all. This group of agreements includes both multilateral treaties like the 1948 *International Convention for the Regulation of Whaling*,⁸⁶ as well as conventions setting up regional fisheries commissions such as the Inter-

⁸¹ *Ibid.*

⁸² Oxman, above n 4, 281–2.

⁸³ *Ibid.* 292–5. Oxman discusses a number of bases on which the decision could be distinguished by tribunals in future cases.

⁸⁴ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [63].

⁸⁵ A selection of dispute settlement provisions from regional fisheries agreements are extracted below in app A, table 1. Table 2 lists regional fisheries agreements with no provision for dispute settlement.

⁸⁶ Opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948). This convention was one of those listed by Japan in annex 47.

American Tropical Tuna Commission ('IATTC'), the North East Atlantic Fisheries Commission ('NEAFC') and the Northwest Atlantic Fisheries Organization ('NAFO').⁸⁷

The majority of regional fisheries agreements adopted after the conclusion of *UNCLOS* make some provision for the settlement of disputes arising under the agreement, though a variety of formulae is used. The most basic provision involves a commitment by the parties to engage in consultations or negotiations where a dispute arises, but nothing more.⁸⁸ The next level up is a dispute settlement clause that requires a dispute to be resolved by resort to peaceful means of the parties' own choice.⁸⁹ Clauses of this type are little more than a reiteration, in the specific context of a fisheries agreement, of the general obligation of all states under article 33 of the *Charter of the United Nations* to seek settlement of their disputes by peaceful means of their own choice.⁹⁰

Slightly more complex provisions, like article 16 of the *CCSBT*, are seen in a number of regional fisheries agreements.⁹¹ These provisions usually provide for

⁸⁷ *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, opened for signature 31 May 1949, 80 UNTS 3 (entered into force 3 March 1950); *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, opened for signature 28 October 1978, 1135 UNTS 369 (entered into force 1 January 1979); *Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries*, opened for signature 24 October 1978, 1285 UNTS 129 (entered into force 17 March 1982).

⁸⁸ See *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, above n 58, art IX; and *Agreement between the Government of Iceland, the Government of Norway and the Government of the Russia Federation Concerning Certain Aspects of Cooperation in the Area of Fisheries*, opened for signature 15 May 1999 (entered into force 15 June 1999) <<http://www.oceanlaw.net/texts/barents.htm>> at 30 April 2002.

⁸⁹ See *Convention on Fisheries Cooperation among African States Bordering the Atlantic Ocean*, opened for signature 5 July 1991, art 21 (entered into force 11 August 1995) <<http://www.oceanlaw.net/texts/dakar.htm>> at 27 April 2002; *Federated States of Micronesia Arrangement for Regional Fisheries Access*, opened for signature 30 November 1994, art 19 (entered into force 23 September 1995) <<http://www.oceanlaw.net/texts/micronesia.htm>> at 30 April 2002; and *Convention for the Conservation and Management of Pollock Resources in the Central Bering Sea*, opened for signature 16 June 1994, 34 ILM 67 (1994), art XIII (entered into force 8 December 1995).

⁹⁰ Oxman, above n 4, 290–1.

⁹¹ See *Agreement for the Establishment of the Indo-Pacific Fisheries Commission*, opened for signature 26 February 1948, 120 UNTS 59, art XIV (entered into force 9 November 1948); *Agreement Instituting the Latin American Organization for Fisheries Development (OLDEPESCA)*, opened for signature 29 October 1982, 1427 UNTS 132, art 38 (entered into force 2 November 1984); *Agreement Creating the Eastern Pacific Tuna Fishing Organization*, opened for signature 21 July 1989, art 33 (not yet in force) <<http://www.oceanlaw.net/texts/oapo.htm>> at 30 April 2002; *Agreement for the Establishment of the Indian Ocean Tuna Commission*, opened for signature 25 November 1993, [1996] ATS 20, art XXIII (entered into force 27 March 1996); *FAO Agreement for the Establishment of the Regional Commission for Fisheries*, opened for signature 1 November 1999, FAO Council Res 1/117, art XVI (not yet in force); and *FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, opened for signature 24 November 1993, FAO Doc CONF Res 15/93, 33 ILM 968 (1994), art IX (not yet in force).

