

# ***AUSTRALIA & NEW ZEALAND V JAPAN: SOUTHERN BLUEFIN TUNA CASE***

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## I INTRODUCTION

On 4 August 2000, an arbitral tribunal constituted under annexure VII of the *United Nations Convention on the Law of the Sea* ('UNCLOS')<sup>1</sup> delivered its *Award on Jurisdiction and Admissibility* ('Award')<sup>2</sup> in a dispute between Australia and New Zealand on the one hand, and Japan on the other, concerning the conservation and management of southern bluefin tuna ('SBT'). In finding that it did not have jurisdiction to rule on the merits of the case, the arbitral tribunal revoked an earlier order for provisional measures made by the International Tribunal for the Law of the Sea ('ITLOS')<sup>3</sup> and encouraged the parties to continue to seek to resolve their dispute under the peaceful means provided for in the *Convention for the Conservation of Southern Bluefin Tuna* ('CCSBT')<sup>4</sup>.

## II HISTORY OF THE DISPUTE

The dispute related to Japan's unilateral declaration of an 'experimental fishing program', which involved catches of SBT over and above its national allocation decided by the Commission for the Conservation of Southern Bluefin Tuna ('the Commission'). Decisions of the Commission are made by unanimous vote of the three signatory parties: Australia, Japan and New Zealand.<sup>5</sup> In May 1994, the first meeting of the Commission set a total allowable catch ('TAC') of 11,750 tonnes, divided into national allocations of 6,065 tonnes to Japan, 5,265 tonnes to Australia and 420 tonnes to New Zealand. However since 1998, the Commission has been unable to agree upon a new TAC; the parties thus continue to apply the 1994 TAC.<sup>6</sup>

Disagreement over catch limits is born out of divergent views as to the health of the SBT stock. Australia and New Zealand believe that catch restraints are

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<sup>1</sup> Opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994).

<sup>2</sup> *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility)* (Arbitral Tribunal constituted under annex VII of the *United Nations Convention on the Law of the Sea*) (Award of 4 August 2000) <<http://www.worldbank.org/icsid/bluefintuna/award080400.pdf>>.

<sup>3</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 (Order of 27 August 1999) ('Provisional Order').

<sup>4</sup> Opened for signature 10 May 1993, ATS 1994 No 16 (entered into force 20 May 1994).

<sup>5</sup> *Ibid* art 7.

<sup>6</sup> *Award*, above n 2, [24].

necessary to restore parental stocks to levels that would promote the achievement of the Commission's long-term management goal, namely returning the SBT spawning stock biomass to 1980 levels by the year 2020. Conversely, Japan claims that available data demonstrates that stocks are recovering from 'historic lows' and that an increase in TAC would still be consistent with management objectives.<sup>7</sup>

Japan commenced a unilateral three-year experimental fishing program in the summer of 1998, in addition to its national allocation. In response, Australia and New Zealand formally requested urgent consultations under the *CCSBT*, and subsequently viewed these consultations as terminated by Japan's refusal to cease fishing under its experimental fishing program in 1999.<sup>8</sup> Australia then initiated proceedings under the UNCLOS dispute settlement provisions,<sup>9</sup> and pending the constitution of an arbitral tribunal,<sup>10</sup> Australia and New Zealand ('the applicants') sought provisional measures from ITLOS.<sup>11</sup> In sum, the applicants claimed that Japan had breached its obligations<sup>12</sup> to conserve and manage SBT stock.<sup>13</sup>

### III REQUEST FOR PROVISIONAL MEASURES

ITLOS 'may prescribe ... provisional measures ... if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.'<sup>14</sup> It may prescribe such provisional measures to preserve the respective rights of the parties to the dispute, or to prevent serious harm to the marine environment.<sup>15</sup> In handing down its provisional measures, ITLOS noted that:

- the differences between the parties concerned issues of law and fact, not only scientific disagreement, and could therefore be regarded as a 'dispute',<sup>16</sup> and
- the general obligations under articles 64 and 116–119 of *UNCLOS*, requiring states to cooperate to ensure conservation and promote optimal utilisation of highly migratory species, appeared to 'afford a basis on which the jurisdiction of the arbitral tribunal might be founded'.<sup>17</sup>

On these bases, ITLOS found that preservation of the rights of the parties and prevention of further harm to SBT stocks required a cessation of catches in

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid [26].

