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Southern Bluefin Tuna Cases

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A. Background to the Case

1 The *Southern Bluefin Tuna Cases* started life in the → *International Tribunal for the Law of the Sea (ITLOS)* when in 1999 the Commonwealth of Australia ('Australia') and New Zealand sought provisional measures against an increase in Japanese tuna fishing in the Southern Ocean (→ *Interim (Provisional) Measures of Protection*; → *Law of the Sea, Settlement of Disputes*). Southern bluefin tuna (*Thunnus maccoyii*) is listed in Annex I United Nations Convention on the Law of the Sea as a highly migratory species (→ *Straddling and Highly Migratory Fish Stocks*). Commercial harvesting in the Southern Ocean began in the early 1950s, but the stock had become seriously depleted. In 1993 the three States most interested (Australia, New Zealand, and Japan) adopted the Convention for the Conservation of Southern Bluefin Tuna (with Annex) ('1993 Convention') (→ *Fisheries Agreements*; → *Marine Living Resources, International Protection*). Under the 1993 Convention, the Commission for the Conservation of Southern Bluefin Tuna ('Commission') would determine a total allowable catch ('TAC') and allocate national quotas by unanimous decision. A TAC of 11,750 tonnes was agreed and remained in force until 1997. In 1998 and 1999 the Commission was unable to agree on a TAC and Japan commenced an 'experimental fishing programme' (EFP) of a further 3000 tonnes.

2 Australia and New Zealand sought an order from ITLOS suspending the EFP pending a hearing on the merits, arguing that the fishing was for commercial purposes, with minimal scientific benefit, and would further endanger a severely depleted stock at its historically lowest levels. They also requested, inter alia, that Japan restrict its catch to the quota last agreed in the Commission and that it should act consistently with the precautionary principle (→ *Precautionary Approach/Principle*).

3 In the *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) ('Bluefin Tuna Case')*, ITLOS held that the provisions of the 1982 United Nations Convention on the Law of the Sea ('UN Convention on the Law of the Sea') invoked by Australia and New Zealand appeared to afford a basis on which the jurisdiction of an arbitral tribunal might be founded (Arts 64, 116–19 UN Convention on the Law of the Sea); that the fact that the 1993 Convention applied between the parties did not preclude recourse to the compulsory dispute settlement procedures in Part XV UN Convention on the Law of the Sea; and that an arbitral tribunal would prima facie have jurisdiction over the merits of the dispute (→ *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*). Notwithstanding this necessarily provisional view, when the parties then proceeded to → *arbitration* Japan successfully maintained its initial preliminary objections and the award handed down in August 2000—*Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility) ('Bluefin Tuna Arbitration')*—thus deals only with the jurisdiction of the arbitrators.

B. The ITLOS Decision

4 ITLOS had no difficulty concluding that under Art. 290 (5) UN Convention on the Law of the Sea, it should prescribe provisional measures to preserve the rights of the parties to the dispute or to prevent serious harm to the marine environment pending the constitution of an arbitral tribunal (→ *Marine Environment, International Protection*). The applicants alleged that Japan had violated their rights under Arts 64, and 116 to 119 UN Convention on the Law of the Sea and that further catches of southern bluefin tuna would cause immediate harm to those rights. ITLOS noted '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' (*Bluefin Tuna Case* para. 71). It concluded that therefore the parties should 'act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna' (*Bluefin Tuna Case* para. 77; → *Conservation of Natural*

Resources). For those reasons, ITLOS found that provisional measures were necessary ‘as a matter of urgency’ pending constitution of an arbitral tribunal.

5 Responding to the argument that the stock was unlikely to collapse in so short a time, Judge Laing explained that the ‘urgency or imminence is of the activity causing the harm, not necessarily the harm itself’ (*Bluefin Tuna Case (Separate Opinion of Judge Lang)* para. 8). Judge Treves made a similar point:

The urgency needed in the present case does not, in my opinion, concern the danger of a collapse of the stock in the months which will elapse between the reading of the Order and the time when the arbitral tribunal will be in a position to prescribe provisional measures. This event, in the light of scientific evidence, is uncertain and unlikely. The urgency concerns the stopping of a trend towards such a collapse. (*Bluefin Tuna Case (Separate Opinion of Judge Treves)* para. 8)

It may be noted that the same argument was made unsuccessfully in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Order of 23 January 2007) paras 43, 50; → *Pulp Mills on the River Uruguay (Argentina v Uruguay)*).

