THE AUSTRALIA AND NEW ZEALAND *V.* JAPAN SOUTHERN BLUEFIN TUNA (JURISDICTION AND ADMISSIBILITY) AWARD

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I am delighted to be back in Bangkok and to have the honour of addressing this important SEAPOL Inter-Regional Conference on "Ocean Governance and Sustainable Development in the East and Southeast Asian Seas: Challenges in the New Millenium". I am particularly grateful for this invitation to speak about the Southern Bluefin Tuna Arbitration, which has indeed uniquely contributed to these challenges. This Arbitration not only marked the first international litigation involving Japan for over 60 years (since the 1923 SS Wimbledon and the 1932 Memel Territory cases before the PCIJ)[1] and was won by Japan, but it also marked the landmark case of great prominence in the peaceful settlement of disputes in more than one count.

As the *Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* is a decision of pronounced procedural complexity and significant multifaceted impacts, I shall present it by addressing:

* *firstly*, the course of proceedings before the Arbitral Tribunal and the delivery of the Award on August 4, 2000;

* *secondly*, the paramount questions raised by the parties and the answers given thereto by the Award; and

* *thirdly*, impacts of the paramount answers of the *Southern Bluefin Tuna Award.*

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[1] Both in the SS Wimbledon, 1923 P.C.I.J. (ser. A) No.1, and Interpretation of the Statute of the Memel Territory [1932 P.C.I.J. (ser. A/B) No.47 at 243 and 1932 P.C.I.J. (ser. A/B) No.49 at 294] cases, Japan was technically an applicant in its capacity as one of the Principal Allied Powers (also including Great Britain, France, and Italy) under the terms of the 1919 Versailles Treaty of Peace. *See, also,* the preceding Germany, France, and Great Britain/Japan Award of May 22, 1905, RIAA XI, 5 1; 2 AM. J. INT'L. L. 915 (1908).

I. THE COURSE OF PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL AND THE DELIVERY OF THE SOUTHERN BLUEFIN TUNA (JURISDICTION AND ADMISSIBILITY) AWARD

The *Southern Bluefin Tuna* case originally arose out of a dispute under the trilateral Convention for the Conservation of Southern Bluefin Tuna (CSBT Convention) of 10 May 1993[2] between Australia and New Zealand (A/NZ), on the one hand, and Japan, on the other, regarding a unilateral experimental fishing programme (EFP) carried out by Japan on the high seas in 1998-99 with respect to southern bluefin tuna (SBT, *Thunnus maccoyii*), a highly migratory species. Following unsuccessful efforts to resolve the matter under the CSBT Convention, A/NZ invoked the compulsory arbitration under Part XV, Section 2 and Annex VII of the 1982 United Nations Convention on the Law of the Sea. The establishment of an Arbitral Tribunal was paralleled by an Order of the International Tribunal for the Law of the Sea (ITLOS) of August 27, 1999, which upheld its prima facie jurisdiction under Articles 288(l) and 290(5) of the 1982 Convention and prescribed provisional measures in apparent reliance on the standard of "serious harm to the marine environment" in pursuance to Article 290(l).[3]

In addition to the prior appointments of Sir Kenneth Keith, KBE by A/NZ and of Professor Chusei Yamada by Japan under Article 3(b)-(c) of Annex VII, three neutral Arbitrators, including then President of the International Court of Justice (ICJ), Judge Stephen M. Schwebel (United States), as well as Judges Florentino Feliciano (Philippines) and Per Tresselt (Norway), were all appointed by November 1999 through agreement between the parties in pursuance of Article

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[2] 1819 U.N.T.S. 360. The Convention's Articles 3-9, 13, 16 and 20 are recited in Award, para.23. Upon its ratification by Australia, New Zealand, and Japan, the CSBT Convention entered into force on May 30, 1994. It is open for accession by any other state fishing for CSBT (Republic of Korea, Taiwan, Indonesia in whose waters SBT stock spawns, and some flag-of-convenience states) or any coastal state other than A/NZ (South Africa) through whose territorial sea and 200-mile exclusive economic zone (EEZ) this stock migrates. *See* http://www.home.aone.net.au/ccsbt/.

[3] *See* case report by this author in 94 AM. J. INT'L. L. 150-155 (2000), noting, at 152, that since none of the three parties had made a declaration under Article 287 of the Law of the Sea Convention, they were deemed to have accepted arbitration in accordance with Annex VII. For the text of the Order, of which paras. 40-87 and operative para. 90 are recited in Award, para.35, *see* 38 I.L.M. 1624 (1999), *available at* http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm.

See, also, surveys of that Order by G. EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, 309-319 (2000); B. Kwiatkowska, *The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases*, 15 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 1-36 (2000), 1-36; M. Hayashi, *The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the ITLOS*, 13 TUL. ENVTL. L. J. 361-385 (2000); R. Churchill, *The Southern Bluefin Tuna (Provisional Measures) Order*, 49 INT'L & COMP. L. Q. 979-990 (2000).

3(d).[4] After appointment of Judge Schwebel as the Tribunal's President,[5] a number of procedural matters were agreed and the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank, Washington D.C. accepted invitation to serve as the Registrar.[6] Japan filed its Memorial on Jurisdiction on February 11, and Australia and New Zealand filed their Joint Reply on March 31, 2000.

