

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, the 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 faces, 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 (“TAC”). 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 on “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 on “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 gain 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

(e)mphasize[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 during the 1930 League of Nations codification process and 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.

- oOo -