6 ITLOS emphasized the need for greater co-operation to ensure conservation and optimum utilization, and it ordered the parties to resume → *negotiation[s]* for that purpose ‘without delay.’ (*Bluefin Tuna Case* para. 78, operative para. (e)). They were also ordered to 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 (*Bluefin Tuna Case* operative para. (f); → *Equitable Utilization of Shared Resources*).

C. Assessment of the ITLOS Case

7 The ITLOS order does not take a narrow view of what is meant by ‘the marine environment’. The *Bluefin Tuna Case* is of course a fisheries dispute, concerned with Part VII UN Convention on the Law of the Sea, rather than Part XII UN Convention on the Law of the Sea, but ITLOS expressly regarded the conservation of the living resources of the sea as an element in the protection and preservation of the marine environment, and its references to the precautionary principle or approach are relevant in general terms to the interpretation and application of Part XII UN Convention on the Law of the Sea.

8 The precautionary principle or precautionary approach has been pleaded in several cases before various international tribunals, but as of 2008 the ITLOS ruling in the *Bluefin Tuna Case* remained the only one that comes close to applying the concept (see paras 77–79). Despite the limited context of a provisional measures application, ITLOS’s order appears to support the conclusion that the UN Convention on the Law of the Sea should be interpreted and applied taking account of the precautionary approach articulated by Principle 15 Rio Declaration on Environment and Development (UN Conference on Environment and Development (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol I, 3 (‘Rio Declaration’); *Bluefin Tuna Case (Separate Opinion of Judge Lang)* paras 16–19; *Bluefin Tuna Case (Separate Opinion of Judge Treves)* para. 9 → *Stockholm Declaration (1972)* and *Rio Declaration (1992)*). Although the judgment studiously avoids using the term ‘precautionary,’ ITLOS’s references to scientific uncertainty focus directly on the core element of the precautionary approach in Principle 15 Rio Declaration. Calling on the parties to act ‘with prudence and caution’ can be seen as an application of that approach, and as a ‘logical consequence’ of the need to ensure effective conservation and avoid further serious harm to the fish stock in advance of the arbitration award. In this sense, as Judge Treves observed, recognizing the uncertainties involved is ‘inherent in the very

notion of provisional measures.’ (*Bluefin Tuna Case [Separate Opinion of Judge Treves]* para. 9).

9 Some writers and governments have argued that the precautionary principle or approach is a rule of → *customary international law*, eg the European Union’s argument in the WTO *EC – Measures Affecting Asbestos and Asbestos-Containing Products* ([12 March 2001] WT/DS135/AB/R) and A Trouwborst in *Evolution and Status of the Precautionary Principle in International Law* ([Kluwer The Hague 2001] 284). Like other international tribunals considering the matter, as well as most governments, ITLOS has been hesitant to accept this characterization. However, as Judge Treves observed, it was not necessary to decide whether the precautionary principle has customary law status or if so, what it might then require (*Bluefin Tuna Case [Separate Opinion of Judge Treves]* para. 9). Nevertheless, like the 1995 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 (‘UN Fish Stocks Agreement’), the *Bluefin Tuna Case* shows that a precautionary approach does not reverse the burden of proof of harm in fisheries cases, even if the position with regard to dumping, → *whaling*, or trade in hazardous waste is to ban such activities unless they can be shown to pose no risk of harm.

10 What we can also observe from the ITLOS decisions in *Bluefin Tuna Case* and *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Order) (‘Land Reclamation’)* is that provisional measures applications may afford a useful method for tackling failure to do an → *environmental impact assessment*. In both cases ITLOS found that the risk of harm to the marine environment could not be excluded. In *Land Reclamation* it expressly ordered the parties to assess the risks and effects of the works, while in *Bluefin Tuna Case* the effect of its order was that catch quotas could only be increased by agreement after further studies of the state of the stock. The outcome in these cases suggests that if an environmental impact assessment has not been undertaken and there is some evidence of a risk of serious harm to the marine environment—even if the risk is uncertain and the potential harm not necessarily irreparable—an order requiring the parties to co-operate in prior assessment is likely to result even at the provisional measures stage.