The oral hearing was held at the seat of ICSID on May 7-1 1. At its opening, President Schwebel announced that in view of the wish of applicants to be considered as a single party, of Japan's lack of objection, and of the parties agreement to continue using the provisional title of the proceedings, the title would be: *Southern Bluefin Tuna (Australia and New Zealand v. Japan) Case*.[7] The A/NZ Agents (Mr. William McFadyen'Campbell and Mr. Timothy Bruce Caughley) and senior counsel (Professor James Crawford, Dr. Henry Burmester, QC, and Mr. Bill Mansfield) remained the same as in the ITLOS proceedings, while Japan had now the new Agent (Mr. Shotaro Yachi) and three new foreign counsel (Shabtai Rosenne, Sir Elihu Lauterpacht, QC, CBE, and Professor Vaughan Lowe). During the hearing, Japan also submitted a voluminous set of special treaties referred to in Annex 47 of its Memorial. On May 10, Arbitrators addressed a number of important questions to the parties, replied to by them in writing on May 26.[8]

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[4] Note that each party prepared a list of 10 arbitrators and that the three Arbitrators were appointed as a result of their inclusion by both parties in their respective lists. On prominent experience of each of the Five Southern Bluefin Tuna Arbitrators, *see* Kwiatkowska, *supra* note 3, at 30-31.

[5] For Biography of then President Stephen M. Schwebel, testifying to the unique prominence of his achievement, *see* 52 ICJ Yearbook 20-21 (1997-1998), http://www.icj-cij.org/icjwww/igeneralinformation/icvjudge/Schwebel.html; and the Johns Hopkins SAIS's site at http://sais-jhu.edu/depts/Intlaw/index.htm. President Schwebel's appointment to the Southern Bluefin Tuna and the Eritrea/Yemen Arbitral Tribunals (*at* http://www.pca-cpa.org/RPC/ch1ER-YE.htm), and to the UN Ethiopia/Eritrea Boundary Commission (PCA, UN Doc. S/2001/45 (2001)) reflected a long- standing tradition for members of the World Court to act as arbitrators in inter-state and other arbitrations. Cf. B. Kwiatkowska, *The Law-of-the-Sea-Related Cases in the International Court of Justice During the Presidency of Judge Stephen M. Schwebel (1997-2000)*, 16 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 1-40 (2001); NILOS YEARBOOK OF INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA, Vol.14-1998 (2000), xix-li; websites of the NILOS and the PICT are http://www.rgi.ruu.nl/english/isep/paper.asp and http://www.pict-pcti.org/links/links.html, respectively.

[6] Award, paras. 6-9. There were no written rules of procedure.

[7] Award, para. 11; Oral Hearings, Vol.1 (Opening Remarks by President Schwebel, May 7, 2000).

[8] Award, para.20; Oral Hearings, Vol.111 (Questions of Arbitrators, May 10, 2000), Vol.IV (Question of Sir Kenneth Keith, May 11, 2000).

In an unprecedented departure from the fundamental principle of the confidentiality of arbitration proceedings,[9] public access to the hearing was allowed, and both the written pleadings (except annexes and replies to Questions of Arbitrators) and transcripts of the hearing were posted on the ICSID website, together with the related Press Release of May 7. Japan has paralleled the proceedings by various measures expressing its support for the peaceful settlement of international disputes, including a visit of the Emperor to the ICJ on May 24.[10] On the occasion of the ILA Opening Address held by President Schwebel to a 600-people audience at Westminster Hall in London on July 25, he reiterated the unique role of the ICJ as the principal judicial organ of the United Nations and the only truly universal judicial body of general jurisdiction, in the context of proliferation of various specialized and regional courts and tribunals.[11]

The *Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* was rendered on August 4, 2000 and was posted on the ICSID website on August 7, together with a Press Release summarizing the findings and decisions of the Arbitral Tribunal. The Tribunal decided by a 4:1 vote that it was without jurisdiction to rule on the merits of the dispute and accordingly, pursuant to Article 290(5), it revoked unanimously provisional measures in force by the 1999 ITLOS Order.[12] Dissenting Arbitrator Sir Kenneth Keith appended his Separate Opinion to the Award.[13]

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[9] Cf. S.M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW - SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL, 228-229 (1994), noting that such confidentiality, along with choosing of arbitrators by the parties, their or the tribunal's deciding upon the rules of procedure, and non-admissibility of third party intervention, have been amongst the most obvious reasons for states to choose arbitration over judicial settlement.

[10] ICJ Communiqué No.2000/15 (May 24, 2000), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2000/ipresscom2000-15_visitofemperorjapan_20000524.htm. Informal character of this visit, effected on invitation of the most senior ICJ member, H.E. Judge Shigeru Oda, was underlined by no speech delivered by the Emperor.

