REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)

4 August 2000

VOLUME XXIII pp. 1-57

NATIONS UNIES - UNITED NATIONS

PART I

Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility

Decision of 4 August 2000

Affaire du thon à nageoire bleue entre l'Australie et le Japon et entre la Nouvelle-Zélande et le Japon, sentence sur la compétence et la recevabilité

Décision du 4 août 2000

SOUTHERN BLUEFIN TUNA CASE BETWEEN AUSTRALIA AND JAPAN AND BETWEEN NEW ZEALAND AND JAPAN, AWARD ON JURISDICTION AND ADMISSIBILITY, DECISION OF 4 AUGUST 2000

AFFAIRE DU THON À NAGEOIRE BLEUE ENTRE L'AUSTRALIE ET LE JAPON ET ENTRE LA NOUVELLE-ZÉLANDE ET LE JAPON, SENTENCE SUR LA COMPÉTENCE ET LA RECEVABILITÉ, DÉCISION DU 4 AOÛT 2000

First Arbitral Tribunal constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention of the Law of the Sea (UNCLOS).

Mootness: resolution of one salient aspect of a dispute is not sufficient to dispose of the dispute and render the case moot.

Jurisdiction: claims must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty; the Tribunal must decide whether the "real dispute" reasonably (and not just remotely) relates to the obligations set forth in the treaties whose breach is alleged; *lex specialis* versus parallelism of treaties both in their substantive content and their dispute settlement provisions; conclusion of an implementing convention does not necessarily vacate or exhaust the obligations imposed by a framework convention; a single dispute arises under both UNCLOS and the 1993 Convention for the Conservation of Southern Bluefin Tuna consistent with UNCLOS (article 311(2) and (5)) and the Vienna Convention on the Law of Treaties (article 30(3); the 1993 Convention excludes any further dispute settlement procedure under UNCLOS; the Tribunal is without jurisdiction to rule on the merits of the dispute.

Premier tribunal arbitral constitué conformément à l'annexe VII (« Arbitrage ») de la partie XV (« Règlement des différends ») de la Convention des Nations Unies sur le droit de la mer.

Défaut d'objet : La résolution d'un aspect important d'un différend ne suffit pas pour régler ce dernier et rendre l'affaire sans objet.

Compétence : Les demandes doivent présenter un lien raisonnable avec les normes juridiques énoncées dans le traité ou pouvoir être appréciées par rapport à ces normes; le Tribunal doit décider si le « véritable différend » entretient un rapport raisonnable (et non pas simplement lointain) avec les obligations énoncées dans les conventions dont la violation est alléguée; la *lex specialis* contre le parallélisme des traités, tant en ce qui concerne leur contenu spécifique qu'en ce qui concerne leurs dispositions relatives au règlement des différends; la conclusion d'une convention d'application n'annule ou n'éteint pas nécessairement les obligations imposées par une convention-cadre; un seul et même différend relève à la fois de la Convention des Nations Unies sur le droit de la mer et de la Convention de 1993 pour la conservation du thon à nageoire bleue, conformément à la Convention des Nations Unies sur le droit de la mer [art. 311(2) et (5)] et à la Convention de Vienne sur le droit des traités [art. 30(3)]; la Convention de 1993 exclut toute nouvelle procédure de règlement du différend sur le fondement de la Convention des Nations Unies sur le droit de la mer; le Tribunal n'est pas compétent pour se prononcer sur le fond du différend.

Southern Bluefin Tuna Case
Australia and New Zealand v. Japan
Award on Jurisdiction and Admissibility
August 4, 2000
rendered by
the Arbitral Tribunal
constituted under Annex VII of the
United Nations Convention on the Law of the Sea

the Arbitral Tribunal being composed of:

Judge Stephen M. Schwebel, President
H.E. Judge Florentino Feliciano
The Rt. Hon. Justice Sir Kenneth Keith, KBE
H.E. Judge Per Tresselt
Professor Chusei Yamada

I. *Procedural History*

1. On August 31, 1998, Australia and New Zealand delivered to Japan identical diplomatic notes formally notifying Japan of the existence of 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. On July 15, 1999, Australia and New Zealand each delivered to Japan a Statement of Claim and Grounds on Which it is Based. Australia and New Zealand thereby commenced these arbitration proceedings against Japan under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS").[1]

2. Pending the constitution of this Arbitral Tribunal under Annex VII of UNCLOS, Australia and New Zealand, on July 30, 1999, each filed a request for the prescription of provisional measures with the International Tribunal for the Law of the Sea ("ITLOS").

3. On August 9, 1999, at the invitation of the President of ITLOS, Japan filed a single statement in response to Australia's and New Zealand's requests. Japan's statement raised objections to the jurisdiction of ITLOS on the basis that this Arbitral Tribunal would not, once constituted, have jurisdiction *prima facie* to decide the dispute.

4. On August 16, 1999, ITLOS issued an Order joining the two requests for provisional measures, thus permitting common oral argument and a

[1] "UNCLOS" initially referred to the United Nations Conference on the Law of the Sea, but the term has come to be used to refer to the United Nations Convention on the Law of the Sea, prepared by UNCLOS III, and is so used in this Award.

common order to be issued in regard to both requests. A hearing on the requests for provisional measures was held by ITLOS in Hamburg on August 18, 19 and 20, 1999.

5. On August 27, 1999, ITLOS issued an Order finding that, *prima facie*, this Arbitral Tribunal would have jurisdiction and prescribing certain provisional measures.

6. Following appointments in due course, this Arbitral Tribunal was constituted, composed as indicated above.

7. On January 19, 2000, the Parties met on procedural matters with the President of the Tribunal at The Hague. As a result of these consultations, agreement was reached on a schedule for filing of pleadings on preliminary objections to jurisdiction raised by Japan, and a hearing on jurisdiction was scheduled in Washington, D.C. in early May 2000, at the facilities of the World Bank.[2] Following consultation with the other members of the Arbitral Tribunal, the President subsequently set the hearing on jurisdiction for May 7 through May 11, 2000, to which the Parties agreed.

8. At the January 19, 2000 meeting with the President of the Tribunal, the Parties agreed that the Tribunal would appoint a Registrar, who would supervise the provision of services of a secretariat. The Parties stated that they would welcome the appointment for this purpose of an appropriate official of the International Centre for Settlement of Investment Disputes ("ICSID"). Following consultations with the Secretary-General of ICSID, the President of the Tribunal wrote to ICSID's Secretariat[3] on February 3, 2000 to ask whether ICSID would be prepared to make its officials and facilities available for the proceeding. By letter of that same day, ICSID replied with its acceptance. Mrs. Margrete L. Stevens and Messrs. Alejandro A. Escobar and Antonio R. Parra were the ICSID officials who were designated to serve as co-secretaries of the Tribunal.

9. In subsequent correspondence between ICSID and the Parties, the tasks that ICSID was to perform in connection with the proceeding were elaborated. ICSID would serve as Registrar; be the official channel of communication between the Parties and the Arbitral Tribunal; make arrangements for keeping a record (including verbatim transcripts) of the hearing on jurisdiction; make other arrangements as necessary for the hearing on jurisdiction; and, from the funds advanced to it by the Parties, pay the fees of the members of the Arbitral Tribunal, reimburse their travel and other expenses in connection with the proceedings, and make other payments as required.

---

[2] The Parties also agreed at their January 19, 2000 meeting with the President that the language of the proceeding shall be English, and on the distribution between them of the costs of the proceeding and on the remuneration to be offered to the members of the Arbitral Tribunal.

[3] All further references herein to ICSID refer to the ICSID Secretariat.

10. On February 11, 2000, Japan filed its memorial on its preliminary objections to jurisdiction. By letter of that same day, ICSID forwarded copies of Japan's memorial to the members of the Arbitral Tribunal.

11. Upon the filing of Japan's memorial on preliminary objections, the Parties exchanged correspondence expressing their disagreement about the title to be given to the proceedings. Australia and New Zealand proposed the title, "Southern Bluefin Tuna Cases." Japan initially proposed the title, "Cases concerning the Convention for the Conservation of Southern Bluefin Tuna" or, in the alternative, "Australia and New Zealand v. Japan." On February 17, 2000, the President of the Tribunal informed the Parties that, until the Tribunal had had the opportunity to meet to consider and dispose of the matter, both the title proposed by Australia and New Zealand and the alternative title proposed by Japan would be used together. At the opening of the hearing on jurisdiction on May 7, 2000, the President announced that, in view of the wish of Australia and New Zealand to be considered as a single party in the proceeding, of Japan's lack of objection, and of the Parties' agreement to continue using the provisional title of the proceeding, the title would be: "Southern Bluefin Tuna Case – Australia and New Zealand v. Japan."

12. On February 22, 2000, Australia and New Zealand filed copies of a dossier of documents used in the proceedings on provisional measures before the ITLOS. Copies were transmitted to Japan and to each member of the Arbitral Tribunal under cover of ICSID's letter to the parties of February 23, 2000.

13. On March 31, 2000, Australia and New Zealand filed a joint Reply on Jurisdiction. Copies of the Reply were transmitted to the members of the Tribunal and to Japan under cover of ICSID's letter of April 3, 2000.

14. On April 3, 2000, an agenda on preliminary matters was distributed to the Parties in anticipation of the hearing on jurisdiction. Observations on the draft agenda were received from Australia and New Zealand and from Japan.

15. A hearing on jurisdiction was held at the seat of ICSID at the World Bank headquarters in Washington, D.C., from May 7 through May 11, 2000. The President announced certain preliminary procedural matters agreed to by the Parties, including the name of the case, public access to the hearing, release of the provisional transcript of the hearing on ICSID's web site, and video recording of the hearing.

16. Japan presented its oral arguments on its objections to jurisdiction and on issues of admissibility on May 7. Australia and New Zealand then presented their oral arguments on jurisdiction and admissibility on May 8. Following a one-day interval, Japan presented its rebuttal arguments on May 10. Australia and New Zealand then presented their surrebuttal arguments on May 11, 2000. Simultaneous interpretation into Japanese was provided at the hearing.

17. The Agent and counsel of Japan who addressed the Tribunal were as follows:

Shotaro Yachi, Agent for Japan, Director-General of the Treaties Bureau, Ministry of Foreign Affairs, Tokyo

Nisuke Ando, Professor of International Law, Doshisha University and Professor Emeritus, Kyoto University

Sir Elihu Lauterpacht, Q.C., C.B.E.

Shabtai Rosenne, Member of the Israel Bar, Member of the Institute of International Law

Vaughan Lowe, Chichele Professor of Public International Law, All Souls College, University of Oxford.

18. The Agents and counsel of Australia and New Zealand who addressed the Tribunal were as follows:

Bill Campbell, Agent for Australia, First Assistant Secretary, Office of International Law, Attorney-General's Department, Canberra

Tim Caughley, Agent for New Zealand, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

James Crawford, Whewell Professor of International Law, University of Cambridge

Bill Mansfield, Barrister, Wellington

Henry Burmester Q.C., Chief General Counsel, Office of the Australian Government Solicitor, Canberra

Mark Jennings, Senior Adviser, Office of International Law, Attorney-General's Department, Canberra

Elana Geddis, Legal Adviser, Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

Rebecca Irwin, Principal Legal Officer, Office of International Law, Attorney-General's Department, Canberra

Andrew Serdy, Executive Officer, Sea Law, Legal Branch, Department of Foreign Affairs and Trade, Canberra.

19. At the hearing on jurisdiction, each Party submitted copies of a binder of materials for assistance of the members of the Arbitral Tribunal. Japan, in addition, submitted a single set of four binders containing the texts of the treaties referred to in Annex 47 of Japan's memorial on jurisdiction. The provisional verbatim transcript for each day of hearings was on the same day distributed electronically to the Parties and ICSID. On the morning following

each day of hearings, each Party received from ICSID a paper copy of the verbatim transcript and audio recordings for that day. Copies of the transcript were likewise provided by ICSID to each member of the Tribunal, and they were posted on ICSID's website.

20. On May 10, 2000, the Arbitral Tribunal addressed a number of questions to the Parties arising from their pleadings and oral presentations. Both Parties indicated that they would subsequently answer the Tribunal's questions in writing. On May 26, 2000, each Party submitted to ICSID its respective answers to the questions of the Arbitral Tribunal, together with their respective corrections to the verbatim transcript made of the hearing. By letter of that same date, ICSID forwarded copies of the Parties' answers and corrections to the members of the Tribunal and copies of each Party's answers and corrections to the other Party.