<sup>9</sup> *UNCLOS*, above n 1, pt XV.

<sup>10</sup> Ibid annex VII.

<sup>11</sup> Pursuant to *UNCLOS*, above n 1, art 290(5).

<sup>12</sup> These obligations arise under *UNCLOS*, above n 1, arts 64, 116–119.

<sup>13</sup> *SBT Provisional Order*, above n 3, [28]–[29].

<sup>14</sup> *UNCLOS*, above n 1, art 290(5).

<sup>15</sup> Ibid art 290(1).

<sup>16</sup> *SBT Provisional Order*, above n 3, [43].

<sup>17</sup> Ibid [52].

excess of the 11,750 tonne TAC,<sup>18</sup> effectively putting a halt to the Japanese experimental fishing program, pending the constitution of an arbitral tribunal.

#### IV THE ARBITRAL TRIBUNAL

A hearing on jurisdiction was held at the World Bank headquarters in Washington from 7–11 May 2000. Jurisdictional arguments concentrated on the meaning and interaction of the dispute settlement provisions of the *CCSBT* and *UNCLOS* respectively. The key provisions were article 281 of *UNCLOS* and article 16 of the *CCSBT*. Article 281 of *UNCLOS* (Procedure where no settlement has been reached by the parties) provides that:

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.

Article 16 of the *CCSBT* provides that:

- 1 If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
- 2 Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

Article 281 is found in section 1 of part XV of *UNCLOS*. Section 2 of that part establishes a system of compulsory referral to arbitration, which applies when parties to a dispute have accepted different dispute resolution procedures (or one party has not accepted any such procedure) upon signing, ratifying or acceding to *UNCLOS*.<sup>19</sup> Because none of the three parties to the dispute had accepted any particular dispute settlement procedure, Japan was obligated under article 287(3) to submit to arbitration.

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<sup>18</sup> Ibid [90(1)(c)].

<sup>19</sup> *UNCLOS*, above n 1, art 287(1): a state is free to choose one or more of the following means for the settlement of disputes by written declaration:

- (a) the International Tribunal for the Law of the Sea;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

## V ARGUMENTS OF THE PARTIES

## A Japan

The central contention of Japan's submissions to the arbitral tribunal was that the dispute at hand did not concern the application or interpretation of *UNCLOS* and should not, therefore, involve the application of its dispute settlement provisions. Japan contended that all attempts at resolving the dispute had been conducted within the framework of the *CCSBT* and that the '[b]elated invocation of *UNCLOS* and customary international law ... [was] an artifice to enable the Applicants to seek provisional measures ... and to evade the consensual requirements of Article 16 of the [*CCSBT*]'.<sup>20</sup> Japan characterised the *CCSBT* as a *lex specialis*, and contended that:

In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of [*UNCLOS*]; they exhaust and supplant those principles as long as the implementing agreement remains in force.<sup>21</sup>

It was argued that the *lex specialis* prevails 'substantively and procedurally', and therefore the wording of article 16 of the *CCSBT* should determine jurisdiction.<sup>22</sup>

In the alternative, if the arbitral tribunal were to find that the dispute was one concerning the interpretation and application of *UNCLOS*, Japan argued that the arbitral tribunal should decline to decide upon the merits of the case. Recourse to the dispute settlement procedures in part XV of *UNCLOS* is available only where no settlement has been reached by the parties pursuant to agreed 'peaceful means of their own choice' and additionally where the 'agreement between the parties does not exclude any further procedure' for dispute settlement.<sup>23</sup> Japan argued that the applicants had failed to exhaust the dispute settlement procedures set out in article 16 of the *CCSBT*, and that this article excludes the possibility of further procedures, including the compulsory procedures of *UNCLOS*, without the consent of all of the parties to the dispute.<sup>24</sup>

## B The Applicants

In response, the applicants argued that the dispute settlement provisions of *UNCLOS* should apply in tandem with those of the *CCSBT*, since the dispute centred on key *UNCLOS* rights and duties, namely whether Japan had failed to 'conserve and cooperate in the conservation of SBT stock, as particularly shown by its unilateral' experimental fishing program.<sup>25</sup> They argued that the provisions in articles 64 and 116–119 of *UNCLOS* establish norms applicable to the case, by which the lawfulness of Japan's actions could be evaluated. According to the

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<sup>20</sup> *Award*, above n 2, [38(a)].