[11] Opening Address of H.E. Judge Stephen M. Schwebel, Report of the 69th International Law Association, London, July 25-29, 2000, 135-136 (2000). Cf. Statements of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, UN Doc. A/52/PV.36 (1997), at 1-5; UN Doc. A/53/PV.44 (1998), at 1-5; and UN Doc. A/54/PV.39 (1999), at 1-5, *at* http://www.icj-cij.org. Cf. *also*, Keynote Speech of President S.M. Schwebel, *The Influence of the International Court of Justice on the Work of the ILC and the Influence of the Commission on the Work of the Court*, *in* Making Better International Law: The International Law Commission, at 50, United Nations Proceedings, October 28-29, 1997, 1998, 161-164; S.M. Schwebel, *The Impact of the International Court of Justice*, *in* Liber Amicorum Boutros Boutros- Ghali, 1998, 663-674; Plenary Address of President Stephen M. Schwebel, *The Contribution of the International Court of Justice to the Development of International Law*, *in* International Law and The Hague's 750th Anniversary, Kurhaus Proceedings, July 2-4, 1998, 1999, 405-416; and S.M. Schwebel, *The Inter-Active Influence of the International Court of Justice and the International Law Commission*, *in* Liber Amicorum Judge Josg Maria Ruda, 2000, 479-505.

[12] Award, (dispositif) para.72(i)-(2).

[13] Award, para.73.

The Award displays masterly legal draftsmanship, which is typical of decisions rendered by the ICJ during President Schwebel's triennium (1997-2000), and it is structured along seven chapters dealing with: I. Procedural History; II. Background to the Current Proceedings; III. Provisional Measures Prescribed by ITLOS; IV. Japan's Position on the Lack of Jurisdiction and Admissibility; V. The Position of Australia and New Zealand on the Presence of Jurisdiction and the Admissibility of Their Claims; VI. The Final Submissions of the Parties; VII. The Paramount Questions and the Answers of the Tribunal; and Dispositif. The critical Chapter VII commences by pointing out that:

> 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 also 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.[14]

The significance of those issues is underlined by the fact that particular density of such special treaties implementing or relating to the Law of the Sea Convention, forms a remarkable part of the fabric of modem law of the sea as part of general international law and as part of the global system of peace and security.[15]

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[14] Award, para. 44. On the use of abbreviation " UNCLOS ", *see* Award, para. 1.

[15] *See* UNITED NATIONS, THE LAW OF THE SEA - MULTILATERAL TREATIES: A REFERENCE GUIDE TO MULTILATERAL TREATIES AND OTHER INTERNATIONAL INSTRUMENTS RELATED TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (rev. ed. as of December 31, 1996); *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, UN Doc. FAO/FIPL/C940 (1999); *Compliance Mechanisms and Dispute Settlement in Global and Regional Environmental Conventions*, UN Doc. UNEP/EC/WG.3 (1999); and the annual reports, *e.g.*, *Oceans and the Law of the Sea - Report of the Secretary-General*, UN Doc. A/55/61 (2000).

II. THE PARAMOUNT QUESTIONS AND THE ANSWERS OF THE SOUTHERN BLUEFIN TUNA (JURISDICTION AND ADMISSIBILITY) AWARD, INCLUDING ITS SEPARATE OPINION

A. HAS THE DISPUTE BECOME MOOT?

In its unprecedented exercising of *la competence de la competence* under Article 288(4) of the 1982 Convention, the Arbitral Tribunal addressed first the question whether the dispute, as respondent maintained and applicants contested, has become moot and should be discontinued due to Japan's acceptance of a 1,500-ton EFP catch limit (as proposed by Australia in 1999).[16] In the view of the Tribunal, if the parties could agree on an EFP, an element of which would be to limit catch beyond the de facto limits of total allowable catch (TAC) to 1,500 tons, that salient aspect of their dispute would indeed have been resolved. But Australia and New Zealand did not now accept such an offer or limitation by Japan, and even if they did, it would not dispose of the dispute, which concerns the quality as well as the quantity of the EFP and perhaps also other elements, such as the assertion of a right to fish beyond TAC limits that were last agreed.[17] Japan now proposed experimentally to fish for no more than 1,500 tons, 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 SBT in the absence of a decision by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) upon a TAC and its allocation among the parties.

B. DID THE DISPUTE FALL UNDER THE CSBT CONVENTION OR THE 1982 CONVENTION OR BOTH? DID THE CSBT CONVENTION PREVAIL AS THE *LEX POSTERIOR* AND *LEX SPECIALIS* OVER THE 1982 CONVENTION?

Having determined that the dispute which the applicants seized the Arbitral Tribunal with was not rendered moot, the Tribunal turned to the paramount and multifaceted question whether that dispute fell solely - as Japan

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[16] Award, paras. 45-46. Cf remarks on mootness in Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Preliminary Objections) (Libya v. U.K.), 1998 I.C.J. 70-71 (February 27) (dissenting opinion of President Schwebel), and Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Preliminary Objections) (Libya v. U.S.), 1998 I.C.J 161-162 (February 27) (dissenting opinion of President Schwebel), *summarized in* 92 AM. J. INT'L. L. 503 (1998).