II. *Background to the Current Proceedings*

21. Southern Bluefin Tuna (*Thunnus maccoyi*, hereafter sometimes designated "SBT") is a migratory species of pelagic fish that is included in the list of highly migratory species set out in Annex I of the United Nations Convention on the Law of the Sea. Southern Bluefin Tuna range widely through the oceans of the Southern Hemisphere, principally the high seas, but they also traverse the exclusive economic zones and territorial waters of some States, notably Australia, New Zealand and South Africa. They spawn in the waters south of Indonesia. The main market for the sale of Southern Bluefin Tuna is in Japan, where the fish is prized as a delicacy for sashimi.

22. It is common ground between the Parties that commercial harvest of Southern Bluefin Tuna began in the early 1950s and that, in 1961, the global catch peaked at 81,000 metric tons ("mt"). By the early 1980s, the SBT stock had been severely overfished; it was estimated that the parental stock had declined to 23-30% of its 1960 level. In 1982, Australia, New Zealand and Japan began informally to manage the catching of SBT. Japan joined with Australia and New Zealand in 1985 to introduce a global total allowable catch (hereafter, "TAC") for SBT, initially set at 38,650 mt. In 1989, a TAC of 11,750 tons was agreed, with national allocations of 6,065 tons to Japan, 5,265 tons to Australia and 420 tons to New Zealand; Japan, as the largest harvester of SBT, sustained the greatest cut. But the SBT stock continued to decline. In 1997, it was estimated to be in the order of 7-15% of its 1960 level. Recruitment of SBT stock – the entry of new fish into the fishery – was estimated in 1998 to be about one third of the 1960 level. The institution of total allowable catch restrictions by Japan, Australia and New Zealand to some extent has been offset by the entry into the SBT fishery of fishermen from the Republic of Korea, Taiwan and Indonesia, and some flag-of-convenience States. Whether, in response to TAC restrictions, the stock has in fact begun to recover is at the core of the dispute between Australia and New

Zealand, on the one hand, and Japan, on the other. They differ over the current state and recovery prospects of SBT stock and the means by which scientific uncertainty in respect of those matters can best be reduced.

23. In 1993, Australia, Japan and New Zealand concluded the Convention for the Conservation of Southern Bluefin Tuna (hereafter, the "1993 Convention" or "CCSBT"). The provisions most pertinent to these proceedings are the following:

"Recalling that Australia, Japan and New Zealand have already taken certain measures for the conservation and management of southern bluefin tuna;

"Paying due regard to the rights and obligations of the Parties under relevant principles of international law;

"Noting the adoption of the United Nations Convention on the Law of the Sea in 1982;

"Noting that States have established exclusive economic or fishery zones within which they exercise, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploring and exploiting, conserving and managing the living resources;

"Recognising that southern bluefin tuna is a highly migratory species which migrates through such zones;

"... Recognising that it is essential that they cooperate to ensure the conservation and optimum utilization of southern bluefin tuna;"

The Parties agreed *inter alia* that:

Article 3

The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.

Article 4

Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

Article 5

1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.

2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.

3. The Parties shall cooperate in collection and direct exchange, when appropriate, of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecologically related species.

4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to this Convention.

Article 6

1. The Parties hereby establish and agree to maintain the Commission for the Conservation of Southern Bluefin Tuna (hereinafter referred to as "the Commission").

* * *

Article 7

Each Party shall have one vote in the Commission. Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.

Article 8

1. The Commission shall collect and accumulate information described below:

a. scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species;

b. information relating to laws, regulations and administrative measures on southern bluefin tuna fisheries;

c. any other information relating to southern bluefin tuna.

2. The Commission shall consider matters described below:

a. interpretation or implementation of this Convention and measures adopted pursuant to it;

b. regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;

c. matters which shall be reported by the Scientific Committee prescribed in Article 9;

d. matters which may be entrusted to the Scientific Committee prescribed in Article 9;

e. matters which may be entrusted to the Secretariat prescribed in Article 10;

f. other activities necessary to carry out the provisions of this Convention.

3. For the conservation, management and optimum utilisation of southern bluefin tuna:

a. the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and

b. the Commission may, if necessary, decide upon other additional measures.

4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider:

a. relevant scientific evidence;

b. the need for orderly and sustainable development of southern bluefin tuna fisheries;

c. the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates;

d. the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development;

e. the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna;

f. any other factors which the Commission deems appropriate.

5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.

6. In deciding upon measures under paragraph 3 above and recommendations under paragraph 5 above, the Commission shall take full account of the report and recommendations of the Scientific Committee under paragraph 2(c) and (d) of Article 9.

7. All measures decided upon under paragraph 3 above shall be binding on the Parties.

8. The Commission shall notify all Parties promptly of measures and recommendations decided upon by the Commission.

9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.

10. The Commission may establish such subsidiary bodies as it considers desirable for the exercise of its duties and functions.

Article 9

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.

2. The Scientific Committee shall:

a. assess and analyse the status and trends of the population of southern bluefin tuna;

b. coordinate research and studies of southern bluefin tuna;

c. report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;

d. make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;

e. consider any matter referred to it by the Commission. ...

5.

a. Each Party shall be a member of the Scientific Committee and shall appoint to the Committee a representative with suitable scientific qualifications who may be accompanied by alternates, experts and advisers. ...

* * *

Article 13

With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable.

* * *

Article 16

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.

* * *

Article 20

Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.

24. In May 1994, the Commission established by the 1993 Convention set a TAC at 11,750 tons, with the national allocations among Japan, Australia and New Zealand set out above. There has been no agreement in the Commission thereafter to change the TAC level or allotments. Japan from 1994 sought an increase in the TAC and in its allotment but any increase has been opposed by New Zealand and Australia. While the Commission initially maintained the TAC at existing levels due to this impasse, since 1998 it has been unable to agree upon any TAC. In the absence of a Commission decision, the Parties in practice have maintained their TAC as set in 1994. At the same time, Japan pressed in the Commission not only for a TAC increase, initially of 6000 tons and then of 3000 tons in its allotment, but also for agreement upon a joint Experimental Fishing Program ("EFP"), whose particular object would be to gather data in those areas where fishing for SBT no longer took place, with a view to reducing scientific uncertainty about recovery of the stock. Japan sought agreement upon its catching 6000 EFP tons annually, for three years, for experimental fishing, in addition to its commercial allotment; it subsequently reduced that request to 3000 tons, also the same amount that it sought by way of increase in its TAC. While the Commission in 1996 adopted a set of "Objectives and principles for the design and implementation of an experimental fishing program," it proved unable to agree upon the size of the catch that would be allowed under the EFP and on modalities of its execution. However, Australia, Japan and New Zealand are agreed on the objective of restoring the parental stock of Southern Bluefin Tuna to its 1980 level by the year 2020.

25. At a Commission meeting in 1998 Japan stated that, while it would voluntarily adhere to its previous quota for commercial SBT fishing, it would commence a unilateral, three-year EFP as of the summer of 1998. Despite vigorous protests by Australia and New Zealand over pursuance of any unilateral EFP, Japan conducted a pilot program with an estimated catch of 1,464 mt. in the summer of 1998.

26. In response, Australia and New Zealand formally requested urgent consultations and negotiations under Article 16(1) of the 1993 Convention. Despite intensive efforts within this framework to reach agreement on an experimental fishing program for 1999, an accord was not achieved. At a meeting in Canberra May 26-28, 1999, Australia was advised that, unless it accepted Japan's proposal for a 1999 joint experimental fishing program, Japan would recommence unilateral experimental fishing on June 1; and New Zealand was similarly so informed. Neither Australia nor New Zealand found Japan's proposal acceptable. While differences about the dimension of EFP tonnage had narrowed, they maintained that Japan's EFP was misdirected and that its design and analysis were fundamentally flawed. In their view, Japan's EFP did not justify what they saw as the significant increased risk to the SBT stock. They informed Japan that, if it recommenced unilateral experimental fishing on June 1, 1999 or thereafter, they would regard such action as a termination by Japan of negotiations under Article 16(1) of the 1993 Convention. Japan, which resumed its EFP on June 1, 1999, replied that it had no intention of terminating those negotiations. It maintained that independent scientific opinion had advised the Commission that Japan's EFP proposals were soundly conceived.

27. On June 23, 1999, Australia restated its position that the dispute did not relate solely to Japan's obligations under the 1993 Convention, but also involved its obligations under UNCLOS and customary international law. It considered that there had been a full exchange of views on the dispute for the purposes of Article 283(1) of UNCLOS, which provides that, "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

28. Also on June 23, 1999, Japan stated that it was ready to have the dispute resolved by mediation under the provisions of the 1993 Convention. Australia replied that it was willing to submit the dispute to mediation, provided that Japan agreed to cease its unilateral experimental fishing and that the mediation was expeditious. Japan responded that the question of its unilateral EFP could be discussed in the framework of mediation. On July 14, 1999, Japan reiterated its position that its experimental fishing was consistent with the 1993 Convention and that it could not accept the condition of its cessation in order for mediation to proceed. Japan declared that it was ready to have the dispute resolved by arbitration pursuant to Article 16(2) of the 1993 Convention, indicating however that it was not prepared to halt its unilateral EFP during its pendency though it was prepared to resume consultations about it. Thereafter Australia notified Japan that it viewed Japan's position as a rejection of Australia's conditional acceptance of mediation, and that Australia had decided to commence compulsory dispute resolution under Part XV of UNCLOS. It followed that it did not accept Japan's proposal for arbitration pursuant to Article 16(2) of the Convention. Australia emphasized

the centrality of Japan's obligations under UNCLOS and under customary international law to the dispute and the need for those obligations to be addressed if the dispute were to be resolved. Australia reiterated its view that the conduct of Japan under the 1993 Convention was relevant to the issue of its compliance with UNCLOS obligations and may be taken into account in dispute settlement under Part XV of UNCLOS. Pending the constitution of the arbitral tribunal to which the dispute was being submitted under UNCLOS's Annex VII, Australia announced its intention to seek prescription of provisional measures under Article 290(5) of UNCLOS, including the immediate cessation of unilateral experimental fishing by Japan.

29. As the preambular references in the 1993 Convention quoted above confirm, the 1993 Convention was prepared in light of the provisions of the 1982 United Nations Convention on the Law of the Sea and the relevant principles of international law. UNCLOS had not come into force in 1993, and in fact did not come into force for the three Parties to the instant dispute until 1996, but the Parties to the 1993 Convention regarded UNCLOS as an umbrella or framework Convention to be implemented in respect of Southern Bluefin Tuna by the adoption of the 1993 Convention.

30. In reliance upon provisions of UNCLOS and of general international law, including UNCLOS provisions for settlement of disputes (Part XV of UNCLOS), Australia and New Zealand thus sought in 1999 to interdict pursuance of Japan's unilateral EFP. They requested the establishment of an arbitral tribunal pursuant to Annex VII of UNCLOS, and sought provisional measures under Article 290(5) of UNCLOS, which provides:

> "Pending constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... 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. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ..."

31. The Applicants' Statement of Claim filed in invoking arbitration under UNCLOS Annex VII maintained that the dispute turned on what the Applicants described as Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999. The Applicants stated that the dispute concerned the interpretation and application of certain provisions of UNCLOS, and that the arbitral tribunal will be asked to take into account provisions of the 1993 Convention and the Parties' practice thereunder, as well as their obligations under general international law, "in particular the precautionary principle."