a number of dispute settlement options that can be used by the parties to the controversy, although they are non-compulsory and non-binding in nature.⁹²

Some fisheries agreements provide limited scope for binding procedures, such as the *Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*,⁹³ which allows technical disputes to be submitted to a Technical Dispute Settlement Board for a final and binding decision. Other fisheries agreements refer all disputes to binding arbitration, which can be initiated at the request of either party to the dispute.⁹⁴ A dispute settlement clause of this type is apparently what is contemplated by the reference in article 282 of *UNCLOS* to ‘a procedure that entails a binding decision’ which then applies in lieu of the part XV procedures unless the parties to the dispute agree otherwise.

The final type of dispute resolution provision found in regional fisheries agreements is one which applies the compulsory procedures of part XV of *UNCLOS* (or their equivalent under part VIII of the *UN Fish Stocks Agreement*) mutatis mutandis to any dispute arising under the agreement.⁹⁵ The majority of recently adopted regional fisheries agreements incorporate either binding arbitral procedures, or the compulsory dispute settlement provisions under *UNCLOS* or the *UN Fish Stocks Agreement*.⁹⁶

In its decision the Tribunal suggested that a large number of agreements with maritime elements exclude reference of a dispute to compulsory or binding procedures, except with the consent of the parties.⁹⁷ The question is: which types of dispute resolution provisions under regional fisheries agreements fall within this category?⁹⁸ It seems that dispute settlement clauses which closely resemble, or are identical to, article 16 of the *CCSBT*, such as article XI of the *Antarctic*

⁹² These provisions commonly specify non-binding forms of dispute resolution as a first resort, eg mediation or conciliation, with judicial or arbitral settlement as a second option. However, resort to binding forms of dispute settlement can only be made with the consent of all parties to the dispute.

⁹³ See *Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*, opened for signature 28 January 1985, 1469 UNTS 357, art XII (entered into force 18 March 1985).

⁹⁴ See *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America*, opened for signature 2 April 1987, 26 ILM 1048 (1987), art 6 (entered into force 15 June 1988); *Western Indian Ocean Tuna Organization Convention*, opened for signature 19 June 1991, art 18 (entered into force 15 December 1992) <<http://www.oceanlaw.net/texts/wioto.htm>> at 30 April 2002; *Convention for the Establishment of the Lake Victoria Fisheries Organization*, opened for signature 30 June 1994, 36 ILM 667 (1997), art XXII (entered into force 24 May 1996); and *Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific*, opened for signature 14 August 2000, art 14 (not yet in force) <<http://www.oceanlaw.net/texts/galapagos.htm>> at 30 April 2002 (‘Galapagos Agreement’).

⁹⁵ See *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, opened for signature 5 September 2000, 40 ILM 277 (2001), art 31 (not yet in force); and *Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean*, opened for signature 20 April 2001, 41 ILM 257(2002), art 24 (not yet in force).

⁹⁶ See below app A.

⁹⁷ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [63].

⁹⁸ Barbara Kwiatkowska, ‘Southern Bluefin Tuna (Australia and New Zealand v Japan). Jurisdiction and Admissibility’ (2001) 95 *American Journal of International Law* 162, 169–70.

*Treaty*⁹⁹ and article XXV of the *Convention on the Conservation of Antarctic Marine Living Resources*,¹⁰⁰ would be interpreted as excluding resort to the procedures of part XV of the *UNCLOS*. Indeed, the Tribunal remarked that ‘it is obvious that these provisions are meant to exclude compulsory jurisdiction’.¹⁰¹

Similar provisions to article 16, which provide for resort to a variety of peaceful means, including those entailing binding decisions, but only with the consent of the parties, would seem to satisfy the Tribunal’s analysis of article 281(1) of *UNCLOS* and impliedly exclude resort to compulsory procedures under that convention. An intention to exclude compulsory jurisdiction is not as readily imported with respect to provisions which simply direct parties to use peaceful means of their own choice; although arguably the consensual basis of such provisions could be taken as an implicit decision to avoid compulsory procedures such as those under part XV of *UNCLOS*.