[17] The TAC of 1989, as last agreed by the CCSBT in 1994, was of 11,750 tons, with national allocations of 6,065 tons to Japan (possessing the main market for the sale of SBT, being prized as a delicacy for sashimi), 5,265 tons to Australia and 420 tons to New Zealand. *See* Award, paras. 21-22 and 24; and the 1999 ITLOS Order, operative para.90(l)(c)-(d).

contended - under the CSBT Convention or whether it also fell - as A/NZ argued - under the Law of the Sea Convention? While reiterating its arguments advanced previously during the ITLOS proceedings, Japan now also contended that the 1993 CSBT Convention prevailed substantively and procedurally as the *lex posterior* and *lex specialis* over the 1982 UN Convention as "an umbrella or framework Convention."[18] In the period between entry into force of the former and the latter treaties for all the three parties in 1994 and 1996 respectively, the former, *i.e.*, the CSBT Convention alone regulated their treaty relations in respect of SBT, and the density of these relations could not, in Japan's view, have increased in as radical a manner as A/NZ asserted. Moreover, the CSBT Convention as a *lex specialis* not only implemented the provisions of an anterior Law of the Sea Convention, but it also exhausted and supplanted those provisions, including Articles 64 and 116-119 and Annex 1, which were relied upon by the applicants and were fully covered by the more specific provisions of the CSBT Convention. The existence of the real dispute at issue only under the CSBT Convention was also reflected by the failure of the applicants to bring suit under the 1982 Convention against CSBT non-party states fishing for the stock in question. Japan considered that its analysis was consistent with the Convention's Article 311(5) on Relation to Other Conventions and International Agreements and Article 30(2)-(3) of the Vienna Convention on the Law of Treaties.[19]

Australia and New Zealand, on their part, admitted that the Arbitral Tribunal was not bound to hold in favour of its jurisdiction over the merits by the findings of ITLOS, but they found it significant that ITLOS, basing itself on the ICJ definition of the dispute,[20] upheld all its findings concerning jurisdiction *prima facie* unanimously.[21] Since the parties held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations, the applicants considered that there was a legal dispute between them over the interpretation and application of the respective provisions of the Law of the Sea Convention.[22] In the A/NZ view, Japan's reliance on the principles of *lex posterior*

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[18] Award, paras. 29, 38(a)-(e) and 51.

[19] Award, para. 38(e); Japan's Memorial, paras 116-131; Oral Hearings, Vol.I (Sir Elihu Lauterpacht, May 7, 2000), Vol.III (Lauterpacht, May 10, 2000).

[20] ITLOS Order, para.44, *citing* the Mavrommatis Palestine Concessions Judgment, 1924 P.C.I.J. (ser. A), No. 2, at 11, and the South-west Africa Cases (Preliminary Objections) 1962 I.C.J. 328 (December 21). For reaffirmation of these holdings, *see* Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Preliminary Objections) (Libya v. U.K.), 1998 I.C.J. 17 (February 27), and the Case Concerning Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Preliminary Objections) (Libya v. U.S.), 1998 I.C.J. 122-123 (February 27).

[21] Award, paras. 36 and 41(a)-(b).

[22] Award, para.41(c), *citing* Advisory Opinion, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase) 1950 I.C.J. 74 (March 30); and Award, paras 41(d)-(f), 43 and 50.

and *lex specialis* was misplaced, not only because those principles only apply when two legal instruments conflict, but also because Article 311(2) itself regulates relationships with implementing compatible treaties such as the CSBT Convention.[23] The applicants drew analogy between parallelisms of treaty obligations and jurisdictional clauses, contending that 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; and that such jurisdictional clauses do not cancel out one another, but are cumulative in effect. They stressed that the presumption of parallelism of jurisdictional clauses (*e.g.*, under the Optional Clause, a bilateral treaty and/or a multilateral treaty) was long-standing and entrenched in the case-law of the ICJ.[24]

The paramount answers given by the Arbitral Tribunal to the foregoing issues raised by the parties are contained in six substantial paragraphs of the Award which were concurred with by all Five Arbitrators.[25] The Tribunal noted that the fact that the applicants maintained, and the respondent denied, that the dispute involved the interpretation and application of the Law of the Sea Convention did not of itself constitute a dispute over the Convention's interpretation. As did the ICJ in like circumstances, the Arbitral Tribunal had to ascertain whether the violations of the treaty pleaded did or did not fall within the provisions of the treaty and whether, as a consequence, the dispute was one which it had jurisdiction *ratione materiae* to entertain.[26] It observed that 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. In determining whether the real dispute, which has been submitted to it, did or did not "reasonably (and not just remotely)" relate to the obligations set forth in the treaties whose breach was alleged, the

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[23] Award, para.41(g) and (k); A/NZ Reply, paras 143-148, 152-163, contending (para. 145 n.161) inapplicability of Article 311(5) on the ground that Article 64 was not listed in, 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 - A COMMENTARY 240 (311.8) (M.N. Nordquist, S. Rosenne & L. Sohn eds., 1989). Note, however, that this was but an editorial or typing oversight, also repeated by Rapporteur Sir Ian Sinclair, *Preliminary Expose on Problems Arising From a Succession of Codification Conventions on a Particular Subject*, YEARBOOK OF INSTITUTE OF INTERNATIONAL LAW 66 (Session of Lisbon 1995, Part 1), 39 and 68, and that Article 64 is clearly covered by Article 311(5). On Article 31 1, *see, also,* Oral Hearings, Vol.11 (Counsels Crawford, Irwin, May 8, 2000), Vol. IV (Counsel Mansfield, May 11, 2000).

[24] Award, para. 41(h) and (k); A/NZ Reply, paras 39-53 and 106, analyzing the respective ICJ jurisprudence.

[25] Award, paras. 47-52, which also took account of replies to Questions of Arbitrators, *supra* note 8. *See* also para.54, *infra* note 36.