32. The provisions of UNCLOS centrally invoked by Australia and New Zealand were the following:

Article 64
Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Article 116
Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

Article 117
Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 118
Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 119
Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis

through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

33. In seeking provisional measures, Australia and New Zealand among other contentions argued that Article 64, read in conjunction with other provisions of UNCLOS, imposes an obligation on Japan, as a distant water State whose nationals fish for SBT, to cooperate with Australia and New Zealand, as coastal States, in the conservation of SBT. The Commission established under the 1993 Convention is "the appropriate international organization" for the purposes of Article 64. Japan's unilateral actions defeat the object and purpose of the 1993 Convention. In such a case, the underlying obligations of UNCLOS remain. While the 1993 Convention was intended as a means of implementing the obligations imposed by UNCLOS in respect of highly migratory fish species, it is not a means of escaping those obligations. Australia and New Zealand contended that Japan's conduct also placed it in violation of Articles 116, 117, 118, and 119, *inter alia* by failing to adopt necessary conservation measures for its nationals so as to maintain or restore SBT stock to levels which can produce the maximum sustainable yield, by ignoring credible scientific evidence presented by Australia and New Zealand and by pursuing a course of unilateral action in its exclusive interest contrary to their rights as coastal States while enjoying the benefits of restraint by Australia and New Zealand, with discriminatory effect upon nationals of the Applicants. They requested the prescription of provisional measures requiring that Japan immediately cease experimental fishing for SBT; that Japan restrict its SBT catch to its national allocation as last agreed in the Commission, subject to reduction by the amount of catch taken in pursuance of its unilateral EFP; that the Parties act consistently with the precautionary principle pending a final settlement of the dispute; and that the Parties ensure that no action is taken to aggravate their dispute or prejudice the carrying out of any decision on the merits.

34. Japan challenged the contentions of Australia and New Zealand on the facts and the law. It contended that it was Australia and New Zealand who had frustrated the functioning of the CCSBT Commission and regime. It maintained that the gravamen of the claims asserted concern the 1993 Convention, not UNCLOS, and that those claims turned not on issues of law but matters of scientific appreciation. Article 290(5) of UNCLOS contemplates the imposition of provisional measures by the International Tribunal for the Law of the Sea ("ITLOS") only if the arbitral tribunal would have *prima facie* jurisdiction over the underlying dispute. Article 288(1) of UNCLOS gave an arbitral tribunal jurisdiction over any dispute concerning the interpretation or application of UNCLOS, a treaty not actually the basis of the Applicants' claims. The Applicants in August 1998 specifically invoked dispute resolution under the 1993 Convention, not UNCLOS; they had treated the dispute as one arising under the CCSBT, and sought consultations not

under UNCLOS but under Article 16 of the 1993 Convention. The procedures under the 1993 Convention had not been exhausted; the Parties were required to continue to seek resolution of their dispute pursuant to those procedures. Nor had the procedural conditions for arbitration under UNCLOS been met; Australia and New Zealand had not attempted to reach a settlement in good faith, or even exchange views, in accordance with the provisions of UNCLOS Part XV. No irreparable damage threatened. Article 64 of UNCLOS merely created an obligation of cooperation, and prescribed no specific principles of conservation or concrete conservation measures. It was doubtful that the precautionary principle had attained the status of a rule of customary international law. The Applicants' actions to thwart settlement under Article 16 of the CCSBT were "abusive" and "redolent of bad faith". For all these reasons, Japan argued that the proposed Annex VII arbitral tribunal lacked jurisdiction *prima facie* and that hence ITLOS lacked authority to prescribe provisional measures. The only remedy that made sense, if there were to be any, would be to call on Australia and New Zealand to resume negotiations under the 1993 Convention with a view to reaching agreement on the TAC, annual quotas, and the continuation of the EFP on a joint basis, with the assistance of independent scientific advice. In the event that ITLOS should make a finding of *prima facie* jurisdiction, Japan asked for counter-provisional measures prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000.

III. *Provisional Measures Prescribed by ITLOS*

35. Australia and New Zealand requested provisional measures on July 30, 1999. The International Tribunal for the Law of the Sea held initial deliberations on August 16 and 17 and noted points and issues that it wished the Parties specially to address; oral hearings were conducted at five public sittings on August 18, 19 and 20. On August 27, 1999, ITLOS issued an Order prescribing provisional measures. Its salient *consideranda* and conclusions merit quotation:

> 40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;
>
> 41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:
>
> > *A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;*
>
> 42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

* * *

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New

Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 20 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

***

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

* * *

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

* * *

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

* * *

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each 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 annual national allocation as prescribed in subparagraph (c);

* * *

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

* * *

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

***

36. It should be observed that, while the Order of ITLOS was not unanimous, no Member of the Tribunal disputed "the view of the Tribunal" that "the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded" (paragraph 52). It so held despite Japan's contention that recourse to the arbitral tribunal "is excluded because the Convention of 1993 provides for a dispute settlement procedure" (paragraph 53). It noted the position of Australia and New Zealand "that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea" (paragraph 54). It held that, "in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2 of

the Convention on the Law of the Sea" (paragraph 55). For the above and other reasons quoted, "the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes" (paragraph 62).

37. It is these holdings of the International Tribunal for the Law of the Sea that were the particular focus of controversy in these proceedings. The Agents and counsel of Australia, New Zealand and Japan plumbed the depths of these holdings with a profundity that the time pressures of the ITLOS processes did not permit. In any event, the ITLOS holdings upheld no more than the jurisdiction *prima facie* of this Tribunal. It remains for it to decide whether it has jurisdiction to pass upon the merits of the dispute.

IV. *Japan's Position on the Lack of Jurisdiction and Inadmissibility*

38. In its written and oral pleadings, Japan has advanced a multiplicity of reasons why, in its view, this Tribunal lacks jurisdiction over the merits of the dispute. Its contentions may be summarized as follows:

(a) The core of the dispute lies in disagreement concerning, as the Applicants' Statement of Claim puts it, "Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999". Neither customary international law nor UNCLOS requires Japan or any other State to proceed with an EFP only with the agreement of the other two States Parties to the 1993 Convention. Any such obligation can only be derived from the CCSBT itself. The dispute necessarily is one concerning the interpretation and implementation of the CCSBT and not a dispute concerning the interpretation or application of UNCLOS. The question of an EFP has been in dispute for five years within the CCSBT Commission. Urgent consultations about Japan's unilateral EFP were requested by the Applicants within the framework of the CCSBT. The negotiations to resolve that dispute took place within the framework of the CCSBT, as did their claimed termination. Any other international rights and obligations asserted are relevant only because of their bearing upon a dispute under the CCSBT, as the Applicants themselves recognized. Belated invocation of UNCLOS and customary international law by the Applicants is an artifice to enable the Applicants to seek provisional measures from ITLOS and to evade the consensual requirements of Article 16 of the 1993 Convention. It is not sustained by the factual history of the dispute. It is significant that, when the dispute first arose, the Applicants protested in the context only of the CCSBT and made no mention of UNCLOS; their original characterization of the dispute is the clearest indication of what the Parties themselves really thought. The Statement of Claim, while cast in terms of UNCLOS, in substance depends upon allegations of breach of the CCSBT; the relief sought by the Applicants in respect of the EFP and TAC is intelligible only within the framework of the CCSBT. The Applicants claiming the dispute to fall within UNCLOS does not

make it so; rejection of that claim by Japan does not give rise to a dispute under UNCLOS; "whether there exists an international dispute is a matter for objective determination" as the International Court of Justice has repeatedly held. In the words of the Court, "the complaint should indicate some genuine relationship between the complaint and the provisions invoked ..." The Statement of Claim does not.

(b) While UNCLOS was concluded in 1982 and the CCSBT in 1993, UNCLOS did not come into force until 1994 and was not ratified by all three of the Parties to these proceedings until 1996. It follows that the CCSBT alone regulated relations among Australia, New Zealand and Japan in respect of SBT for some 26 months. The advent of UNCLOS could not have increased the density of treaty relations between the Parties in respect of SBT in as radical a manner as Australia and New Zealand now assert. Rather the governing treaty in respect of SBT is not UNCLOS but the CCSBT.

(c) However, if UNCLOS is regarded as the earlier treaty and as the framework or umbrella convention that sets out broad principles that in practice are to be realized by the conclusion and application of specific implementing agreements, then the CCSBT is the exemplar of such an implementing agreement. It then is not only the *lex posterior* but the *lex specialis*. In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of an anterior framework agreement; they exhaust and supplant those principles as long as the implementing agreement remains in force. The provisions of UNCLOS on which the Applicants rely, Article 64 and 116-119, are fully covered by the more specific provisions of the CCSBT. The function of the CCSBT is to fulfill and implement UNCLOS and discharge its obligations in respect of SBT by providing the necessary institutional structure which UNCLOS contemplates and the substantive detail that amplifies the outlines laid down in UNCLOS. "There is no penumbra of obligation under UNCLOS that extends beyond the circle of commitment established by CCSBT." The *lex specialis* prevails substantively and procedurally, and hence it – i.e., Article 16 of the 1993 Convention – determines jurisdiction. While it is in theory possible that a given act may violate more than one treaty, on the facts of this case, that is not possible.

(d) The failure of Australia and New Zealand to bring suit against Korea, Taiwan and Indonesia under UNCLOS suggests that the real dispute at issue is under the 1993 Convention, to which none of those States are, at any rate, yet, party. It demonstrates the realization of the Applicants that the CCSBT is the only effective legal link between them and Japan in relation to SBT.

(e) Article 311 of UNCLOS, concerning its relation to other conventions and international agreements, is consistent with Japan's analysis.[4] The 1993 Convention is compatible with UNCLOS and does not detract from the enjoyment of rights thereunder; the 1993 Convention is expressly permitted by Article 64 of UNCLOS.

(f) Article 282 of UNCLOS gives no nourishment to the Applicants' position, since the instant dispute concerns not the interpretation or application of UNCLOS but the interpretation and implementation of the 1993 Convention.[5]

---

[4] Article 311 provides:

> Article 311
> *Relation to other conventions and international agreements*
>
> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
>
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
>
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

[5] UNCLOS Article 282 provides:

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

(g) In accordance with Article 280 of UNCLOS,[6] the Parties to these proceedings are free to settle a dispute between them concerning the interpretation or application of UNCLOS by any peaceful means of their own choice; if it is assumed for the sake of argument that the instant dispute arises under UNCLOS as well as the CCSBT (which Japan denies), the Parties have chosen the means set out in Article 16 of the CCSBT. The Parties may so agree "at any time", either before or after a dispute has arisen.

(h) The terms of Article 281 of UNCLOS are also consistent with the position of Japan.[7] If, *arguendo*, it were to be assumed that a dispute under the CCSBT could also be a dispute under UNCLOS, then Article 16 of the CCSBT fits precisely into Article 281(1). The Parties to the CCSBT have agreed to settlement by a peaceful means of their own choice, namely, whatever method indicated in Article 16 they agree to pursue. Such agreement excludes any further procedure, because the Parties to the 1993 Convention have made it clear in Article 16(2) that no dispute shall be referred to the International Court of Justice or to arbitration without their consent.

(i) A very large number of treaties that relate to the law of the sea have dispute settlement provisions which have no compulsory element. If the approach of Australia and New Zealand in espousing the governance of the dispute settlement provisions of UNCLOS were to apply to these treaties, parties to those treaties who had no intention of entering into compulsory jurisdiction would find themselves so bound. Japan cited among a number of examples the International Convention for the Regulation of Whaling. An old but still important convention, it contains no dispute settlement provisions. If the approach of the Applicants were to be accepted, it would be open to any Party to UNCLOS to bring proceedings against a whaling State under UNCLOS Part XV by alleging that an action was a breach of an UNCLOS

---

[6] UNCLOS Article 280 provides:

> Article 280
> *Settlement of disputes by any peaceful means chosen by the parties*
>
> Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

[7] UNCLOS Article 281 provides:

> Article 281
> *Procedure where no settlement has been reached by the parties*
>
> 1. 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.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

provision. It is improbable that in becoming party to UNCLOS, States so intended. Other treaties, entered into after UNCLOS came into force, have dispute settlement clauses similar to that in Article 16 of the CCSBT, or, at any rate, clauses that lack compulsory sanction. Clearly the parties chose to avoid, and not implicitly to undertake, obligations for compulsory adjudication or arbitration, i.e., the intention was to exclude recourse to the compulsory jurisdiction of UNCLOS. It cannot reasonably be presumed that States concluded treaties containing such clauses which are useless because they are overridden by UNCLOS Part XV. But where States intend UNCLOS procedures of peaceful settlement to govern, they so provide, notably in the Agreement of 1995 for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. If this Tribunal were to find that UNCLOS Part XV overrides the specific terms of Article 16 of the CCSBT, it would profoundly disturb the host of dispute settlement provisions in treaties – whether antedating or postdating UNCLOS – that relate to matters embraced by UNCLOS.