<sup>21</sup> *Ibid* [38(c)].

<sup>22</sup> *Ibid*.

<sup>23</sup> *UNCLOS*, above n 1, art 281(1).

<sup>24</sup> *Award*, above n 2, [39(b)].

<sup>25</sup> *Ibid* [41(e)].

applicants, *UNCLOS* establishes an ‘overarching, mandatory regime for the regulation of, and resolution of disputes concerning, the law of the sea, which itself includes conservation and management of fisheries’.<sup>26</sup> It was argued that the *CCSBT*, as the subsequent treaty implementing *UNCLOS*, should not be held to have ‘exhausted and eclipsed the obligations of *UNCLOS*’.<sup>27</sup> The applicants also argued that the principle of *lex specialis* only applies where two applicable treaties appear to conflict, and that in any event, article 311 of *UNCLOS* ‘asserts the primacy of *UNCLOS* over other treaties’.<sup>28</sup> It was said that if the Japanese view on this issue was to be upheld, the provisions of *UNCLOS* for mandatory dispute settlement could be regarded as ‘a paper umbrella which dissolves in the rain’.<sup>29</sup>

The applicants noted that the invocation of compulsory dispute settlement provisions pursuant to article 281 of *UNCLOS* would require:

- (i) that no settlement had been reached by the peaceful means adopted by the parties (pursuant to the methods listed in article 16 of the *CCSBT*); and
- (ii) article 16 of the *CCSBT* did not expressly exclude any further dispute settlement procedure, including those provided for by *UNCLOS*.<sup>30</sup>

With respect to the first requirement of article 281, the applicants claimed to have made the requisite efforts to settle the dispute by peaceful means. They claimed that Japan could not ‘block recourse to compulsory dispute settlement by continuing to offer negotiations when all reasonable efforts have shown that such negotiations [would] not resolve the issue.’<sup>31</sup> With respect to the second requirement of article 281, they argued that the exclusion of alternative procedures had to be express and not implied. There was nothing to suggest exclusion of alternative procedures in the wording of article 16. In fact, it was said that far from excluding any other procedure, article 16 does not exclude *any* procedure at all.<sup>32</sup>

## VI AWARD OF THE ARBITRAL TRIBUNAL ON JURISDICTION AND ADMISSIBILITY

The *Award* of the arbitral tribunal isolated the key issue as being ‘whether the dispute arises solely under the [*CCSBT*] or whether it also arises under *UNCLOS*’.<sup>33</sup> In seeking to answer this question, the *Award* noted that all the main elements of the dispute had been addressed under the *CCSBT* framework. Despite this, it was held that Japan’s reliance on the concept of *lex specialis* to exclude the general application of *UNCLOS* was erroneous. The arbitral tribunal noted that there is ‘frequently a parallelism of treaties’ in that it is ‘commonplace of international law and State practice for more than one treaty to bear upon a

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<sup>26</sup> Ibid [41(b)].

<sup>27</sup> Ibid [41(g)].

<sup>28</sup> Ibid [41(k)].

<sup>29</sup> Ibid.

<sup>30</sup> Ibid [41(i)].

<sup>31</sup> Ibid [41(g)].

<sup>32</sup> Ibid [41(k)].

<sup>33</sup> Ibid [47].

particular dispute.<sup>34</sup> It was non-sensical to find that a party to *UNCLOS* is not subject to *UNCLOS* obligations relating to highly migratory fish (of which SBT is one species) simply because it is subject to *CCSBT* obligations. The rights and duties under the two treaties were inextricably linked ‘for the very reason that the *CCSBT* was designed to implement broad principles set out in *UNCLOS*.’<sup>35</sup>

Furthermore, the arbitral tribunal said that the realm of rights and duties under *UNCLOS* is wider than that of the *CCSBT*, so that *UNCLOS* provisions not found in the *CCSBT* would still apply even where cooperation in the Commission has broken down. As an example, it was said that the obligation imposed upon states by *UNCLOS* to take measures with respect to their nationals necessary for the conservation of the living resources of the high seas<sup>36</sup> is not found in the *CCSBT*, but would continue to apply where the parties to the *CCSBT* failed to reach agreement on the setting of a TAC.<sup>37</sup>