[26] Award, para. 48, *citing* Oil Platforms (Preliminary Objections) (Iran v. U.S.), 1996 I.C.J. 810 (December 12), para. 16.

Tribunal – like the ICJ – based itself in the instant case not only on the application and final submissions of the parties, but on diplomatic exchanges, public statements and other pertinent evidence.[27]

It was clear from the record placed before the Arbitral Tribunal by both parties that the most acute elements of the dispute turned on their inability to agree on a revised TAC and the related conduct by Japan of unilateral EFP in 1998-99, as well as Japan's announced plans for such fishing thereafter.[28] All these main elements of the dispute, including resort to its resolution in pursuance of Article 16 of the CBST Convention, were clearly within the mandate of the CCSBT and the contentions of the parties in respect of that dispute related to the implementation of their obligations under this Convention. The Tribunal's answer to the first part of the question here under consideration, namely whether the dispute fell under the CSBT Convention was, therefore, in the affirmative and the Award notes that in fact there was no disagreement between the parties in this respect. The issue rather was that question's second part, namely whether the dispute also fell under the 1982 Convention, in particular its Articles 64 and 116-119 laying down applicable norms by which - along with the respective principles of customary international law - the lawfulness of Japan's conduct could be evaluated? The related question was whether, as Japan argued and the applicants contested, the *lex specialis* of the CSBT Convention and its institutional arrangements have subsumed, discharged and eclipsed provisions of the Law of the Sea Convention bearing on the conservation and optimum utilization of SBT?[29] While rejecting (as did ITLOS) central contention of Japan that the dispute fell solely under the CSBT Convention and accepting A/NZ's arguments in favour of its falling under both this and the Law of the Sea Convention, the Arbitral Tribunal made certain observations which amount to an unprecedented exposition of a paramount doctrine of substantive and procedural parallelism between the umbrella Law of the Sea Convention and its innumerous implementing special treaties. The Tribunal stated:

> 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

[27] Award, para. 48, *citing* Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4), paras. 30-31, *reported in* 93 AM. J. INT'L. L. 502-507 (1999), http://www.icj-cij.org.

[28] Award, paras. 47, 49 and 52 in fine. *See, also, infra* note 40.

[29] Award, paras. 50-51.

> 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 cooperate 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.[30]

Such a parallelism was reinforced by the Tribunal's questions whether if the CSBT Convention were to be regarded as having eclipsed the fisheries related obligations of the Law of the Sea Convention, those obligations would revive for a party to the former convention that withdraws therefrom under its Article 20; and whether it could really be the case that the obligations of the 1982 Convention in respect of migratory stocks do not run between the parties to the CSBT Convention, but do run to third states being the parties to the former but not to the latter treaty. Nor was it clear that the particular provisions of the CSBT Convention exhaust the extent of the relevant obligations of the 1982 Convention, of which, some provisions (duty to take measures for their nationals under Article 117, or prohibition of discrimination against fishermen of any state under Article 119) are not found in the former convention and remain operative even where no TAC has been agreed and cooperation in the CCSBT has broken down. The CSBT Convention commits the parties to take all action necessary to ensure its enforcement and compliance with measures that become binding. But the Tribunal viewed the respective Law of the Sea Convention's provisions as not only going beyond this general obligation in the foregoing respects but as in force even where measures being considered under the CSBT Convention have not become binding thereunder. Moreover, a dispute concerning the interpretation and implementation of the CSBT Convention could not be completely alien to the interpretation and application of the 1982 Convention for the very reason that the former was designed to implement the latter. For all these reasons, the Tribunal concluded that the dispute, while centered in the CSBT Convention,

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[30] Award, para. 52. On importance attached by President Schwebel to the "considerable and constructive" influence of the ICJ on the development of the international law of human rights, *see* SCHWEBEL, *supra* note 9, at 146-168; and his Statements of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, UN Doc. A/52/PV.36 (1997), at 1-5; UN Doc. A/53/PV.44 (1998), at 1-5; and UN Doc. A/54/PV.39 (1999), at 1-5, *at* http://www.icj-cij.org. For reliance on Judge Schwebel's views, *see* Nuclear Weapons Oral Hearings, CR 95/25, 37 (Indonesia, 3 November 1995), CR 95/27, 67 (Malaysia, 7 November 1995).

also arose under the Law of the Sea Convention, and that this conclusion was consistent both with its Article 311(2) and (5) and with Article 30(3) of the Vienna Convention on the Law of Treaties.[31]

C. DID ARTICLE 281(1) JUSTIFY RESORT TO PART XV SECTION 2, DUE TO THE FORMERS REQUIREMENT THAT "NO SETTLEMENT HAS BEEN REACHED BY RECOURSE" TO MEANS OF OWN CHOICE UNDER SECTION 1, A APPLICABLE TO THE CSBT CONVENTION? WAS ARTICLE 283 FULFILLED?