(j) The Applicants argue that UNCLOS establishes a "new and comprehensive legal regime for all ocean space", a vital element of which is "mandatory" settlement of disputes. But in fact the peaceful settlement provisions of UNCLOS are flexible and are designed to afford Parties great leeway in their choice of means of peaceful settlement.

39. Japan in the alternative argued that, if, contrary to its view, the Tribunal were to find that the dispute is one concerning the interpretation or application of UNCLOS, it should nevertheless decline to pass upon the merits of the case because the Applicants had failed to meet the conditions governing such recourse set out in UNCLOS. Its principal contentions may be summarized as follows:

(a) Article 280 of UNCLOS [8] empowers the Parties to a dispute concerning the interpretation or application of UNCLOS to agree "at any time'' to settle their dispute by any peaceful means of their own choice. "At any time" means just that, i.e., it embraces not only disputes that have arisen but disputes that may arise. By adhering to Article 16 of the CCSBT, the Parties to the instant case had chosen the peaceful means listed therein, which do not include compulsory arbitration pursuant to Part XV of UNCLOS.

(b) Article 281 of UNCLOS[9] is critical. Since the Parties had agreed by Article 16 to seek settlement of their dispute by their chosen peaceful means, UNCLOS recourse was open "only where no settlement had been reached by recourse to such means". But in this case, the Applicants had failed to exhaust such means, namely, Japan's proposals for mediation and arbitration under the 1993 Convention. They failed to continue to seek resolution of the dispute in

---

[8] Quoted above
[9] Quoted above

accordance with Article 16. Instead they resorted to "abusive exploitation" of the compulsory procedures of UNCLOS. Moreover, Article 281 further conditions access to UNCLOS procedures; access applies only where "the agreement between the parties does not exclude any further procedure". Japan maintains that, "The agreement between the parties, Article 16 of CCSBT, does exclude further procedure beyond what is stipulated in paragraph 1 without the consent of all the parties to the dispute. This means that CCSBT excludes further procedures, including the compulsory procedures of UNCLOS without the consent of the parties." Indeed the Applicants' request to ITLOS for provisional measures was itself a violation of the 1993 Convention, which excludes recourse to compulsory settlement procedures without the consent of all parties to the dispute.

(c) Article 282 of UNCLOS[10] provides that, if there is a procedure open to the parties that entails a binding decision, that procedure shall apply in lieu of UNCLOS procedures. The phrase in Article 282 "or otherwise" was understood when drafted and adopted to relate to reference to the International Court of Justice pursuant to declarations adhering to its jurisdiction under the Optional Clause. Japan, Australia and New Zealand all are bound by such declarations, but the Applicants have not applied to the Court. That is inconsistent with their obligations under Article 282 (even though, Japan acknowledged, it would have objected to the Court's jurisdiction had Australia and New Zealand invoked it, on grounds of reservations to the Optional Clause.)

(d) Article 283 of UNCLOS requires the Parties to a dispute to proceed expeditiously to an exchange of views regarding its settlement.[11] In all the diplomatic correspondence exchanged between the Parties to this dispute, there is no mention of conducting negotiations in accordance with Article 283. Nothing in Article 283 moreover envisages as conclusive a unilateral determination by one Party that negotiations (which actually took place under Article 16 of the CCSBT) are terminated.

40. Japan further argued, again in the alternative, that, should the Tribunal find that it has jurisdiction over the instant dispute, and should it find that

---

[10] Quoted above.

[11] Article 283 provides:

> Article 283
> *Obligation to exchange views*
>
> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Australia and New Zealand have complied with the conditions for recourse under UNCLOS (both of which findings Japan contests), it should nevertheless hold that the dispute is inadmissible. The grounds for challenging admissibility were as follows:

(a) Article 16 was fashioned to deal with the kinds of disputes likely to arise under the 1993 Convention, namely, questions of scientific judgment. Such questions are not justiciable. While an ad hoc reference to arbitration such as Japan proposed within the framework of the CCSBT would have permitted the agreed identification of the precise matters over which the Parties differ, and the construction of a tribunal and a procedure specially adapted to deal with such scientific questions, that proposal was immediately rejected by Australia and New Zealand. The essentially scientific character of the instant dispute is apparent from the remedies sought. It is also shown by the reasons cited by Australia and New Zealand for contesting Japan's experimental fishing program. All turn on matters of scientific, not legal, judgment. There is no controversy about general conservation duties. The dispute is only over the accuracy of particular scientific predictions and judgments concerning SBT. That is why it is not susceptible of legal judgment.

(b) The Applicants' Statement of Claim fails to specify precisely what the case against Japan is. Its vague and elusive reference to articles of UNCLOS is insufficient. There is a failure to identify a cause of action.

(c) The dispute is in any event moot. Japan has now accepted a catch limit for its EFP of 1500 mt. That is the exact figure proposed by Australia in 1999. The Applicants' complaints center upon contentions that Japan is taking an EFP catch above the level of the national quotas agreed in the CCSBT for 1997. But now they are in agreement on what that EFP catch should be, so the case is moot. Not only has Japan committed itself to observe a limit of 1500 mt. in its EFP for the remaining two experimental fishing programs. It has undertaken to pay back all excess catches above the 1500 limit. It has also committed itself to a reduction in catch limits if the results of the EFP show that a reduction is required to safeguard the SBT stock. Japan, as the largest fisher and by far the largest consumer of Southern Bluefin Tuna, has the strongest interest in ensuring the survival of a healthy SBT stock.

V. *The Position of Australia and New Zealand on the Presence of Jurisdiction and the Admissibility of Their Claims*

41. The arguments of Australia and of New Zealand in support of this Tribunal's jurisdiction and of the admissibility of their claims were no less multifaceted than were those of Japan to the contrary. The following contentions were made, among others.

(a) The International Tribunal for the Law of the Sea was unanimous in its finding that this Tribunal has *prima facie* jurisdiction. The Applicants accept that this Tribunal is not bound to hold in favor of its jurisdiction over the merits by the finding of ITLOS concerning jurisdiction *prima facie*. Yet there was not a trace of doubt in the reasoning of ITLOS that such *prima facie* jurisdiction exists. The conclusion of 22 judges of ITLOS cannot be summarily disregarded, and their reasoning and holdings are significant in several respects. ITLOS found that the dispute is not only one of scientific appreciation: "the differences between the parties also concern points of law". ITLOS, in holding that "the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993 ... is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea" and in concluding that "... the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna ..." did not accept Japan's central substantive contention that the dispute is solely one under the CCSBT. Moreover, ITLOS rejected Japan's principal procedural contention by holding that: "... the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea ..." ITLOS observed that negotiations between the Parties were considered by Australia and New Zealand as being under the 1993 Convention "and also under the Convention on the Law of the Sea ..." As to their treating those negotiations as terminated, ITLOS held that "... a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted ..." It concluded that "the requirements for invoking the procedures under Part XV, section 2 of the Convention have been fulfilled."

(b) UNCLOS established a new and comprehensive legal regime for all ocean space. The importance of the obligations it contains were such "that their acceptance was seen as critically dependent upon the establishment of an effective, binding and compulsory system for resolving all disputes concerning the interpretation and application of the Convention as a whole." As the first President of the Third United Nations Conference on the Law of the Sea put it, "The provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium must be balanced." That dispute settlement system is set out in Part XV of the Convention, under which these proceedings have been brought. Part XV is mandatory and comprehensive. Section 2 of Part XV is entitled "Compulsory Procedures Entailing Binding Decisions," and framed so as to "not permit evasion". The key provision in respect of fisheries is Article 297(3), which specifies that, "Disputes concerning the interpretation or application of the provisions of this

Convention with regard to fisheries shall be settled in accordance with section 2 ..." with only one exception, concerning the sovereign rights of a coastal State in its exclusive economic zone.[12] That exception is not in point in these proceedings. Thus UNCLOS seeks to establish "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, which in turn includes highly migratory species such as SBT." When the drafters wanted to exclude any provision of UNCLOS from the scope of compulsory dispute settlement under Part XV, they did so expressly by exclusions which do not apply in the instant case. These provisions indicate that this Tribunal should sustain the effectiveness and comprehensive character of the UNCLOS dispute settlement regime, and reject arguments lending themselves to evasion of its provisions.

(c) It is common ground between the Parties that there is a dispute, and that it concerns the conservation and management of Southern Bluefin Tuna. Japan however contends that it is purely a scientific dispute over questions of scientific judgment. But the dispute involves questions of principle and of the legal obligations of the Parties as well. Article 297(3) of UNCLOS would be devoid of meaning if disputes concerning questions of scientific fact and opinion were not justiciable. Nor is the dispute only about scientific disagreement. It is about the way a party to UNCLOS and to a regional fishing agreement may behave in circumstances of scientific uncertainty or management disagreement. The Applicants maintain that Japan has not only failed to take the necessary action to conserve the SBT stock; it has endangered that stock by an experimental fishing program that was unilateral, contained a high component of commercial fishing and did not comply with agreed guidelines for experimental fishing. The dispute is about the primacy of conservation over exploitation of a seriously depleted stock. The Applicants consider that Japan is exploiting the stock with unnecessary risk and is thereby in breach of its obligations under Articles 64 and 116-119 of UNCLOS. Such a dispute, on the meaning and content of the obligations

---

[12] Article 297(3) provides:

> 3. (a) 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.

contained in those articles, in Article 300[13], and on relevant underlying principles of international law, is a legal dispute. It is a dispute over obligations to cooperate set out in those UNCLOS articles, obligations that comprise serious, substantive obligations which cannot be, or at any rate, have not been, overridden by the 1993 Convention. These obligations of conduct are, in the view of Australia and New Zealand, being violated by Japan, whereas Japan has consistently denied that claim. Since the two sides "hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", there is a legal dispute between the Parties over the interpretation and application of UNCLOS (and the Applicants cited a number of judgments and opinions of the International Court of Justice in support of the quoted phrase, found in *Interpretation of Peace Treaties with Bulgaria,Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 74).

(d) There is a dispute over the interpretation or application of a given treaty if the actions complained of can reasonably be measured against the standards or obligations prescribed by that treaty. The International Court of Justice has repeatedly analyzed the issue by comparing the substance of the dispute with the terms of the obligations set out in the treaty. It has also held that the fact that a party did not refer to that treaty in exchanges with another party does not debar it from invoking the compromissory clause of that treaty before the Court. That one party maintains that a dispute falls within the scope of the treaty and the other denies it is not enough to bring the dispute within the treaty and its compromissory clause; it is for objective judicial or arbitral process to determine whether the dispute falls within the provisions of the treaty. Whether a treaty is applicable may however be a question concerning its interpretation or application provided that the treaty crosses the threshold of potential applicability.

(e) In fact, the present dispute does concern the interpretation or application of UNCLOS. The essence of the Applicants' claim is that Japan has failed to conserve and cooperate in the conservation of SBT stock, as particularly shown by its unilateral EFP. In so doing, Japan has placed itself in breach of its obligations under international law, specifically those of Articles 64 and 116-119 of UNCLOS. Those provisions lay down norms applicable to this case, by which the lawfulness of Japan's actions can be evaluated. Article 64 imposes an obligation on Japan to cooperate in achieving the conservation

---

[13] Article 300 provides:

> Article 300
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

and sustainable management of SBT. Article 118 requires Japan to cooperate with the Commission established by the Convention on the Conservation of Southern Bluefin Tuna. Where that Commission is at an impasse, the underlying obligations of UNCLOS provide a standard by which the lawfulness of unilateral conduct can be evaluated. Similarly Article 117 imposes on Japan the obligation to take and cooperate with other States in taking such measures for their nationals as may be necessary for the conservation of the living resources of the high seas. By the import of Article 119, a State may not engage in unilateral additional fishing of a seriously depleted stock where scientific evidence indicates that so doing may threaten its recovery. The right of the nationals of a State to fish on the high seas, expressed by Article 116, is there conditioned by their treaty obligations, including those of UNCLOS (and the Applicants cite the authoritative *University of Virginia Commentary on the United Nations Convention on the Law of the Sea*, Part VIII, p. 286 for the conclusion that "treaty obligations" as used in Article 116 includes obligations under the 1982 Convention). The meaning of Article 116 is that the right of high seas fishing is qualified. But the effect of Japan's argument is that it alone can decide whether there is to be a TAC, it alone can decide how much it will fish, and it alone can decide what limits it will accept. The effect of Japan's argument is that once a State becomes party to a regional agreement, it has, in so doing, effectively fulfilled and discharged its UNCLOS obligations regarding co-operation in the conservation of the relevant high seas resource. The Applicants contend that, "This is the old anarchy returned in procedural guise." They reject Japan's reading of the meaning of the pertinent provisions of UNCLOS, from which it follows that there is a dispute between the Parties over the interpretation and application of provisions of UNCLOS.