The basis for holding that part XV of *UNCLOS* is impliedly excluded by agreements that merely commit the parties to consult with one another in the advent of a dispute, or make no provision at all for the resolution of controversies, is more tenuous, albeit not implausible. On the one hand, it could be argued that extending the Tribunal’s ruling to such provisions is simply taking the findings too far; it is difficult to infer any intention with respect to the applicability of the compulsory procedures of part XV of *UNCLOS* from treaties which are silent on the question of the appropriate method for resolving disputes arising under the treaty. Moreover, in respect of those agreements adopted after or at the same time as *UNCLOS*, it is arguable that silence on the issue of dispute settlement is merely an acknowledgment that the compulsory procedures of part XV will apply to disputes between the parties which also raise issues under *UNCLOS*.¹⁰² On the other hand, a credible argument could be made that the parties’ failure to specify methods for the settlement of disputes indicates their intention that all disagreements should be resolved on a consensual basis without the need for compulsory resort to binding arbitration or judicial settlement. This argument has added weight in the regional fisheries context where the majority

⁹⁹ The Tribunal described art 16 of the *CCSBT* as having its ‘essential origins’ in the *Antarctic Treaty* provision: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [58].

¹⁰⁰ Opened for signature 20 May 1980, 1329 UNTS 47, 19 ILM 841 (1980) (entered into force 7 April 1982). This provision is identical in its terms to art 16 of the *CCSBT*.

¹⁰¹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [58].

¹⁰² Regional fisheries agreements in this category include: *Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest*, opened for signature 11 February 1982 (entered into force 4 December 1982) <<http://www.oceanlaw.net/texts/nauru.htm>> at 30 April 2002; *Convention for the Conservation of Salmon in the North Atlantic Ocean*, opened for signature 2 March 1982, 1338 UNTS 33 (entered into force 1 October 1983); *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, opened for signature 24 November 1989, 1899 UNTS 3, 29 ILM 1454 (1990) (entered into force 17 May 1991); *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, opened for signature 11 February 1992, TIAS 11465 (entered into force on 16 February 1993); and *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, above n 58.

of disputes are over scientific matters¹⁰³ or political issues¹⁰⁴ that may not be readily resolved by a legal ruling.¹⁰⁵

IV IMPACT OF THE *UN FISH STOCKS AGREEMENT*

In the final paragraph of its decision, the Tribunal observed that

when it comes into force, the Agreement for the Implementation of the Provisions of the *United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, which was adopted on August 4, 1995 and opened for signature December 4, 1995 (and signed by Australia, Japan and New Zealand), should, for States Parties to it, not only go far towards resolving procedural problems that have come before this Tribunal but, if the Convention is faithfully and effectively implemented, ameliorate the substantive problems that have divided the Parties.¹⁰⁶

The *UN Fish Stocks Agreement* elaborates on the general principles established in *UNCLOS* that states should cooperate with a view to ensuring conservation and promoting the objective of optimum utilisation of straddling and highly migratory stocks, both within and beyond the EEZs of coastal states.¹⁰⁷ The *UN Fish Stocks Agreement* seeks to achieve this objective by prescribing detailed minimum international standards for the conservation and management of straddling and highly migratory fish stocks;¹⁰⁸ by ensuring that measures taken for the conservation and management of these stocks in areas under coastal state jurisdiction and in the adjacent high seas are compatible and coherent;¹⁰⁹ and by ensuring that there are effective mechanisms for compliance and enforcement of such measures on the high seas.¹¹⁰ The *UN Fish Stocks Agreement* also makes provision for compulsory and binding dispute settlement in article 30, which provides as follows:

- 1 The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States

¹⁰³ For example, whether stocks have recovered sufficiently to justify increasing the TAC.

¹⁰⁴ For example, the division of the TAC amongst coastal states and high seas fishing nations.