With a view of further determining its *la competence de la competence*, the Arbitral Tribunal had to consider the procedural effects of the above parallelism in terms of applicability of the dispute settlement schemes designed in the two treaties. In particular, the Tribunal could uphold its jurisdiction only if it was able to conclude that the applicants were justified in their resort to compulsory procedure of the Annex VII Arbitral Tribunal in pursuance of Articles 286-288 of Part XV, Section 2, as a result of fulfillment of both paramount requirements laid down in Article 281(l) on Procedure Where No Settlement Has Been Reached by the Parties. They were:

> * that "no settlement has been reached" by recourse to means of own choice of the parties pursuant to Section 1, with such means in the instant case being designed in Article 16 of the CSBT Convention; and
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> * that "the agreement between the parties", as applicable to Article 16 of the CSBT Convention, "does not exclude any further procedure."

With respect to the first of those requirements of Article 281(l) and the corresponding Article 283 on Obligation to Exchange Views, Japan and A/NZ reiterated and further clarified all their conflicting arguments against and in support of the contention that in pursuance of those provisions, dispute settlement procedures agreed in Article 16 of the CSBT Convention have been exhausted.[32] Japan argued that even if it was to assume for the sake of argument that the dispute fell under both the CSBT and the Law of the Sea Conventions, the parties were - under Article 280 on Settlement of Disputes by Any Peaceful Means Chosen by the Parties, found in Part XV, Section I - free to settle the

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[31] Award, para. 52 in fine. Cf. *supra* notes 19 and 23. On Article 30 of the Vienna Convention as supplying elements upon which the provisions of Article 311 - centered around the compatibility standard - were constructed, *see* B.H. Oxman, *The UNCLOS III Ninth Session (1980)*, 75 AM. J. INT'L. L. 211, 249-250 (1981); Roseniie & Solin, *supra* note 23, at 235-236, 241, 243. On Article 30(3) of the Vienna Convention, *see* SIR ARTHUR WAITS, KCMG, QC, 11 THE INTERNATIONAL COMMISSION 1949-1998, 675, 679, 804 (1999).

[32] Award, paras. 26-28, 34, para.38(a), (g)-(j), para.39, para.41(a), (g) and (i)-(k), unit paras. 42-43.

dispute "at any time" (be it before or after a dispute has arisen) by any means of their own choice. And that by failing to exhaust those means, namely Japan's proposals for mediation and arbitration under Article 16, A/NZ were precluded from resorting to the compulsory procedures of Part XV, Section 2. According to the applicants, these proposals had not been accepted because they contained no undertaking to suspend EFP and no specific proposal for the procedure or powers of the proposed arbitration. The "circular procedure or menu of options" set out in Article 16 could not, in their the view, be regarded as a choice of means under Article 280, because the latter applies to an agreement between parties to a dispute after that dispute has arisen.[33]

The paramount answers given by the Arbitral Tribunal to the foregoing issues concerning the first requirement of Article 281(1) are contained in three paragraphs of the Award.[34] The Tribunal showed appreciation of the critical importance of Article 286 of Part XV, Section 2, which the Award refers to first and points out that it must be read in "qualifying context" that includes Article 281(l), as well as the two preceding provisions of Section I - Articles 279 and 280.[35] The Tribunal accepted Article 16 of the CSBT Convention as "an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice," because it considered that the three parties well grappling not with two separate disputes under the CSBT and the Law of the Sea Conventions but with what in fact was "a single dispute arising under both Conventions."[36] It also regarded Article 16 not as a peaceful means, but as list of various procedures of peaceful settlement, of which none has thus far been chosen by the parties for settlement of the instant dispute. Nevertheless, the Tribunal was of the view (adhered to by Japan) that Article 16 fell within the terms and intent of Article 281(l) as well as Article 280.

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[33] Award, para. 41(i).

[34] Award, paras. 53-55. The award also took account of written replies of the parties to one question, *supra* note 8, namely, whether Articles 280 and 281(l) refer only to agreements reached after a dispute has arisen.

[35] Award, para. 53. Article 279 commences Section I by proceeding from the basic principle of the free choice of means in accordance with Articles 2(3) and 33 of the UN Charter. For that principle's reaffirmation, *see* Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4), at para. 56, *reported in* 93 AM. J. INT'L. L. 502-507 (1999), http://www.icj-cij.org. On Article 286, *see* 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 - A COMMENTARY 240 (311.8) (M.N. Nordquist, S. Rosenne & L. Sohn eds., 1989), at 39 (286.6); and B.H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 353, 367 (1996), remarking: "Much has been written, not all of it flattering, about the complex and at times unusual detail of the Convention regarding settlement of disputes. A lot of it misses the point. The point is Article 286." He briefly adds that Article 286 applies only subject to Articles 281-283.

[36] Award, para. 54.

That being so, the Arbitral Tribunal unanimously concluded (as did ITLOS) that it was satisfied about fulfillment of the first fundamental requirement of Article 281(1) that no settlement has been reached by recourse of the parties to means set out in Article 16.[37] Negotiations under Article 16 "have been prolonged, intense, and serious" and could also, in the Tribunal's view, be regarded as having fulfilled Article 283, even though no settlement has manifestly been reached by recourse to negotiations required by this provision, at any rate, as yet. The Arbitral Tribunal admitted that every means listed in Article 16 has not been tried, in particular Japan's proposal for mediation and arbitration, and that Article 16(2) provided that failure to reach agreement on reference of a dispute to the ICJ or to arbitration shall not absolve parties from the responsibility of continuing to seek to resolve the dispute by any of the various means referred to in Article 16(l). But this provision did not require the parties to negotiate indefinitively while denying a party the option concluding for purposes of both Articles 281(l) and 283 that no settlement has been reached.[38] The Tribunal held that to read Article 16 otherwise would not be reasonable.