D. The Arbitral Award

11 The *Bluefin Tuna Arbitration* was the first to take place under Annex VII UN Convention on the Law of the Sea. Arbitration is compulsory where none of the parties to the dispute has made declarations under Art. 287 UN Convention on the Law of the Sea choosing any other procedure. Japan argued, however, that the dispute arose under and should be settled solely in accordance with the 1993 Convention. That agreement did not provide for compulsory dispute settlement, and according to Japan, by becoming parties to it Australia and New Zealand had precluded themselves from referring the same matters to arbitration under Art. 281 UN Convention on the Law of the Sea. Alternatively, Japan argued that the parties’ declarations accepting the compulsory jurisdiction of the ICJ took precedence over arbitration under Art. 282 UN Convention on the Law of the Sea and that in any event attempts to settle the dispute had not been exhausted. Japan also put forward a number of objections to admissibility, arguing that the dispute was essentially about science rather than law, and that the claimants had failed to identify a cause of action.

E. The Decision of the Arbitral Tribunal

12 The arbitral tribunal held that there had been adequate efforts to negotiate a settlement, that there remained a legal dispute between the parties concerning the interpretation and application of both the UN Convention on the Law of the Sea and the 1993 Convention, and it also rejected Japan's contention that the 1993 Convention should be treated as a *lex specialis*. Obligations under the UN Convention on the Law of the Sea coexisted with and could determine the interpretation of the 1993 Convention, so that the dispute, 'while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea' (*Bluefin Tuna Arbitration* para. 52). However, on the central issue of jurisdiction, the arbitral tribunal, from whose award only Sir Kenneth Keith dissented, found in favour of Japan on the ground that, by entering into the 1993 Convention, the parties had 'preclude[d] subjection of their disputes to section 2 procedures in accordance with Article 281(1)' (*Bluefin Tuna Arbitration* para. 63). Since it thus lacked jurisdiction to rule on the merits of the case, the arbitral tribunal also revoked the provisional measures imposed in the earlier proceedings. The reasons for this denial of jurisdiction are complex and controversial, and have been heavily criticized. They have significant implications not only for law of the sea disputes but also for other treaty dispute settlement systems (Boyle [2001] 448).

13 Two findings are central to the tribunal's conclusion. First, notwithstanding its acceptance of the applicants' argument that the dispute raised issues under both treaties, the tribunal saw it as 'artificial' to separate the UN Convention on the Law of the Sea elements from the broader dispute 'centred' on the 1993 Convention, although it did accept that there might be exceptional cases where such a separation is possible. Secondly, starting from the perspective that they were essentially faced with a dispute concerning the 1993 Convention rather than the UN Convention on the Law of the Sea, the tribunal then considered whether Art. 16 1993 Convention met the terms of Art. 281(1) (b) UN Convention on the Law of the Sea. That provision excludes from compulsory jurisdiction any case where the parties have agreed to seek settlement of a UN Convention on the Law of the Sea dispute by other means unless 'no settlement has been reached by recourse to such means and the agreement...does not exclude any further procedure'. Art. 16 1993 Convention does not in terms exclude any further procedure, but in one of the more unusual exercises in creative treaty interpretation by an international tribunal, the arbitrators noted that Art. 16 1993 Convention was based on Art. XI Antarctic Treaty ([signed 1 December 1959, entered into force 23 June 1961] 402 UNTS 71), and found it 'obvious that these provisions are meant to exclude compulsory jurisdiction' (*Bluefin Tuna Arbitration* para. 58). The arbitrators supported this interpretation by reference to the number of other post-UN Convention on the Law of the Sea treaties which also make no provision for compulsory dispute settlement, and by the assertion that Art. 281 UN Convention on the Law of the Sea allows states to limit UN Convention on the Law of the Sea compulsory jurisdiction by agreement (Boyle [2001] 449).