¹⁰⁵ Bill Mansfield, 'Letter to the Editor: The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article' (2001) 16 *International Journal of Marine and Coastal Law* 361, 362. Mansfield was the counsel for New Zealand in *Southern Bluefin Tuna*. Mansfield emphasises, however, that this does not mean that formal third party international legal dispute settlement procedures are of no value in the resolution of fisheries disputes. He suggests that the ruling of the Arbitral Tribunal in *Southern Bluefin Tuna* has played a major part in revitalising the role of the Commission under the *CCSBT* and helping the parties to achieve a constructive solution to their differences over stock levels and an EFP. In April 2001, at a meeting of the *CCSBT*, Japan agreed to abandon its EFP for SBT: see Lee Glendinning, 'Japan Gives in on Bluefin Tuna', *The Age* (Melbourne, Australia), 19 April 2001, 4.

¹⁰⁶ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [71].

¹⁰⁷ *UNCLOS*, above n 7, arts 63 (stocks occurring within the EEZs of two or more coastal states or both within the EEZ and in an area beyond and adjacent to it) and 64 (highly migratory species).

¹⁰⁸ *UN Fish Stocks Agreement*, above n 15, arts 5–7.

¹⁰⁹ *Ibid* art 8.

¹¹⁰ *Ibid* arts 9–23.

Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

- 2 The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.

Clearly, the Tribunal considered that the *UN Fish Stocks Agreement* provides a means not only for ameliorating the substantive problems faced by states attempting to regulate the fishing of straddling and highly migratory fish stocks, but also for resolving the procedural difficulties presented by conflicting dispute resolution provisions under *UNCLOS* and regional fisheries agreements.¹¹¹

At first glance the Tribunal's confidence in the *UN Fish Stocks Agreement* as a panacea for the types of 'procedural problems'¹¹² which came before it in *Southern Bluefin Tuna* may seem misplaced. The effect of the *UN Fish Stocks Agreement* certainly seems to be to import the compulsory dispute resolution provisions of part XV of *UNCLOS* into the *CCSBT* and other regional fisheries agreements. However, those provisions include article 281(1) which, as the Tribunal itself ruled, removes from the reach of the compulsory procedures of part XV of *UNCLOS* those disputes which also arise under regional fisheries agreements with non-binding, non-compulsory dispute settlement provisions.¹¹³

On closer analysis, however, the apparent circularity of the Tribunal's reasoning is avoided. Through the mechanism of article 30 of the *UN Fish Stocks Agreement*, part XV is, in effect, incorporated into both that agreement and the regional agreement in question. As such, the question when looking at the relationship between part XV and the dispute resolution provision of the regional fisheries agreement is no longer one of *competing* dispute settlement clauses in *different* agreements, but rather one of *inconsistent* provisions for dispute settlement side by side in the *same* agreement.¹¹⁴ The compulsory procedures of part XV, as the *lex posterior*, would prevail over the prior dispute settlement clause of the regional treaty. Alternatively, the coming into force of the provisions of article 30 of the *UN Fish Stocks Agreement* could be viewed as an amendment of prior regional agreements relating to straddling and highly migratory stocks. In either case the dispute settlement clause of the regional fisheries agreement should be overridden by the provisions of part XV of *UNCLOS* to the extent that it does not provide for compulsory jurisdiction.¹¹⁵

¹¹¹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [71].

¹¹² *Ibid.*

¹¹³ Alan Boyle, 'The Southern Bluefin Tuna Arbitration' (2001) 50 *International and Comparative Law Quarterly* 447, 451.

¹¹⁴ Oxman, above n 4, 306.

¹¹⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1969), art 30(2) (entered into force 27 January 1980).