D. DID ARTICLE 281(1) JUSTIFY RESORT TO PART XV, SECTION 2 DUE TO THE FORMER'S REQUIREMENT THAT THE AGREEMENT BETWEEN THE PARTIES", AS APPLICABLE TO THE CSBT CONVENTION, DID NOT EXCLUDE ANY FURTHER PROCEDURE?

As far as the second paramount requirement of Article 281(l) that "the agreement between the parties does not exclude any further procedure" is concerned, it should be noted that it was neither pleaded in the proceedings before the ITLOS, nor pronounced upon in the 1999 Order or addressed in any of its Opinions.

During the arbitral proceedings, Japan, while contesting A/NZ's reliance on the Law of the Sea Convention and customary law as "an artifice to evade the consensual requirements of Article 1.6", argued that this provision fitted into Article 281(l). In particular, Article 16(l) "excluded any further procedures" - including compulsory arbitration pursuant to Part XV, Section 2 - beyond means which were listed therein without the consent of all the parties to the dispute, while Article 16(2) provided that no dispute was to be referred to the ICJ or to

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[37] Award, para. 55.

[38] *Id. In fine*, resembling the ITLOS Order para.60, 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."

arbitration without their consent.[39] Japan contended that a very large number of treaties have dispute settlement provisions which do not entail compulsory procedures, and that if the approach of applicants were to apply to these treaties - *e.g.*, to the 1946 International Convention for the Regulation of Whaling (ICRW) containing no dispute settlement provisions,[40] or to treaties having dispute settlement clauses similar to that in Article 16, or, at any rate, lacking compulsory sanction - their parties, which had no intention of entering into compulsory jurisdiction, would find themselves so bound. It could not reasonably be presumed that states concluded treaties containing such clauses which are useless because they are overridden by Part XV, Section 2,[41] especially that where states intend the 1982 Convention's procedures to govern, they so provide, notably in the 1995 UN Fish Stocks Agreement.[42] Japan pointed out that if the Arbitral Tribunal were to find that Part XV overrides the specific terms of Article 16 of the CSBT Convention, it "would profoundly disturb" dispute settlement provisions in many special treaties relating to the framework Law of the Sea Convention, of which vital dispute settlement regime is in fact designed to afford parties great leeway in their choice of means of peaceful settlement.

The response of Australia and New Zealand to the foregoing contentions was perhaps not the strongest part of their otherwise excellent pleadings, because they did not properly explore interpretation of the second requirement under Article 281(l) in the light of the UNCLOS III *travaux preparatories* and the related

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[39] Award, para. 38(a), (b) and (ii), para.39(a)-(b).

[40] 161 U.N.T.S. 72 (entered into force on Nov. 10, 1948); and the 1956 Protocol, 338 U.N.T.S. 366 (entered into force on May 4, 1959). An express reference in the Award, para.38(i) to tile ICRW might not have been unrelated to problems shared by Japan and Norway with respect to the US/UK and A/NZ - sponsored moratorium on commercial whaling, which has been circumvented by Norway through the objection procedure, and by Japan - through scientific research catches. In view of largely the same membership of Japan's delegations to the ICRW and the CSBT Convention, the EFP was likely modeled on scientific research programme which is allowed by and carried out by Japan under the ICRW. For recent appraisal, *see* W. Aron, W. Burke & M. Freeman, *The Whaling Issue*, 24 MARINE POLICY 179-191, 501 (2000). On the banning of Japan's access to the US EEZ and threatening economic sanctions if Japan did not curtail its scientific research whaling called to Bryde's and sperm whales, *see* INTERNATIONAL HERALD TRIBUNE, Sept. 14, 2000, at 4.

[41] Award, para.38(i)-(j). The texts of special treaties were submitted to the Arbitral Tribunal in voluminous Annex 47 to Japan's Memorial, discussing them in paras. 137-145; Oral Hearings, Vol.1 (Counsel Sir Elihu Lauterpacht, May 7, 2000). *See, also*, *supra* note 12.

[42] *United Nations Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of August 4, 1995*, 29 UN LAW OF THE SEA BULLETIN 25 (1995). For status of both the Convention and the Agreement, *see* 43 UN LAW OF THE SEA BULLETIN 1 (2000). The Agreement was signed by Australia, Japan and New Zealand but not ratified by either of them. Cf. *infra.* note 113. It was ratified by Canada on Aug. 3, 1999 in follow-up to Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4).

state practice.[43] The applicants, while stressing that the Arbitral Tribunal should sustain the effectiveness and comprehensive character of the Law of the Sea Convention's dispute settlement regime and should reject arguments lending themselves to evasion of its provisions, maintained that nothing in the terms of the CSBT Convention or its *travaux* indicated that this Convention was intended to derogate from Part XV, Section 2 in relation to obligations under the 1982 Convention.[44] Nor did Article 16 of the CSBT Convention opt out of Part XV, Section 2 for any dispute concerning the interpretation or application of that Convention even if the dispute was also one concerning the interpretation or application of the 1982 Convention. It was clear to the applicants that the second requirement of Article 281(l) was fulfilled in that "circular" Article 16 did not in terms exclude further recourse to Part XV. The requirement could not be met impliedly and it certainly was not met expressly by the language of Article 16, which far from excluding "any further procedure", excluded no possible procedure at all.[45] Although the applicants overlooked certain points while replying to Japan's contentions concerning treaty practice (Annex 47), they did invoke the practice of the World Trade Organization (WTO) providing, as does the Law of the Sea Convention, for mandatory dispute resolution, while fostering specialized arrangements and regional agreements.[46]