(f) Australia and New Zealand invoked provisions of UNCLOS in the course of the dispute. Their formal notices to Japan of the existence of a legal dispute on August 31, 1998 cited the 1993 Convention, UNCLOS and customary international law, including the precautionary principle. Australia's diplomatic note of September 11, 1998 declared that it was not possible or ever contemplated that matters concerning the 1993 Convention should be isolated from related international obligations; indeed those of UNCLOS are recognized in the preamble to the 1993 Convention. Allegations of Japan's breach of obligations under UNCLOS recur in the subsequent diplomatic exchanges.

(g) Australia and New Zealand had made the required efforts to settle the dispute by peaceful means. Article 281 of UNCLOS affords arbitral jurisdiction "only where no settlement has been reached by recourse to such means". No settlement has in fact been reached. Negotiations over the best part of a year had been extensive and intensive as indicated above and in detail in the pleadings. Those negotiations embraced not only the substance of the dispute but procedures for resolving it. The nature and manner of Japan's ultimatum of May 1999, and its insistence on resuming unilateral

experimental fishing on its own terms a few days later, was unacceptable and, when implemented, were rightly regarded as tantamount to termination of negotiations. The Applicants invoked the holding of ITLOS that "... a State Party is not obliged to pursue procedures under Part XV, Section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted." A Party whose unilateral action is the subject of dispute cannot block recourse to compulsory dispute settlement by continuing to offer negotiations when all reasonable efforts have shown that such negotiations will not resolve the issue. Japan's proposals for mediation and arbitration pursuant to Article 16 of the CCSBT had not been accepted because they contained no undertaking to suspend experimental fishing during their pendency and no specific proposal for the procedure or powers of the proposed arbitration. Without suspension of the EFP the arbitration would have been precluded effectively from dealing with the issue at the center of the dispute. Australia and New Zealand had no choice but to seek a definitive solution of the dispute through arbitral proceedings under UNCLOS. Article 282 of UNCLOS does not mean that this dispute shall be submitted to an alternative procedure, because that article refers only to a procedure "that entails a binding decision", as the circular procedure – or "menu" of settlement options – set out in CCSBT Article 16 does not. Moreover Article 16 deals with disputes under the CCSBT, not with disputes under UNCLOS.

(g) [sic] The Japanese argument that the CCSBT, as the subsequent treaty that implements UNCLOS, has exhausted and eclipsed the obligations of UNCLOS, is unpersuasive. The 1993 Convention does not "cover" the relevant obligations of the Parties under UNCLOS. The mere existence of the sort of appropriate international organization referred to in UNCLOS Article 64 – such as the CCSBT – does not discharge relevant UNCLOS obligations, which rather require the Members of the organization to participate and cooperate in that organization's work. Or, to take Article 117, nothing in the 1993 Convention imposes the duty to cooperate with other parties that is established by Article 117. Nor are the obligations of Article 119 "covered" by clauses of the CCSBT; there is nothing in the latter which requires the parties to ensure that conservation measures and their implementation do not discriminate against the fishermen of any State. The 1993 Convention was intended to be a means of implementing UNCLOS obligations in respect of highly migratory species, not a means of escaping those obligations. The CCSBT was not intended to derogate from UNCLOS, in particular from Part XV; nothing in the terms of the 1993 Convention or its preparatory work so indicate. It is true that Japan declined to accept proposals made during the drafting of the CCSBT for compulsory arbitration under that Convention. But nothing was ever said about derogating from the comprehensive and binding procedures of Part XV of UNCLOS in relation to UNCLOS obligations. Reliance on the principles of *lex posterior* and *lex specialis* is misplaced, not only because those principles apply only when two legal instruments conflict, but because Article 311 of UNCLOS itself regulates relationships with

implementing conventions such as the 1993 Convention. The terms of paragraph 4 of Article 311 do not affect international agreements "expressly permitted" by other articles of UNCLOS; and Article 64 calls for the conclusion of instruments such as the CCSBT. But an organization cannot be "permitted" by Article 64 if it gives any single State a veto over decision-making which extends to the performance of UNCLOS obligations themselves. The purpose of establishing international organizations under Article 64 is to ensure conservation and promote optimum utilization of highly migratory species, not to prejudice those objectives. The better view is that the 1993 Convention is covered not by paragraph 4 but by paragraph 2 of Article 311; it is clearly "compatible" with UNCLOS (the latter conclusion is common ground between the Parties). That is the normal interpretation of one treaty that refers to an earlier one that it purports to implement. Nor does Article 16 of the 1993 Convention opt out of Part XV of UNCLOS for any dispute concerning the interpretation or application of the 1993 Convention even if the dispute is also one concerning the interpretation or application of UNCLOS. Article 16 does not say so; there is no indication in its *travaux* that this was intended; and such an interpretation would be inconsistent with the presumption of parallelism of compromissory clauses.

(h) Just as there may be more than one treaty among the same States relating to the same subject matter, there may be compromissory clauses in more than one treaty that are not necessarily inconsistent. Such jurisdictional clauses do not cancel out one another; rather they are cumulative in effect. It is common for a particular dispute to be covered by several bases of jurisdiction, e.g., under the Optional Clause of the International Court of Justice, under a bilateral treaty and under a multilateral treaty, and each may provide for a distinct dispute settlement body. The presumption of parallelism of jurisdictional clauses is of long standing, it is entrenched in the case-law of that Court, and was not challenged before Japan's counsel thought of so pleading in the current case.

(i) Article 16 of the CCSBT cannot be viewed as a choice of means under Article 280 of UNCLOS. Properly interpreted, Article 280 refers to an agreement between parties to "a" dispute, after that dispute has arisen, to settle it by a peaceful means that they choose. In any event, Article 16 is not an agreement covering disputes concerning the interpretation or application of UNCLOS. Even if it were, the preconditions of Article 281 are not met by Article 16. It does not in terms exclude further recourse to Part XV, an explicit requirement of Article 281. The precondition cannot be met impliedly and it certainly is not met expressly by the language of paragraph 2 of Article 16.

(j) Thus Section 1 of Part XV of UNCLOS gives States complete control over the means of settlement of any dispute arising under UNCLOS provided that they agree to effective alternate means. If they do not, Section 2 comes into operation. Article 286 provides that, "... any dispute concerning the interpretation or application of this Convention shall, where no settlement has

been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Pursuant to Article 287, as neither the Applicants nor Japan have accepted a particular settlement procedure, they are taken to have accepted arbitration in accordance with Annex VII. This Tribunal accordingly has been constituted pursuant to that Annex.

(k) UNCLOS, with the WTO, is one of the great general regulatory treaties of our time. Both treaties provide for mandatory dispute resolution. Both foster specialized arrangements and regional agreements. This case confronts the workability of mandatory dispute settlement in giving effect to the essential principles of the general treaty. If Japan is right, the provisions of UNCLOS for mandatory dispute settlement are "a paper umbrella which dissolves in the rain". If Japan is right, by entering into the 1993 Convention, the Parties opted out of the dispute settlement provisions of UNCLOS, and indeed UNCLOS as a whole in its governance of SBT, without putting any secure equivalent in its place. That cannot be so. Article 311 of UNCLOS asserts the primacy of UNCLOS over other treaties; UNCLOS is a regime; and disputes arising under that regime are governed by Part XV. Part XV does not override dispute settlement provisions of other treaties, but this Tribunal does have jurisdiction over claims concerning the interpretation and application of UNCLOS. The dispute settlement provisions of UNCLOS afford parties considerable flexibility. The one thing that they cannot do is to exclude Part XV in advance of a dispute without substituting another form of settlement entailing a binding decision. As to the substance of the relationship between UNCLOS and the CCSBT, the former expressly imposes obligations to co-operate in the conservation of migratory fish, the latter subjects any implied obligation of co-operation to the veto of one State. The contention that the 1993 Convention "covers" and thus eclipses the obligations in respect of SBT of UNCLOS is wrong in fact, and the principle of "coverage" is unknown to international law. The array of modern standards of international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise, and that is not the instant case. Even if the 1993 Convention completely covered all relevant obligations of UNCLOS, it would not supersede them; there would simply be a parallelism of obligations, not unusual in international practice. Moreover the 1993 Convention is meant to implement UNCLOS not supplant it; and the presumption that implementing agreements should suppress head agreements cannot be right as a matter of legislative policy. The same approach applies to peaceful settlement clauses. Article 16 of the 1993 Convention is not a procedure for peaceful settlement but a menu of options. Far from excluding any other procedure, it excludes no possible procedure at all. Moreover Article 16 does not address disputes under UNCLOS; it simply says that disputes under the 1993 Convention may be solved in any way on which the parties agree. It is not a negative dispute clause in respect of UNCLOS itself.

To so read it would conflict with the terms of Article 4 of the 1993 Convention, because it would prejudice the standing position of Australia and New Zealand favoring compulsory dispute settlement.[14] Each party to the 1993 Convention has a double veto. It can veto the TAC or the adoption of other binding measures, and it can veto any form of dispute settlement. In such event, the Parties are thrown back on to UNCLOS itself, onto its express provisions for co-operation and for binding dispute settlement in respect of fisheries. If Japan is right, then the parties to implementation agreements will be accountable to third parties for breach of governing general principles of the head agreement but not to each other. If Japan is right, the three States concerned cooperating informally would be accountable to each other for breach of UNCLOS principles but not accountable once they conclude a treaty embodying the principles of their cooperation. It follows for these and other reasons that the analysis of Japan cannot be right. The Applicants do not argue that the dispute settlement provisions of UNCLOS govern those of other agreements, including the 1993 Convention. But if it is accepted that there is a dispute under UNCLOS, then they have the right to have that dispute resolved by UNCLOS dispute settlement procedures.

(l) The reason why legal procedures under UNCLOS have been brought against Japan alone is that there is dispute with Japan alone. Negotiations are in train with third States about reducing their catch of Southern Bluefin Tuna, and progress is being made. It would not be politic at this juncture to turn to legal procedures. The Applicants' difficulties with Japan are ripe for dispute settlement whereas differences with third parties are not. Third States are not necessary parties in the proceedings against Japan; no finding as to their legal obligations is needed for decision on claims against Japan.

(m) While welcoming the new spirit of compromise accompanying Japan's latest proposal for an experimental fishing program, that proposal does not make the proceedings moot. The differences between the Parties are not limited to tonnage of tuna taken in an EFP. The quality of the EFP is a central issue. There has as yet been no agreement between the Parties nor a binding unilateral commitment on the part of Japan that resolves the issues between them.

---

[14] Article 4 of the CCSBT provides:

> Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

VI. *The Final Submissions of the Parties*

42. Japan, as Respondent, in maintaining its Preliminary Objections on jurisdiction and admissibility, made the following final Submissions:

> This Tribunal should adjudge and declare,
> first, that the case has become moot and should be discontinued; alternatively,
> second, that the Tribunal does not have jurisdiction over the claims made by the Applicants in this case; alternatively,
> third, that the claims are not admissible.

43. Australia and New Zealand, as Applicants, in rejecting the Respondent's Preliminary Objections, made the following final Submissions:

> one, that the Parties differ on the question whether Japan's EFP and associated conduct is governed by UNCLOS;
> two, that a dispute thus exists about the interpretation and application of UNCLOS within the meaning of Part XV;
> three, that all the jurisdictional requirements of that Part have been satisfied; and
> four, that Japan's objections to the admissibility of the dispute are unfounded.

VII. *The Paramount Questions and the Answers of the Tribunal*

44. The Preliminary Objections raised by Japan and the arguments advanced in support of them, and the rejection of those Preliminary Objections by Australia and New Zealand and the arguments advanced in support of that rejection, present this Tribunal with questions of singular complexity and significance. The Tribunal is conscious of its position as the first arbitral tribunal to be constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention on the Law of the Sea. The Parties, through their written pleadings and the oral arguments so ably presented on their behalf by their distinguished Agents and counsel, have furnished the Tribunal with a comprehensive and searching analysis of issues that are of high importance not only for the dispute that divides them but for the understanding and evolution of the processes of peaceful settlement of disputes embodied in UNCLOS and in treaties implementing or relating to provisions of that great law-making treaty.