V FUTURE OF COMPULSORY DISPUTE SETTLEMENT UNDER *UNCLOS*

Southern Bluefin Tuna highlights the sometimes uneasy relationship between dispute settlement provisions of a ‘framework’ or ‘umbrella’ convention like *UNCLOS*, and those of implementing agreements, such as regional fisheries arrangements. Given the overlap between the substantive provisions of *UNCLOS* and regional fisheries agreements, it is likely that most disputes arising under the latter agreements will be able to be ‘characterised’ as also arising under *UNCLOS*.¹¹⁶ Disagreements between members of regional fisheries bodies over the status of migratory fish stocks — and hence the need for conservation measures — are increasingly common.¹¹⁷ These disagreements can readily be framed in terms of a dispute over general *UNCLOS* obligations, such as the duty for states to cooperate ‘in the conservation and management of living resources in the areas of the high seas.’¹¹⁸ In its decision the Tribunal affirmed a substantial body of international practice indicating the parallelism of both the substantive provisions of framework conventions and their implementing agreements, and their respective procedural provisions for dispute settlement.¹¹⁹ The Tribunal also recognised that it would be artificial to treat the majority of disputes arising under both conventions as separate disputes.¹²⁰ However, this

¹¹⁶ This raises the possibility that any complaining party to a dispute arising initially under a regional fisheries agreement can simply ‘recharacterise’ the dispute as a *UNCLOS* dispute to bring it within the ambit of the compulsory procedures of pt XV. This effectively renders the dispute settlement mechanisms in regional fisheries agreements nugatory: see Sir Elihu Lauterpacht, above n 45, 42–3.

¹¹⁷ The dispute over the status of SBT, which gave rise to the *Southern Bluefin Tuna* arbitration, is a case in point. Limited or uncertain scientific evidence concerning the biology, ecology and/or exploitation level of regional fish stocks is a common problem and frequently leads to a divergence of views over appropriate conservation and management measures. See also Christopher Carr and Harry Scheiber, ‘Dealing with a Resource Crisis: Regulatory Regimes for Managing the World’s Marine Fisheries’ (2002) 21 *Stanford Environmental Law Journal* 45, 54.

¹¹⁸ *UNCLOS*, above n 7, art 118.

¹¹⁹ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [52].

¹²⁰ The Tribunal noted that, in some respects, *UNCLOS* may be viewed as extending beyond the reach of the *CCSBT*, citing the obligations of States Parties under arts 117 and 119 as examples: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [52]. Sir Kenneth Keith explored this issue in greater depth in his Separate Opinion, differentiating three categories of substantive obligations:

- 1 those which exist under both treaties;
- 2 those which exist only under the *CCSBT* (such as the obligation to meet Secretariat budget obligations); and
- 3 those which do or may exist only under *UNCLOS*; the Award mentions, for instance, the obligations of (a) each State, under article 117, to take such measures for their nationals as may be necessary for the conservation of the living resources of the high seas; and of (b) the three *CCSBT* Parties owed to each State: at [11].

His Honour argued that in order for art 16 of the *CCSBT* to exclude the compulsory procedures of *UNCLOS* it ‘would have to be capable of dealing with *all* the disputes relating to Southern Bluefin tuna arising between *CCSBT* parties and concerning the interpretation and application of the relevant provisions of the *UNCLOS*’: *Southern Bluefin Tuna*, 39 ILM 1359 (2000) (Separate Opinion of Sir Kenneth Keith) [14] (emphasis in original). The recent decision of ITLOS in the *MOX Plant Case*, above n 56, seems to lend support to Sir Kenneth Keith’s view, though the Tribunal in that case was dealing with the exclusion of compulsory procedures under art 282 rather than art 281. The Tribunal found that the dispute between the UK and Ireland over potential harm to the Irish Sea, through the UK commencing operation of a nuclear fuel recycling plant at Sellafield in Cumbria, concerned

pragmatic conclusion gives rise to the difficulty of deciding on which set of (often conflicting) dispute settlement provisions to apply.