F. Assessment of the Arbitral Award

14 There are two problems with the arbitral tribunal's view of Art. 281 UN Convention on the Law of the Sea. First, the fact that other agreements, even post-UN Convention on the Law of the Sea, make no provision for compulsory jurisdiction tells us nothing about the parties' intention with regard to the settlement of UN Convention on the Law of the Sea disputes. While Art. 16 1993 Convention excludes compulsory jurisdiction over disputes under that convention, it is not obvious that it is meant also to exclude compulsory disputes under the UN Convention on the Law of the Sea. Secondly, the more obvious article on which to rely for this purpose is Art. 282 UN Convention on the Law of the Sea, under which dispute settlement procedures of other agreements apply in lieu of Part XV UN

Convention on the Law of the Sea, provided they entail a *binding decision*. Of course Art. 16 1993 Convention does not entail such an outcome, so it could not have deprived the arbitrators of jurisdiction in this case, hence the resort to Art. 281 UN Convention on the Law of the Sea (Boyle [2001] 449).

15 But what is the effect of the tribunal's creative reading of Art. 281 UN Convention on the Law of the Sea, taken together with the unambiguous terms of Art. 282 UN Convention on the Law of the Sea? Under their interpretation of Art. 281 UN Convention on the Law of the Sea a regional agreement which makes no provision for compulsory binding settlement of disputes will apparently exclude resort to Part XV UN Convention on the Law of the Sea on the assumption that is what the parties intended. Under Art. 282 UN Convention on the Law of the Sea a regional agreement which makes provision for compulsory binding dispute settlement will also exclude resort to Part XV UN Convention on the Law of the Sea. On that interpretation these two articles could thus be reduced to a single simple proposition: regional agreements exclude the UN Convention on the Law of the Sea dispute settlement. If that is the law, why then does the UN Convention on the Law of the Sea need two articles to achieve what could be expressed in one sentence? The most pertinent answer is that Art. 281 UN Convention on the Law of the Sea was never intended to have the meaning attributed to it in this case. The context for which it seems more appropriately designed is one in which the parties to an UN Convention on the Law of the Sea dispute are seeking a negotiated settlement and agree to resort, for example, to conciliation (Boyle [2001] 449–50; → *Conciliation*). If this does not result in settlement, then the parties would remain free to resort to the UN Convention on the Law of the Sea procedures unless they had specifically agreed otherwise. Yet, even if Art. 281 UN Convention on the Law of the Sea were intended also to cover dispute settlement clauses such as the one found in the 1993 Convention, one comes back to the question: how is it possible to read into one agreement (the 1993 Convention) an intention to preclude resort to compulsory procedures in the event of disputes arising under another agreement (the UN Convention on the Law of the Sea)? Or, put another way, where is the justification for reading Art. 16 1993 Convention as applying both to disputes under that agreement and to disputes under the UN Convention on the Law of the Sea? The arbitral tribunal offers none, save for its vague assertion that Art. 281 UN Convention on the Law of the Sea so intends, and its reliance on those other treaties which also make no reference to the UN Convention on the Law of the Sea, and which tell us only how the parties intend to handle disputes arising under those same agreements (Boyle [2001] 450); → *Judicial Settlement of International Disputes*).

16 The core of the problem is the reluctance of the arbitrators to treat the case as raising UN Convention on the Law of the Sea issues separate from the 1993 Convention. There is no doubt that the case is about high seas fishing, and that there are relevant and applicable articles of the UN Convention on the Law of the Sea—Arts 64, 116–19—as the ITLOS observed in the earlier proceedings (→ *Fisheries, High Seas*). There is equally no doubt that, but for the 1993 Convention, a dispute concerning the interpretation or application of those articles would have fallen within Part XV UN Convention on the Law of the Sea compulsory jurisdiction. On the facts of this case, such a dispute, confined to the application of the UN Convention on the Law of the Sea, might well have led to failure on the applicants part to show a violation of the Convention, but that does not mean there is no UN Convention on the Law of the Sea dispute or that the UN Convention on the Law of the Sea has no further relevance for parties to the 1993 Convention, as the arbitral tribunal itself admits. What the arbitrators may have believed is that they could not decide the UN Convention on the Law of the Sea issues without also deciding on interpretation and application of the 1993 Convention. Since it clearly had no jurisdiction over disputes concerning the latter, the tribunal may have felt unable to decide any other issues, including those concerning the UN Convention on the Law of the Sea, which could not be kept separate. This would be a defensible position under a treaty which by no means makes

binding settlement compulsory for all disputes and under which issues subject to compulsory jurisdiction may well be bound up with others which are not. In effect a UN Convention on the Law of the Sea tribunal would then be required to deny jurisdiction over any of the issues unless it had jurisdiction over all of them. If the case can be understood in this way then its implications for dispute settlement would be important, but also consistent with the overall scheme of Part XV UN Convention on the Law of the Sea. But the tribunal makes no reference to any such principle of inseparability in justifying its dismissal of the case, apart from pointing to the 'artificiality' of treating such a case as a UN Convention on the Law of the Sea dispute.