45. Having regard to the final Submissions of the Parties, the Tribunal will initially address the contention that the case has become moot and should be discontinued. The relevant arguments of the Parties have been set forth above (in paragraphs 40(c), 41(m)). In short, Japan maintains that the essence of the dispute turns on its pursuance of a unilateral experimental fishing program; that the contentious element of that program is its proposal to fish 1800 mt. of Southern Bluefin Tuna; that in the course of exchanges between the Parties in that regard, Australia had in 1999 proposed an EFP limit of 1500 mt.; that Japan is now prepared to limit its EFP catch to 1500 mt.; hence that the Parties are in accord on what had been the focus of their dispute, with the result that it has been rendered moot. Australia and New Zealand reply that the proposed acceptance of an EFP of 1500 tons of tuna was an offer made in

the course of negotiations which is no longer on the table; and that in any event their dispute with Japan over a unilateral EFP is not limited to the quantity of the tonnage to be fished but includes the quality of the program, i.e., the design and modalities for its execution, which they maintain is flawed.

46. In the view of the Tribunal, the case is not moot. If the Parties could agree on an experimental fishing program, an element of which would be to limit catch beyond the de facto TAC limits to 1500 mt., that salient aspect of their dispute would indeed have been resolved; but Australia and New Zealand do not now accept such an offer or limitation by Japan. Even if that offer were today accepted, it would not be sufficient to dispose of their dispute, which concerns the quality as well as the quantity of the EFP, and perhaps other elements of difference as well, such as the assertion of a right to fish beyond TAC limits that were last agreed. Japan now proposes experimentally to fish for no more than 1500 mt., but it has not undertaken for the future to forego or restrict what it regards as a right to fish on the high seas for Southern Bluefin Tuna in the absence of a decision by the Commission for the Conservation of Southern Bluefin Tuna upon a total allowable catch and its allocation among the Parties.

47. The Tribunal will now turn to the fundamental and multifaceted issues of jurisdiction that divide the Parties. Putting aside the question of mootness, it is common ground that there is a dispute, and that the core of that dispute relates to differences about the level of a total allowable catch and to Japan's insistence on conducting, and its conduct of, a unilateral experimental fishing program. What profoundly divides the Parties is whether the dispute arises solely under the 1993 Convention, or whether it also arises under UNCLOS.

48. The conflicting contentions of the Parties on this question are found in paragraphs 38 (a) (d) and 41 of this Award. An essential issue is, is the dispute with which the Applicants have seized the Tribunal a dispute over the interpretation of the CCSBT, or UNCLOS, or both? That the Applicants maintain, and the Respondent denies, that the dispute involves the interpretation and application of UNCLOS does not of itself constitute a dispute over the interpretation of UNCLOS over which the Tribunal has jurisdiction. In the words of the International Court of Justice in like circumstances, "in order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty ... pleaded ... do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain ..." (*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 16.) In this and in any other case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the

legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue. "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties ... The Court will itself determine the real dispute that has been submitted to it ... It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence ..." (*Fisheries Jurisdiction Case (Spain v. Canada), I.C.J. Reports 1998*, paragraphs 30-31.) In the instant case, it is for this Tribunal to decide whether the "real dispute" between the Parties does or does not reasonably (and not just remotely) relate to the obligations set forth in the treaties whose breach is alleged.

49. From the record placed before the Tribunal by both Parties, it is clear that the most acute elements of the dispute between the Parties turn on their inability to agree on a revised total allowable catch and the related conduct by Japan of unilateral experimental fishing in 1998 and 1999, as well as Japan's announced plans for such fishing thereafter. Those elements of the dispute were clearly within the mandate of the Commission for the Conservation of Southern Bluefin Tuna. It was there that the Parties failed to agree on a TAC. It was there that Japan announced in 1998 that it would launch a unilateral experimental fishing program; it was there that that announcement was protested by Australia and New Zealand; and the higher level protests and the diplomatic exchanges that followed refer to the Convention for the Conservation of Southern Bluefin Tuna and to the proceedings in the Commission. The Applicants requested urgent consultations with Japan pursuant to Article 16(1) of the Convention, which provides that, "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 ..." Those consultations took place in 1998, and they were pursued in 1999 in the Commission in an effort to reach agreement on a joint EFP. It was in the Commission in 1999 that a proposal by Japan to limit its catch to 1800 mt. under the 1999 EFP was made, and it was in the Commission that Australia indicated that it was prepared to accept a limit of 1500 mt. It was in the Commission that Japan stated, on May 26 and 28, 1999 that, unless Australia and New Zealand accepted its proposals for a joint EFP, it would launch a unilateral program on June 1. Proposals for mediation and arbitration made by Japan were made in pursuance of provisions of Article 16 of the CCSBT. In short, it is plain that all the main elements of the dispute between the Parties had been addressed within the Commission for the Conservation of Southern Bluefin Tuna and that the contentions of the Parties in respect of that dispute related to the implementation of their obligations under the 1993 Convention. They related particularly to Article 8(3) of the Convention, which provides that, "For the conservation, management and optimum utilization of southern bluefin tuna: (a) the Commission shall decide upon a total allowable catch and its allocation

among the Parties ..." and to the powers of a Party in a circumstance where the Commission found itself unable so to decide.

50. There is in fact no disagreement between the Parties over whether the dispute falls within the provisions of the 1993 Convention. The issue rather is, does it also fall within the provisions of UNCLOS? The Applicants maintain that Japan has failed to conserve and to cooperate in the conservation of the SBT stock, particularly by its unilateral experimental fishing for SBT in 1998 and 1999. They find a certain tension between cooperation and unilateralism. They contend that Japan's unilateral EFP has placed it in breach of its obligations under Articles 64, 116, 117, 118 and 119 of UNCLOS, for the specific reasons indicated earlier in this Award (in paragraphs 33 and 41). Those provisions, they maintain, lay down applicable norms by which the lawfulness of Japan's conduct can be evaluated. They point out that, once the dispute had ripened, their diplomatic notes and other demarches to Japan made repeated reference to Japan's obligations not only under the 1993 Convention but also under UNCLOS and customary international law.

51. Japan for its part maintains that such references were belated and were made for the purpose of permitting a request to ITLOS for provisional measures. It contends that the invoked articles of UNCLOS are general and do not govern the particular dispute between the Parties. More than that, Japan argues that UNCLOS is a framework or umbrella convention that looks to implementing conventions to give it effect; that Article 64 provides for cooperation "through appropriate international organizations" of which the Commission is an exemplar; that any relevant principles and provisions of UNCLOS have been implemented by the establishment of the Commission and the Parties' participation in its work; and that the *lex specialis* of the 1993 Convention and its institutional expression have subsumed, discharged and eclipsed any provisions of UNCLOS that bear on the conservation and optimum utilization of Southern Bluefin Tuna. Thus Japan argues that the dispute falls solely within the provisions of the 1993 Convention and in no measure also within the reach of UNCLOS.

52. The Tribunal does not accept this central contention of Japan. It recognizes that there is support in international law and in the legal systems of States for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute. But the Tribunal recognizes as well 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. The

broad provisions for the promotion of universal respect for and observance of human rights, and the international obligation to co-operate for the achievement of those purposes, found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for States Parties by their ratification of the Human Rights Covenants and other human rights treaties. Moreover, if the 1993 Convention were to be regarded as having fulfilled and eclipsed the obligations of UNCLOS that bear on the conservation of SBT, would those obligations revive for a Party to the CCSBT that exercises its right under Article 20 to withdraw from the Convention on twelve months notice? Can it really be the case that the obligations of UNCLOS in respect of a migratory species of fish do not run between the Parties to the 1993 Convention but do run to third States that are Parties to UNCLOS but not to the 1993 Convention? Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of UNCLOS. In some respects, UNCLOS may be viewed as extending beyond the reach of the CCSBT. UNCLOS imposes obligations on each State to take action in relation to its own nationals: "All States have the duty to take ... such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (Article 117). It debars discrimination "in form or fact against the fishermen of any State" (Article 119). These provisions are not found in the CCSBT; they are operative even where no TAC has been agreed in the CCSBT and where co-operation in the Commission has broken down. Article 5(1) of the CCSBT provides that, "Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding ..." But UNCLOS obligations may be viewed not only as going beyond this general obligation in the foregoing respects but as in force even where "measures" being considered under the 1993 Convention have not become binding thereunder. Moreover, a dispute concerning the interpretation and implementation of the CCSBT will not be completely alien to the interpretation and application of UNCLOS for the very reason that the CCSBT was designed to implement broad principles set out in UNCLOS. For all these reasons, the Tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea. In its view, this conclusion is consistent with the terms of UNCLOS Article 311(2) and (5), and with the law of treaties, in particular Article 30(3) of the Vienna Convention on the Law of Treaties.[15]

---

[15] Article 30(3) of the Vienna Convention on the Law of Treaties provides:

> When all the parties to an earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty

53. This holding, however, while critical to the case of the Applicants, is not dispositive of this case. It is necessary to examine a number of articles of Part XV of UNCLOS. Article 286 introduces section 2 of Part XV, a section entitled, "Compulsory Procedures Entailing Binding Decisions". Article 286 provides that, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section". Article 286 must be read in context, and that qualifying context includes Article 281(1) as well as Articles 279 and 280. Under Article 281(1), if the States which are parties to a dispute concerning the interpretation or application of UNCLOS (and the Tribunal has just held that this is such a dispute) have agreed to seek settlement of the dispute "by a peaceful means of their own choice", the procedures provided for in Part XV of UNCLOS apply only (a) where no settlement has been reached by recourse to such means and (b) the agreement between the parties "does not exclude any further procedure".

54. The Tribunal accepts Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice. It so concludes even though it has held that this dispute, while centered in the 1993 Convention, also implicates obligations under UNCLOS. It does so because the Parties to this dispute – the real terms of which have been defined above – are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

55. Article 16 is not "a" peaceful means; it provides a list of various named procedures of peaceful settlement, adding "or other peaceful means of their own choice." No particular procedure in this list has thus far been chosen by the Parties for settlement of the instant dispute. Nevertheless – bearing in mind the reasoning of the preceding paragraph – the Tribunal is of the view that Article 16 falls within the terms and intent of Article 281(1), as well as Article 280. That being so, the Tribunal is satisfied about fulfillment of condition (a) of Article 281(1). The Parties have had recourse to means set out in Article 16 of the CCSBT. Negotiations have been prolonged, intense and serious. Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions, those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283, which requires that, when a dispute arises between States Parties concerning UNCLOS' interpretation or application, the parties to the dispute shall proceed

---

applies only to the extent that its provisions are compatible with those of the later treaty.

expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. Manifestly, no settlement has been reached by recourse to such negotiations, at any rate, as yet. It is true that every means listed in Article 16 has not been tried; indeed, the Applicants have not accepted proposals of Japan for mediation and for arbitration under the CCSBT, essentially, it seems, because Japan was unwilling to suspend pursuance of its unilateral EFP during the pendency of such recourse. It is also true that Article 16(2) provides that failure to reach agreement on reference of a dispute 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". But in the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Articles 281(1) and 283, that no settlement has been reached. To read Article 16 otherwise would not be reasonable.

56. The Tribunal now turns to the second requirement of Article 281(1): that the agreement between the parties "does not exclude any further procedure". This is a requirement, it should be recalled, for applicability of "the procedures provided for in this Part," that is to say, the "compulsory procedures entailing binding decisions" dealt with in section 2 of UNCLOS Part XV. The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.

57. Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive. Article 16(1) requires the parties to "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." Article 16(2), in its first clause, directs the referral of a dispute not resolved by any of the above-listed means of the parties' "own choice" for settlement "to the International Court of Justice or to arbitration" but "with the consent in each case of all parties to the dispute". The ordinary meaning of these terms of Article 16 makes it clear that the dispute is not referable to adjudication by the International Court of Justice (or, for that matter, ITLOS), or to arbitration, "at the request of any party to the dispute" (in the words of UNCLOS Article 286). The consent in each case of all parties to the dispute is required. Moreover, the second clause of Article 16(2) provides that "failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve the 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". The effect of this express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is 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. Article 16(3) reinforces that intent by specifying that, in cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided for in an annex to the 1993 Convention, which is to say that 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.