One option is to interpret the requirements of article 281(1) of *UNCLOS* strictly, such that any exclusion of the compulsory procedures of part XV by a regional fisheries agreement must be express. On this basis the only context in which article 281(1) would apply to exclude compulsory dispute settlement under part XV would be one where the parties to a *UNCLOS* dispute are seeking a negotiated settlement of their dispute and agree to resort to a particular method, such as mediation or conciliation. If the parties agree to abide by the result of the alternative dispute settlement method, one of the parties could not later initiate proceedings under part XV of *UNCLOS*. Where no settlement is reached, either party remains free to invoke compulsory dispute settlement under *UNCLOS*.¹²¹ This approach necessarily views *UNCLOS* as establishing a 'new and comprehensive legal regime for all ocean space',¹²² an integral element of which is 'mandatory' settlement of disputes.¹²³ Taking this view, the purpose of the compulsory procedures under part XV of *UNCLOS* is to ensure the integrity of the oceans regime as a whole, as well as compliance with its substantive rules and principles.¹²⁴

The alternative option for a tribunal faced with conflicting dispute settlement provisions under *UNCLOS* and a regional fisheries agreement is to give priority to the dispute settlement provision in the regional agreement. This choice could be justified on the basis that the application of compulsory *UNCLOS* procedures, in circumstances where the regional agreement opts for a non-compulsory, non-binding method of dispute settlement, would defeat the parties' intentions and render the dispute settlement provisions of the regional agreement nugatory. This option relies on viewing *UNCLOS* as an 'umbrella' convention which is given effect through detailed and specific legal measures adopted under implementing agreements. Since *UNCLOS* requires states to cooperate within specialised organisations and arrangements in their management and conservation of fisheries, it can be argued that deference is due to the parties' right to opt for non-binding, non-compulsory dispute settlement procedures in the context of

only the interpretation and application of *UNCLOS* and no other agreement. Hence only the dispute settlement procedures under *UNCLOS* were considered relevant to the dispute arising under *UNCLOS*: at [52]. However, it is not clear from the Tribunal's decision whether it regarded the disputes arising under *UNCLOS* and the regional agreements at issue (the *OSPAR Convention*, the *EC Treaty* and the *Euratom Treaty*) as exactly the same dispute or as different disputes. It is arguable that the position is different in respect of disputes which arise under both *UNCLOS* and another self-contained agreement, such as the *EC Treaty* — where often it will be possible to characterise the disputes as involving different issues and claims — and the case of disputes that arise under both *UNCLOS* and an implementing agreement, such as a regional fisheries arrangement where there is a greater likelihood that the parties concerned will be 'grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions': *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [54].

¹²¹ Boyle, above n 113, 450.

¹²² *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [41(b)].

¹²³ *Ibid.* This was the argument put by Australia and New Zealand.

¹²⁴ Oxman, above n 4, 279.

those organisations and arrangements.¹²⁵ Essentially, this was the view adopted by the Tribunal in *Southern Bluefin Tuna*.

The Tribunal's approach, however, threatens to take a large number of fisheries disputes out of the reach of the *UNCLOS* compulsory dispute settlement provisions by virtue of the disputing states being party to a regional fisheries agreement with provision for non-compulsory, consensual dispute settlement. The parties to such disputes are then forced to seek settlement of the dispute in accordance with the provisions of the regional fisheries agreement, which may ultimately fail to produce a resolution of the dispute binding on all states concerned. Frustration with the dispute settlement procedures of the *CCSBT*, which necessitated the parties engaging in endless rounds of fruitless negotiations, was undoubtedly the motivation for Australia and New Zealand to seek compulsory dispute settlement under *UNCLOS* in respect of their dispute with Japan over the management of SBT.¹²⁶ Notwithstanding the Tribunal's finding that it had no jurisdiction to hear the merits of the dispute, the process of resorting to the compulsory procedures under *UNCLOS* has clearly had beneficial results, not least of which has been to remove the previous political deadlock within the Commission for the Conservation of Southern Bluefin Tuna.¹²⁷ If the option to resort to compulsory dispute settlement under *UNCLOS* is removed, there might potentially be a resurgence of the kind of unilateral action that *UNCLOS* and its part XV procedures were designed to avoid. Ironically, it may be high seas fishing nations, like Japan, which stand to lose the most if parties are denied the option of compulsory dispute settlement to resolve fisheries disputes which have arisen within regional organisations. In cases where coastal states unilaterally extend their conservation and management measures to areas beyond their EEZs, high seas fishing nations may well prefer the certainty of resolution of the resulting dispute under *UNCLOS* rather than the non-binding, non-compulsory procedures offered by many regional fisheries agreements.¹²⁸