17 On the other hand, if the inseparability of the UN Convention on the Law of the Sea issues is not the basis of this judgment, then the outcome is more questionable. The arbitrators would then simply be reading Part XV UN Convention on the Law of the Sea as impliedly subject to subsequent regional agreements, and as taking out of compulsory settlement any case which raises matters concerning both the UN Convention on the Law of the Sea and another agreement on which the dispute is 'primarily centred'. Such an outcome means that when high seas fishing states participate in regional fishery agreements without a compulsory dispute settlement clause they may well lose the protection from coastal state 'creeping jurisdiction' which Part XV UN Convention on the Law of the Sea provides. The irony in the *Bluefin Tuna Arbitration* award is that it would appear also to deny Japan access to compulsory dispute settlement if Australia and New Zealand were to assert jurisdiction over Japanese tuna fishing on the high seas for the purpose of enforcing or making more effective the 1993 Convention. Moreover, it is far from certain when a dispute is 'primarily centred' on one treaty rather than another. Can there be disputes which have no primary centre in either treaty? The arbitral tribunal's reasoning, rather than its actual conclusion, opens up a minefield of uncertainty (Boyle [2001] 451).

18 A further irony, of which the arbitral tribunal was well aware, is that Art. 30 (2) UN Fish Stocks Agreement imports the provisions of Part XV UN Convention on the Law of the Sea compulsory dispute settlement into the 1993 Convention and other regional agreements. Or perhaps not? Those provisions include Art. 281 UN Convention on the Law of the Sea, which according to the arbitrators' award, excludes from Part XV UN Convention on the Law of the Sea those disputes which also arise under regional treaties with no provision for compulsory dispute settlement. The tribunal conveniently ignores the circularity in its own reasoning when adverting to the benefits the UN Fish Stocks Agreement will bring to fisheries disputes such as this one (Boyle [2001] 451).

19 The most difficult aspect of this case concerns the relationship between the UN Convention on the Law of the Sea and regional treaties. Regional environmental and fisheries treaties often amplify the framework provisions of the UN Convention on the Law of the Sea; only rarely do they mirror its dispute settlement provisions (→ *Regional Seas, Environmental Protection*). How should a UN Convention on the Law of the Sea tribunal respond to a dispute which straddles both the UN Convention on the Law of the Sea and a regional implementation treaty? The answers are confused. In contrast to ITLOS, the arbitrators chose to integrate the application of the UN Convention on the Law of the Sea and the 1993 Convention, and in so doing went on to conclude that the latter treaty deprived them of jurisdiction to decide the dispute under the former. The decision of the *Bluefin Tuna Arbitration* arbitrators may simply be wrong, and it is far from certain, given its earlier views, that ITLOS would follow the award's treatment of the 1993 Convention. In the → *MOX Plant Arbitration and Cases (The MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)* ITLOS Case No 10 (3 December 2001) paras 49-52; *Dispute concerning Access to Information under Article 9 of the OSPAR Convention- Ireland v United Kingdom* (PCA, 2 July 2003) (2003) 42 ILM 1118, para. 18), neither ITLOS nor the

arbitrators did so. Both judgments preferred to see the UN Convention on the Law of the Sea and the Convention for the Protection of the Marine Environment of the North-East Atlantic ([opened for signature 22 September 1992, entered into force 25 March 1998] 32 ILM 1069) as parallel but separate regimes. Notwithstanding that the latter convention provided for compulsory binding settlement of disputes, neither tribunal accepted the argument that Art. 282 UN Convention on the Law of the Sea thereby excluded jurisdiction over the case as pleaded. It is not possible for both the *Bluefin Tuna Arbitration* and the *MOX Plant Case* to be correct on this issue; the choice between them is essentially one of policy, but at some point a choice will have to be made.

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