58. It is plain that the wording of Article 16(1) and (2) has its essential origins in the terms of Article XI of the Antarctic Treaty; the provisions are virtually identical. In view of the States that concluded the Antarctic Treaty – divided as they were between some States that adhered to international adjudication and arbitration and a Great Power that then ideologically opposed it – it is obvious that these provisions are meant to exclude compulsory jurisdiction.

59. For all these reasons, the Tribunal concludes that Article 16 of the 1993 Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of UNCLOS.

60. There are two other considerations that, to the mind of the Tribunal, sustain this conclusion. The first consideration is the extent to which compulsory procedures entailing binding decisions have in fact been prescribed by Part XV of UNCLOS for all States Parties to UNCLOS. Article 286, in providing that disputes concerning the interpretation or application of UNCLOS "shall ... where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [Article 287]", states that that apparently broad provision is "subject to section 3" of Part XV. Examination of the provisions comprising section 3 (and constituting interpretive context for sections 1 and 2 of Part XV) reveals that they establish important limitations and exceptions to the applicability of the compulsory procedures of section 2.

61. Article 297 of UNCLOS is of particular importance in this connection for it provides significant limitations on the applicability of compulsory procedures insofar as coastal States are concerned. Paragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases only, i.e.: (a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and (b) cases involving the protection and preservation of the marine environment. Paragraph 2 of Article 297, while providing for the application of section 2 compulsory procedures to disputes concerning marine scientific research, exempts coastal States from the obligation of submitting to such procedures in cases involving exercise by a coastal State of its rights or discretionary authority in its exclusive economic zone (EEZ) or its

continental shelf, and cases of termination or suspension by the coastal State of a research project in accordance with article 253. Disputes between the researching State and the coastal State concerning a specific research project are subject to conciliation under annex V of UNCLOS. Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important "but", the coastal State is not obliged to submit to such procedures where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations. Complementing the limitative provisions of Article 297 of UNCLOS, Article 298 establishes certain optional exceptions to the applicability of compulsory section 2 procedures and authorizes a State (whether coastal or not), at any time, to declare that it does not accept any one or more of such compulsory procedures in respect of: (a) disputes concerning Articles 15, 74 and 83 relating to sea boundary delimitations or historic bays or titles; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities by a coastal State. Finally, Article 299 of UNCLOS provides that disputes excluded by Article 297 or exempted by Article 298 from application of compulsory section 2 procedures may be submitted to such procedures "only by agreement of the parties to the dispute".

62. It thus appears to the Tribunal that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions. This general consideration supports the conclusion, based on the language used in Article 281(1), that States Parties that have agreed to seek settlement of disputes concerning the interpretation or application of UNCLOS by "peaceful means of their own choice" are permitted by Article 281(1) to confine the applicability of compulsory procedures of section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures. In the Tribunal's view, Article 281(1), when so read, provides a certain balance in the rights and obligations of coastal and non-coastal States in respect of settlement of disputes arising from events occurring within their respective Exclusive Economic Zones and on the high seas, a balance that the Tribunal must assume was deliberately established by the States Parties to UNCLOS.

63. The second consideration of a general character that the Tribunal has taken into account is the fact that a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. 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. The Tribunal is of the view that the existence of such a body of treaty practice – postdating as well as antedating the conclusion of UNCLOS – tends to confirm the conclusion that States Parties to UNCLOS may, by agreement, preclude subjection of their disputes to section 2 procedures in accordance with Article 281(1). To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.

64. The Tribunal does 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. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith.

65. It follows from the foregoing analysis that this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan. Having reached this conclusion, the Tribunal does not find it necessary to pass upon questions of the admissibility of the dispute, although it may be observed that its analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only. It may be added that this Tribunal does not find the proceedings brought before ITLOS and before this Tribunal to be an abuse of process; on the contrary, as explained below, the proceedings have been constructive.

66. In view of this Tribunal's conclusion that it lacks jurisdiction to deal with the merits of the dispute, and in view of the terms of Article 290(5) of UNCLOS providing that, "Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ...", the Order of the International Tribunal for the Law of the Sea of August

27, 1999, prescribing provisional measures, shall cease to have effect as of the date of the signing of this Award.

67. However, revocation of the Order prescribing provisional measures does not mean that the Parties may disregard the effects of that Order or their own decisions made in conformity with it. The Order and those decisions – and the recourse to ITLOS that gave rise to them – as well as the consequential proceedings before this Tribunal, have had an impact: not merely in the suspension of Japan's unilateral experimental fishing program during the period that the Order was in force, but on the perspectives and actions of the Parties.

68. As the Parties recognized during the oral hearings before this Tribunal, they have increasingly manifested flexibility of approach to the problems that divide them; as the Agent of Japan put it, "strenuous efforts which both sides have made in the context of the CCSBT have already succeeded in narrowing the gap between the Parties." An agreement on the principle of having an experimental fishing program and on the tonnage of that program appears to be within reach. The possibility of renewed negotiations on other elements of their differences is real. Japan's counsel, in the course of these hearings, emphasized that Japan remained prepared to submit the differences between the Parties to arbitration under Article 16 of the 1993 Convention; Japan's Agent observed that, "That would allow the Parties to set up procedures best suited to the nature and the characteristics of the case." Japan's counsel affirmed Japan's willingness to work with Australia and New Zealand on the formulation of questions to be put to a CCSBT Arbitration Tribunal, and on the procedure that it should adopt in dealing with those questions. He restated Japan's willingness to agree on the simultaneous establishment of a mechanism in which experts and scientists can resume consultation on a joint EFP and related issues. The agent of Japan stated that, not only is its proposal to cap its EFP at 1500 mt. on the negotiating table; negotiations on the appropriate design for the EFP are already underway.

69. Counsel for Australia pointed out that the ITLOS Order already had played a significant role in encouraging the Parties to make progress on the issue of third-party fishing. The Agents of Australia and of New Zealand declared that progress in settling the dispute between the Parties had been made. They expressed the hope that progress would continue and stated that they will make every attempt to ensure that it does; they "remain ready to explore all productive ways of finding solutions".

70. The Tribunal recalls that Article 16(2) prescribes that failure to reach agreement on reference to arbitration shall not absolve the 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; and among those means are negotiation, mediation and arbitration. The Tribunal further observes that, to the extent that the search for resolution of the dispute were to resort to third-party procedures, those listed in Article 16 are labels that conform to

traditional diplomatic precedent. Their content and *modus operandi* can be refined and developed by the Parties to meet their specific needs. There are many ways in which an independent body can be configured to interact with the States party to a dispute. For example, there may be a combination or alternation of direct negotiations, advice from expert panels, benevolent supervision and good offices extended by a third-party body, and recourse to a third party for step-by-step aid in decision-making and for mediation, quite apart from third-party binding settlement rendered in the form of an arbitral award. Whatever the mode or modes of peaceful settlement chosen by the Parties, the Tribunal emphasizes that the prospects for a successful settlement of their dispute will be promoted by the Parties' abstaining from any unilateral act that may aggravate the dispute while its solution has not been achieved.

71. Finally, the Tribunal observes 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. The substantive provisions of the Straddling Stocks Agreement are more detailed and far-reaching than the pertinent provisions of UNCLOS or even of the CCSBT. The articles relating to peaceful settlement of disputes specify that the provisions relating to the settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Agreement concerning its interpretation or application. They further specify that the provisions relating to settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the 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.

72. FOR THESE REASONS

The Arbitral Tribunal

By vote of 4 to 1,

1. Decides that it is without jurisdiction to rule on the merits of the dispute; and,

Unanimously,

2. Decides, in accordance with Article 290(5) of the United Nations Convention on the Law of the Sea, that provisional measures in force by

Order of the International Tribunal for the Law of the Sea prescribed on August 27, 1999 are revoked from the day of the signature of this Award.

73. Justice Sir Kenneth Keith appends a Separate Opinion.

(*Signed*)
Stephen M. Schwebel
President of the Arbitral Tribunal

(*Signed*)
Margrete L. Stevens
Co-Secretary of the Arbitral Tribunal

Washington, D.C.
August 4, 2000

SEPARATE OPINION OF JUSTICE SIR KENNETH KEITH

1. While I agree with much of the Award, I have the misfortune to disagree with my colleagues on one critical issue. I have accordingly prepared this opinion.

Each of the treaties in issue in this case sets up substantive obligations and obligations relating to peaceful settlement. The parallel and overlapping existence of the obligations arising under each treaty is fundamental in this case. I conclude that the one has not excluded or in any relevant way prejudiced the other.

2. This Tribunal has jurisdiction under section 2 of Part XV of UNCLOS "where no settlement has been reached by recourse to section 1" (article 286). Section 1 begins by imposing an obligation on States Parties:

> Article 279
> *Obligation to settle disputes by peaceful means*
>
> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

3. Section 1 then saves the rights of States Parties to choose their own means of peaceful settlement and to settle the dispute by that means:

Article 280
Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

That provision, like article 281, depends on the Parties first agreeing to and then using a "peaceful means of their own choice". Article 281 however proceeds on the basis that the agreed procedure has failed:

Article 281
Procedure where no settlement has been reached by the parties

1. 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.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

4. The two main issues which this provision raises in the circumstances of this case are:

(a) Have the Parties "agreed to seek settlement of the dispute by a peaceful means of their own choice" – that is by way of article 16 of the CCSBT or some other agreed means?

(b) Does article 16 "exclude any further procedure"? (Japan invoked no other basis for its "exclusion" contention.)

5. While my answer to question (a) is No so far as article 16 is concerned, I agree that there is a good argument that in their diplomatic exchanges the Parties did agree to attempt to settle the dispute by negotiation.

6. I do not however take that latter aspect of question (a) any further. Rather, I give my primary attention to question (b) on the assumption (rejected in paragraph 8 below) that article 16 is an "agreement" in terms of article 281(1). I answer question (b) No. The consequence is that, to my mind, that bar to the tribunal's jurisdiction is not established.

7. Article 16 of the CCSBT is as follows:

Article 16

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.

8. Paragraph (1) requires the parties to consult about methods of dispute resolution – those listed or others of their own choice – but it does not itself oblige them to apply any particular method. In that it is like articles 283 and 284 of UNCLOS, which require an exchange of views about methods and empower the making of an invitation to conciliation. Like article 280 (a savings provision), article 283, article 284 and in particular article 16(1), do not of themselves amount to an "agree[ment] to seek settlement of the dispute by a peaceful means of their own choice". Paragraph (2) of article 16 is also not an agreement on a method. Reference to the International Court or to arbitration must be separately agreed to in respect of the particular dispute, and the final part of the paragraph too does not itself amount to an agreement on one of the methods referred to in paragraph 1. Further, as discussed in paragraphs 15 and 16, article 16 applies only to disputes concerning the CCSBT and does not necessarily extend to disputes concerning UNCLOS.

9. The Parties in their written and oral submissions have given greater attention to the second issue – whether article 16 "excludes" any further procedure, including the compulsory binding procedures under section 2 of Part XV. As already indicated, I give my principal attention to that issue.

10. My reasons for concluding that article 16 does not exclude any further procedure and in particular the compulsory binding procedures under section 2 of Part XV are to be found in the ordinary meaning of the terms of the two treaties read in their context and in the light of their objects and purposes.

11. Part of the context is provided by the distinct and overlapping substantive obligations of UNCLOS and the CCSBT, a matter recognised by the Award. That parallelism and lack of full coincidence also exists for the two sets of procedures for the peaceful means for the settlement of disputes concerning each treaty which they each set up. The Award indeed recognises a longstanding and widespread parallelism of dispute settlement obligations as well as of substantive obligations. Three relevant categories of substantive obligations can be usefully distinguished:

> (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 third States.

Australia and New Zealand invoke UNCLOS procedures in respect of 1 and 3. Their contention is that the disputes between them and Japan concern "the interpretation or application of [the specified provisions of] this Convention [UNCLOS]".

12. That the disputes may or may not also concern the interpretation or implementation of the CCSBT is beside the point. Subject to the critical

question stated in paragraph 4(b) – does article 16 "exclude" further procedures - the separate set of UNCLOS peaceful settlement obligations exists along with and distinct from the provisions of article 16.