The Tribunal's decision, while it reduces the future utility of the compulsory procedures of *UNCLOS* in resolving fisheries disputes, may nevertheless have positive impacts in the long term. One of these may be to promote the widespread ratification of the *UN Fish Stocks Agreement*.¹²⁹ As the Tribunal noted, this is likely to obviate conflicts between part XV compulsory procedures and conflicting dispute settlement provisions in regional fisheries agreements.¹³⁰

¹²⁵ *Ibid.*

¹²⁶ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [55].

¹²⁷ Mansfield, above n 105, 363.

¹²⁸ Perhaps this was the kind of situation the Tribunal envisaged when it stated that it did

not exclude the possibility 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 consequences of such gravity, that a Tribunal might find that the obligations of *UNCLOS* provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of *UNCLOS*: *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [64].

¹²⁹ Bialek, above n 76, 161.

¹³⁰ *Southern Bluefin Tuna*, 39 ILM 1359 (2000), [71].

Until the *UN Fish Stocks Agreement* achieves widespread support from fishing nations,¹³¹ it will be necessary for national legal advisers to consider carefully the framing of dispute settlement provisions in regional fisheries agreements. Inclusion of a dispute settlement clause that provides for anything less than a binding procedure or the incorporation of part XV procedures runs the risk of being interpreted as excluding a state's option to resort to compulsory dispute settlement under *UNCLOS* where a fisheries dispute arises under both conventions. Where no dispute settlement provision is included in the regional agreement, the position is not as clear. However, a broad reading of the Tribunal's decision could plausibly construe the absence of any provision for compulsory, binding dispute resolution procedures as an implied exclusion of compulsory jurisdiction under *UNCLOS*. In any event, the trend of recent fisheries agreements is to opt for more stringent dispute settlement procedures that are either equivalent to those in part XV of *UNCLOS* or entail a 'binding decision' in terms of article 282. Indeed, a regional fisheries conference, held soon after the Tribunal's decision in *Southern Bluefin Tuna* and attended by all three parties to the dispute adopted the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* which contains the following provision for dispute settlement:

The provisions relating to the settlement of disputes set out in Part VIII of the [Straddling Stocks] Agreement apply, *mutatis mutandis*, to any dispute between members of the Commission, whether or not they are also Parties to the Agreement.¹³²

The Chairman of the Conference, Ambassador Satyan Nandan of Fiji, in his closing remarks, described the Convention's provision for compulsory and binding dispute settlement as a 'fundamental precept in the regime' and noted that the procedures were based 'on the widely accepted norms contained in [UNCLOS], which is the paramount instrument governing all ocean-related activities.'¹³³

Ultimately, while the short term impact of the Tribunal's decision may be acute, in the long term it may promote the adoption of stringent dispute resolution provisions in regional fisheries agreements and facilitate general acceptance of the detailed regime for management of high seas fisheries contained in the *UN Fish Stocks Agreement*.

¹³¹ There are currently 31 States Parties to the *UN Fish Stocks Agreement*, compared with the 138 parties to *UNCLOS*. See 'Table Recapitulating the Status of the Convention and of the Related Agreements, as at 6 February 2002', above n 15.

¹³² *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, above n 95, art 31.

¹³³ Satya Nandan, 'Closing Remarks by the Chairman' (presented at the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, 7th session, Honolulu, 30 August to 5 September 2000) annex 8. The *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* was adopted by a vote of 19 in favour, 2 against (Japan and Korea). The Japanese delegation objected to, *inter alia*, the inclusion of compulsory jurisdiction over disputes, maintaining that 'dispute settlement procedures should be within the framework of the Convention, based first on consent among concerned parties and should be unique to the regional organisation': at annex 9.