The *Award* then turned to a literal interpretation of the wording of, and interaction between, article 16 of the *CCSBT* and article 281 of *UNCLOS*. As noted above, the compulsory dispute settlement provisions of *UNCLOS* only apply where: (i) the states parties to a dispute have agreed to seek settlement of disputes by a peaceful means and no settlement has been reached by recourse to such means; and (ii) the agreement between the parties *does not exclude any further procedure*.<sup>38</sup> The arbitral tribunal found that article 16 of the *CCSBT* does not, of itself, constitute ‘a peaceful means’, but rather constitutes an agreed list of choices for the pursuit of peaceful settlement.<sup>39</sup> While this list had not been exhausted, the arbitral tribunal found that the parties had vigorously pursued a number of options and were not required by article 281(1) to ‘negotiate indefinitely’ in order to affirm the conclusion that no settlement had been reached for the purposes of article 281(1).<sup>40</sup>

The arbitral tribunal then turned to the second requirement of article 281(1), namely whether article 16 of the *CCSBT* excluded any further procedure of dispute settlement. While the terms of article 16 ‘did not expressly and in so many words exclude the applicability of any procedure’,<sup>41</sup> the arbitral tribunal adopted a contextual interpretation approach to find, by implication, that:

The intent of Article 16 is to remove dispute settlement proceedings under [the *CCSBT*] 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.<sup>42</sup>

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<sup>34</sup> *Ibid* [52].

<sup>35</sup> *Ibid* [52].

<sup>36</sup> *UNCLOS*, above n 1, art 117.

<sup>37</sup> *Award*, above n 2, [52].

<sup>38</sup> *UNCLOS*, above n 1, art 281(1) (emphasis added).

<sup>39</sup> *Award*, above n 2, [55].

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* [56].

<sup>42</sup> *Ibid* [57].

The arbitral tribunal supported this conclusion by reference to the ordinary meaning of the terms of article 16. While article 16(1) requires the parties to pursue resolution of disputes by ‘negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice’, article 16(2) requires that disputes not resolved by such methods be referred to the International Court of Justice or to arbitration ‘with the consent in each case of all parties to the dispute’. Furthermore, the failure to reach an agreement for referral of the dispute does not absolve the parties from the responsibility to continue to seek resolution of the dispute by the peaceful means referred to in article 16(1). Article 16(3) then deals with the constitution of an arbitral tribunal, if agreed to by the parties, as provided in the annexure to the CCSBT. According to the arbitral tribunal, an accumulative reading of these paragraphs leads to the conclusion that the ‘arbitration contemplated by Article 16 is not compulsory arbitration under section 2 of Part XV of UNCLOS but rather autonomous and consensual arbitration provided for in that CCSBT annex’.<sup>43</sup>

In support of its position, the arbitral tribunal went to great lengths to emphasise the large number of exceptions in *UNCLOS*<sup>44</sup> that act to exclude unilaterally triggered compulsory dispute settlement provisions. For example, it discussed article 297(3), which exempts from the purview of section 2 fisheries disputes arising out of the exercise of sovereign rights by a coastal state within its exclusive economic zone.<sup>45</sup> Curiously, none of the exceptions mentioned have direct significance for the dispute at hand. Reference was also made to the practice of parties concluding marine agreements in the post-*UNCLOS* period, as constituting attempts to ‘exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures.’<sup>46</sup> The arbitral tribunal also noted, without further explanation, that article 16 of the *CCSBT* is a carbon copy of the dispute settlement provision of article XI of the *Antarctic Treaty*,<sup>47</sup> and that it is ‘obvious that these provisions are meant to exclude compulsory jurisdiction.’<sup>48</sup> The relevance of these passing comments was not made clear, but they seem intended to exhibit that ‘UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction’.<sup>49</sup>

## VII SEPARATE OPINION OF SIR KENNETH KEITH

Sir Kenneth Keith was not prepared to imply an intention on behalf of the drafters of the *CCSBT* to exclude the compulsory dispute settlement provisions of *UNCLOS*. He found that the applicants had invoked *UNCLOS* procedures based on Japan’s alleged violation of *UNCLOS* obligations. He also found that

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<sup>43</sup> *Ibid.*

<sup>44</sup> See, eg, *UNCLOS*, above n 1, s 3 of pt XV.