13. But does article 16 "exclude" the UNCLOS set of obligations? It does not say that it does. It could have, given the timing of the drafting of the two treaties as the preamble reflects. Next, it does not say that disputes concerning the CCSBT must be resolved *only* by procedures under it and *must not* be referred to any tribunal or other third party for settlement. Again it could have said that, as treaty parties have. But does it impliedly exclude the UNCLOS procedures?

14. To do that, article 16 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 UNCLOS. And, as well, it would have to *exclude* (impliedly) the UNCLOS procedures. I consider those two points in turn.

15. If it is the case, as the Award indicates, that Australia and New Zealand have appropriately invoked obligations which are not covered by the CCSBT it would be surprising were procedures for settlement of disputes *concerning that Convention* to be able to apply to disputes arising beyond it. To recall its terms, article 16 is about a "dispute ... between two or more parties concerning the interpretation or implementation of this Convention". The parties are obliged under paragraph 1 of article 16 to "consult ... with a view to having *the dispute* resolved" in one of the listed ways or through other peaceful means of their own choice. Under paragraph 2 of the article "any dispute of *this character*" – to repeat, concerning the interpretation or implementation of the CCSBT – not so resolved may then be referred to the International Court of Justice or to arbitration in accordance with the Annex if all parties agree. Finally, if the parties do not agree, they are not absolved from "the responsibility of continuing to seek to resolve *it*" – again the dispute as characterised – "by any of the various peaceful means referred to in paragraph 1 ...". On their face, those provisions, which, to repeat, do not in any event themselves amount to an agreed choice one or more of 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. What they do say is that the binding or indeed any non-binding procedures listed apply only if the parties agree. If any procedure is agreed to, that procedure applies to disputes concerning the interpretation or implementation (perhaps a wider word than "application") *of the CCSBT*.

16. It is important to consider the possible scope of such an agreed procedure under the CCSBT. Take as an example a failure by the Commission to meet its obligation to fix the total allowable catch. In that situation, the issue of "implementation" which Parties might agree to put to the arbitral tribunal, given the objective (stated in article 3) of conservation and optimum

utilisation through appropriate management, would be that the Tribunal decide, in place of the Commission, the TAC and its allocation among the parties (article 8(3)). They might also agree that the decisions would be binding on them, as are the decisions of the Commission (see articles 8(7) and 5). In the course of the current dispute the Japanese authorities have indeed appeared to be willing to contemplate such a binding reference to scientific experts, this too in the context of a failure by the Commission to fix the TAC. Such a reference appears to fall clearly within the scope of article 16 and the arbitration annex. It can be compared with the power of UNCLOS Parties to agree that a court or tribunal *which already has jurisdiction under Part XV(2)* may decide *ex aequo et bono* (article 293(2)). As with that very broad power, so too with a power to make decisions about the TAC and its allocation, a matter at the heart of "the implementation" of the CCSBT, it is hardly remarkable that the Parties did not give a general open ended consent to binding arbitration in advance. To anticipate a matter mentioned later, judicial or arbitral powers in respect of the interpretation or application of the relevant provisions of UNCLOS invoked in this case would be more confined. By retaining that freedom in respect of such matters as fixing the TAC under the CCSBT the parties are not, in my view, expressing any purpose at all in relation to their quite distinct obligations under UNCLOS. The same point could probably be made about many, if not all, of the many dispute settlement provisions of maritime treaties to which the tribunal was referred. The provisions do not appear to me to help in the interpretation of article 281(1). In terms of their possible interpretative role, those adopted since 1982 do not for instance meet the strict standard reflected in article 31(3)(b) of the Vienna Convention on the Law of Treaties. The essential point is that the two treaty regimes (including their settlement procedures) remain distinct. The UNCLOS provisions are not to be seen in any sense as being part of, or being read into the other treaty system. The UNCLOS dispute means have no application to it – unless of course the Parties through the other treaty have so agreed : article 288(2).

17. I return to the wording of article 281(1) of UNCLOS. The requirement is that the Parties have agreed to *exclude any* further procedure for the settlement of the dispute concerning UNCLOS. The French and Spanish texts have the same wording and structure. They require opting out. They do not require that the Parties positively agree to the binding procedure by opting in, by contrast to other provisions of Part XV: articles 282, 284(2) and (4) and 288(2).

18. The word *any* in the final phrase of article 281(1) is also significant since it requires the exclusion to be of any other procedure available between the Parties such as those under the compulsory jurisdiction of the International Court or other treaties for the peaceful settlement of disputes. As the Virginia Commentary (para 281.5) puts it, the phrase "envisages the possibility that the Parties, in their agreement to resort to a particular procedure, may also specify that this procedure shall be an exclusive one and that no other procedure

(including those under Part XV) may be resorted to". Such strong and particular wording would appear to be required, given the presumption of the parallel and overlapping existence of procedures for the peaceful settlement of disputes appearing in international judicial practice and the general law of treaties, as stated for instance in article 30(3) of the Vienna Convention on the Law of Treaties.

19. The need for clear wording to exclude the obligations to submit to the UNCLOS binding procedure, beyond the wording found in article 16, is further supported by other particular provisions of Part XV and by the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS.

20. Article 282, the very next provision to that at centre stage, does indeed give preference to another agreed peaceful settlement procedure over Part XV, but it gives that preference only if that procedure "entails a binding decision"; and of course the terms of article 16 by themselves do not. As well, that preference can be reversed if the parties to the dispute so agree. As already mentioned, that requirement to agree to opt into the UNCLOS process is to be contrasted with the opting out for which article 281(1) calls.

21. The structure of Part XV and three elements of section 3 of that Part also contribute to an understanding of article 281(1) and the compulsory binding procedures of section 2 of Part XV. They too are part of the relevant context. Section 1, "General Provisions", begins with the obligation of the State Parties to settle UNCLOS disputes by peaceful means (article 279). Within that overall obligation, which is supported by obligations to exchange views about means of settlement (article 283) and the availability of a conciliation procedure (article 284 and Annex V), the emphasis of the section is on the Parties' freedom of choice of means (articles 280-282). If the Parties' chosen means does not lead to a settlement then one Party can submit the dispute to "Compulsory Procedures Entailing Binding Decisions", to quote the heading to section 2 (article 286). That power is however in turn subject to section 3 of the Part, "Limitations and Exceptions to Applicability of Section 2".

22. That structure itself supports the need for States to include clear wording in their agreements if they are to remove themselves from their otherwise applicable compulsory obligations arising under section 2 to submit to procedures entailing binding decisions. So, too, does the detail of section 3 which (1) enables States to opt out of certain otherwise compulsory, binding processes, (2) provides for non-binding processes in certain circumstances, and (3) limits the extent of the third party review of certain State actions. States may opt out of the binding section 2 procedures – for example in respect of military activities (article 298(1)(b)) and certain maritime delimitation disputes (article 298(1)(a)), with the qualification in the latter case (but not the former) that compulsory (non-binding) conciliation is then available. Conciliation, rather than binding adjudication or arbitration, is also

available in respect of the exercise by a coastal State of rights and discretions in relation to marine scientific research in its exclusive economic zone and on its continental shelf. Further, in considering those matters, the conciliation commission cannot call in question the exercise of two specific discretions exercisable by the coastal State (article 297(2)). Coming closer to the subject matter of the present dispute, a coastal State is not obliged to accept the submission to settlement under section 2 of fisheries disputes relating to its sovereign rights with respect to living resources within its exclusive economic zone, but again compulsory conciliation is available, although only on the limited basis that coastal state has "manifestly" failed to comply with its conservation and management obligations or has "arbitrarily" refused to determine the TAC or its allocation. But, significantly, the general run of fisheries disputes, such as the present, is not subject to those limitations and exceptions. Section 2, *it is expressly said, continues to apply to them in full* (article 297(3)).

23. Finally, in terms of the object and purpose of UNCLOS as a whole, I refer to the widely stated and shared understanding, expressed throughout all the stages of the Conference which prepared the Convention, about the critical central place of the provisions for the peaceful settlement of disputes. The States at that Conference moved decisively away from the freedom which they generally have in their international relations not to be subject in advance to dispute settlement processes, especially processes leading to binding outcomes. The processes in significant part were not to be optional and, in general, third party binding decisions were to be available at the request of any party to the dispute.

24. At its first session the Conference had before it a paper containing drafts, among other things, on (i) the obligation to settle disputes under the Convention by peaceful means; (ii) the settlement of disputes by means chosen by the parties; (iii) the obligation to resort to a means resulting in binding decisions (the alternatives being arbitration, a Law of the Sea Tribunal, or the International Court of Justice); (iv) the possibility of special procedures in functional areas such as fishing, seabed, marine pollution or scientific research; and (v) possible exceptions or reservations. A co-chair of the working group which prepared the paper made the following points in introducing it to the Conference:

> (i) that the settlement of disputes by effective legal means would be necessary in order to avoid political and economic pressures; (ii) that uniformity in the interpretation of the Convention should be sought; (iii) while the advantages of obligatory settlement of disputes are thus recognized, a few carefully defined exceptions should be allowed; (iv) that the system for the settlement of disputes must form an integral part and an essential element of the Convention, an optional protocol being totally inadequate; and (v) with well-defined legal recourse, small countries have powerful means available to prevent interference by large countries, and the latter in turn could save themselves trouble, both groups gaining by the principle of strict legality which implies the effective application of the agreed rules. (Virginia Commentary XV.4)

25. The President of the Conference, Ambassador H S Amerasinghe, in 1976 prepared an informal single negotiating text on the Settlement of Disputes. He explained his initiative in this way:

> Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise [embodied in the whole UNCLOS text] will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and permanent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of a treaty will be interpreted both consistently and equitably. (A/CONF.62/WP.9/Add.1, 31 March 1976, para 6)

26. Throughout the negotiating process there were to be seen the essential elements of what became Part XV: the basic obligation of peaceful settlement, the freedom of parties to choose their own means (both in section 1), the backstop of compulsory, binding procedures (section 2), and precise limits on, and exceptions to, those procedures (section 3).

27. Ambassador T T B Koh, who succeeded to the Presidency of the Conference, in speaking at the final session in 1982 answered in the affirmative his question whether the Conference had produced a comprehensive constitution for the oceans which would stand the test of time. Among his reasons was the following:

> The world community's interest in the peaceful settlement of disputes and the prevention of use of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the Convention.

He also stressed that the Convention forms an integral whole. States cannot pick what they like and disregard what they do not like. (Published in United Nations, *The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea*; from statements made on 6 and 11 December 1982.)

28. The Japanese delegation had no doubt spoken for many when, early in the process, it similarly

> Emphasize[d] the necessity of making the general obligation to settle disputes an integral part of the future convention. In his delegation's view, the solution adopted at the First United Nations Conference on the Law of the Sea in 1958, in the form of an Optional Protocol of Signature, was insufficient and unacceptable. (6 April 1976, 60th meeting, paragraph 56).

29. The authoritative Virginia Commentary captures the essence, by introducing its discussion of Part XV with this sentence:

> One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect of the interpretation or application of the 1982 UN Convention on the Law of the Sea. (paragraph XV.1)

The Commentary goes on to contrast earlier "less successful" attempts, in the 1930 League of Nations codification process and at the 1958 Conference also criticised by the Japanese delegation in 1976.

30. The objects and purposes of UNCLOS in general and its comprehensive, compulsory and where necessary, binding dispute settlement provisions in particular, along with the plain wording of its article 281(1) and of article 16 of the CCSBT lead me to the conclusion that the latter does not "exclude" the jurisdiction of this tribunal in respect of disputes arising under UNCLOS.

31. The possibly quite different subject matter of an arbitration under article 16 of the CCSBT relating to the "implementation" of that Convention (see paragraph 15 above) both supports that conclusion and suggests the possible limits on an assessment by a tribunal of a State's actions by reference to its obligations under articles 64 and 117-119 of UNCLOS and on any relief which might be available were a breach to be established. But such limits do not at this stage, to my mind, affect this tribunal's jurisdiction.

32. I have accordingly voted in favour of holding that this Tribunal has jurisdiction and against the contrary decision of the Tribunal. Given the majority position, I agree of course with the revocation of the order for provisional measures.