APPENDIX A: DISPUTE SETTLEMENT PROVISIONS IN
REGIONAL FISHERIES AGREEMENTS**TABLE 1: REGIONAL FISHERIES AGREEMENTS WITH PROVISION
FOR DISPUTE SETTLEMENT**

Type of Dispute Settlement Clause Agreement	Article	Opened for Signature	Entry into Force
Consultations only			
<i>Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region</i>	IX	9/7/1992	20/5/1993
<i>Agreement between the Government of Iceland, the Government of Norway and the Government of the Russia Federation Concerning Certain Aspects of Cooperation in the Area of Fisheries</i>	10	15/5/1999	15/6/1999
Peaceful means			
<i>Convention on Fisheries Cooperation among African States Bordering the Atlantic Ocean</i>	21	5/7/1991	11/8/1995
<i>Federated States of Micronesia Arrangement for Regional Fisheries Access</i>	19	30/11/1994	23/9/1995
<i>Convention for the Conservation and Management of Pollock Resources in the Central Bering Sea</i>	XIII	16/6/1994	8/12/1995
Variety of peaceful means including judicial/arbitral settlement with consent			
<i>Agreement for the Establishment of the Indo-Pacific Fisheries Commission</i>	XIV	26/2/1948	9/11/1948
<i>Agreement Instituting the Latin American Organization for Fisheries Development (OLDEPESCA)</i>	38	29/10/1982	2/11/1984
<i>Agreement Creating the Eastern Pacific Tuna Fishing Organization</i>	33	21/7/1989	Not yet in force
<i>Convention for the Conservation of Southern Bluefin Tuna</i>	16	10/5/1993	20/5/1994
<i>FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels in the High Seas</i>	IX	24/11/1993	Not yet in force
<i>Agreement for the Establishment of the Indian Ocean Tuna Commission</i>	XXIII	25/11/1993	27/3/1996
<i>Agreement for the Establishment of the Regional Commission for Fisheries</i>	XVI	1/11/1999	Not yet in force

Technical disputes

<i>Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon</i>	XII	28/1/1985	18/3/1985
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Binding arbitration at option of any party to dispute

<i>Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America</i>	6	2/4/1987	15/6/1988
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<i>Western Indian Ocean Tuna Organization Convention</i>	18	19/6/1991	15/12/1992
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<i>Convention for the Establishment of the Lake Victoria Fisheries Organization</i>	XXII	30/6/1994	24/5/1996
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<i>Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific</i>	14	14/8/2000	Not yet In force
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Compulsory procedures under part XV

<i>Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean</i>	31	5/9/2000	Not yet In force
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<i>Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean</i>	24	20/4/2001	Not yet in force
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TABLE 2: REGIONAL FISHERIES AGREEMENTS WITH NO PROVISION FOR DISPUTE SETTLEMENT

<i>Agreement</i>	<i>Opened for Signature</i>	<i>Entry into Force</i>
<i>International Convention for the Regulation of Whaling</i>	2/12/1946	10/11/1948
<i>Convention for the Establishment of an Inter-American Tropical Tuna Commission</i>	31/5/1949	3/3/1950
<i>Agreement for the Establishment of a General Fisheries Council for the Mediterranean</i>	24/9/1949	20/2/1952
<i>Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea</i>	2/3/1953	28/10/1953
<i>Convention Concerning Fishing in the Black Sea</i>	7/7/1959	21/3/1960
<i>Warsaw Agreement Concerning Cooperation in Marine Fishing</i>	28/7/1962	22/2/1963
<i>International Convention for the Conservation of Atlantic Tunas</i>	14/5/1966	21/3/1969
<i>Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts</i>	13/9/1973	28/7/1974
<i>Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries</i>	28/10/1978	1/1/1979
<i>South Pacific Forum Fisheries Agency Convention</i>	10/7/1979	9/8/1979
<i>Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries</i>	24/10/1978	17/3/1982
<i>Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest</i>	11/2/1982	4/12/1982
<i>Convention for the Conservation of Salmon in the North Atlantic Ocean</i>	2/3/1982	1/10/1983
<i>Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific</i>	24/11/1989	17/5/1991
<i>Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean</i>	11/2/1992	16/2/1993