<sup>45</sup> *Award*, above n 2, [61].

<sup>46</sup> *Ibid* [63].

<sup>47</sup> Opened for signature 1 December 1959, 402 UNTS 71, ATS 1961 No 12 (entered into force 23 June 1961).

<sup>48</sup> *Award*, above n 2, [58].

<sup>49</sup> *Ibid* [62].

the fact that the disputes arose within the context of the *CCSBT* framework should not have prevented the invocation of the separate set of *UNCLOS* peaceful settlement obligations that exist both ‘along with and distinct from the provisions of article 16’<sup>50</sup> of the *CCSBT*.

It therefore remained to be decided whether article 16 excluded the *UNCLOS* dispute settlement procedures. The wording of article 16(1) refers to disputes ‘concerning the interpretation or implementation of *this* Convention’ (emphasis added), and according to Sir Kenneth Keith, should not be read as referring to disputes arising through the invocation of *UNCLOS* obligations which are not in the *CCSBT*.<sup>51</sup>

Sir Kenneth Keith emphasised that the ‘two treaty regimes (including their settlement procedures) remain distinct’<sup>52</sup> and that it would be surprising if procedures for the settlement of disputes under the *CCSBT* were applicable to disputes arising beyond it. He noted that article 16 does not ‘exclude means to which the parties have separately agreed in respect of disputes concerning the interpretation or application of *other* treaties.’<sup>53</sup> Given the general recognition of overlapping dispute settlement provisions in ‘international judicial practice and the general law of treaties’<sup>54</sup> and the pivotal role played by compulsory and binding dispute settlement in the *travaux préparatoires* and operation of *UNCLOS*, Sir Kenneth Keith concluded that the exclusion of the binding procedures of *UNCLOS* under the *CCSBT* would require a clear and express wording to that effect. On this basis, he held that the arbitral tribunal had jurisdiction to hear the merits of the dispute.

#### VIII CONCLUSION

The *Award* represents a rare example of an arbitral body prepared to decline jurisdiction and take the adventurous step of implying the exclusion of the compulsory dispute settlement provisions of *UNCLOS* through the provisions of a regional fisheries agreement, the *CCSBT*. The concerns expressed in the separate opinion of Sir Kenneth Keith appear well-founded, especially in the context of a dispute that involved *only* the invocation of general *UNCLOS* obligations. Above all, the dispute highlights the care that needs to be taken in drafting dispute settlement provisions in regional fisheries agreements, since the result in this case derived mainly from a failure of the *CCSBT* to make explicit reference to the *UNCLOS* dispute settlement provisions.

Interestingly, the *Award* noted the effect that an ‘in force’ *Straddling Stocks Agreement* (*SSA*)<sup>55</sup> may have had on the outcome of this dispute, in particular

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<sup>50</sup> *Ibid* [12].

<sup>51</sup> See especially, *UNCLOS*, above n 1, art 117.

<sup>52</sup> *Award*, above n 2, [16].

<sup>53</sup> *Ibid* [15].

<sup>54</sup> *Ibid* [18].

<sup>55</sup> *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*, opened for signature 4 December 1995, 34 ILM 1542 (not yet in force).

its dispute settlement provisions which would apply part XV of *UNCLOS* mutatis mutandis to disputes relating to the conservation and management of highly migratory and straddling fish stocks.<sup>56</sup> The arbitral tribunal described the provisions of the *SSA* as ‘more detailed and far-reaching’ than those of *UNCLOS* and suggested that the *SSA* would have clarified both the procedural and substantive aspects at issue in this dispute, if in force between the parties.<sup>57</sup> The *Southern Bluefin Tuna Case* provides an important example of the uncomfortable overlap between *UNCLOS* and regional fisheries agreement dispute settlement provisions. It should act as an incentive towards the prompt ratification and entry into force of the *SSA*, so as to prevent *UNCLOS* mandatory system of dispute settlement from ‘dissolving in the rain’.

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<sup>56</sup> Award, above n 2, [71].

<sup>57</sup> *Ibid.*