The paramount answers given by the Arbitral Tribunal to the foregoing issues pertaining to the critical second requirement of Article 281(t) are contained in eight paragraphs of the Award.[47] As the Arbitrators were now divided, they ultimately decided by the majority vote of 4:1 (with Sir Kenneth Keith dissenting) that the Tribunal was without jurisdiction to rule on the merits of the dispute. The Award, including its Separate Opinion, also took account of written replies of the parties (remaining confidential) to important questions asked by Arbitrators during the oral hearing, in particular: what is meant in

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[43] *See* A/NZ response to Japan's contentions concerning Annex 47 treaties, in Oral Hearings, Vol. II (Counsel Crawford, May 8, 2000), referring to Sir Elihu's contentions as "the assaults," stressing that everything Sir Elihu said was irrelevant to the instant case, and remarking: "Armed with his 107 treaties - the number probably went up overnight thanks to the combined efforts of the slave treaty workers of Clary Gottleib – he ran around in circles looking at the sky and predicting doom. Unfortunately for him, the doomed world was not the one we inhabit". *See, also, id.* (Counsel Irwin), Vol. IV (Counsel Mansfield, May 11, 2000). A/NZ might have also given not fully adequate replies to Questions of Arbitrators, *infra* note 48. *See, also, supra* notes 33-34, and *infra* note 46, 64-69 and 112-114.

[44] Award, para.41(b)) and (g); A/NZ Reply, paras. 129-155.

[45] Award, para. 41(i); Oral Hearings, Vol.11 (Counsel Burmester, May 8, 2000).

[46] Award, para. 41(k). For Understanding on Rules and Procedures Governing the Settlement of Disputes, constituting Annex 2 of the Marrakesh Agreement Establishing the WTO of April 15, 1994., *see* 33 I.L.M. 1144 (1994). Cf. F.P. Feliciano & P.L.H. Van den Bossche, *The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice*, 75 PHIL. L.J. 1 (2000).

[47] Award, paras. 56-64.

Article 281(l) by the phrase that "the agreement between Parties does not exclude any further procedure"? If, as A/NZ appear to argue or infer, it was the intent in concluding the CSBT Convention and Article 16 thereof, to leave the 1982 Convention's mandatory settlement of disputes involving SBT unaffected, why do not the terms of Article 4.6 reflect this intention and why do not they provide for compulsory settlement of the type provided for by the 1982 Convention? Do the many international agreements cited in Annex 47 of the Memorial of Japan show that international agreements do not attach fundamental importance to compulsory and binding dispute settlement in law of the sea matters? And (supplementary question of Sir Kenneth) what significance do the parties give to negative clause of some agreements that a dispute will not be referred to third-party settlement?[48]

Although the Arbitral Tribunal accepted that the terms of Article 16 do not expressly and in so many words exclude applicability of any procedure, including the procedures of Part XV, Section 2,[49] it did not draw therefrom the A/NZ conclusion that the second requirement of Article 281(l) was therefore fulfilled. Instead, the Award holds: "Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive."[50] Article 16(l) 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, while Article 16(2), in its first clause, directs the referral of a dispute not resolved by any of the above-listed means for settlement to the ICJ or to arbitration but with the consent in each case of all parties to the dispute. Since similar standard clauses are contained in many special treaties, the Award's next holding is of considerable importance. In particular, the Tribunal asserts that:

> The ordinary meaning of these terms of Article 16 makes it clear that the dispute is not referable by adjudication by the ICJ (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.[51]

Moreover, the effect of the second clause of Article 16(2) obliging the parties to continue to seek resolution of the dispute by any of the various peaceful

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[48] *See supra* note 8.

[49] Award, para. 56, and *supra* note 45. *See, also,* para.54, *supra* note 36.

[50] Award, para. 57 (the very first sentence following the previous holding).

[51] SBT Award, para. 57, and *supra* note 32. For reaffirmation of the rule of the ordinary meaning, *see* Kasikili/Sedudu Island (Bots./Namib.), 2000 I.C.J. (forthcoming), at para.20, *at* http://www.icj-cij.org/icjwww/idocket/ibona/ibonaframe.htm.

means referred to in Article 16(l) is "not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration," but also to import "that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures" of Part XV, Section 2, 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."[52] That intent is, in the Arbitral Tribunal's view, reinforced by Article 16(3) 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 CSBT Convention, which according to the Award is to say that arbitration contemplated by Article 16 is not compulsory arbitration under Part XV, Section 2, but "rather autonomous and consensual arbitration" provided in that annex. The Award finds it plain that the wording of Article 16(l) and (2) has its essential origins in the virtually identical terms of Article XI of the 1959 Antarctic Treaty that are clearly meant to exclude compulsory jurisdiction.[53] For all these reasons the Arbitral Tribunal concludes that Article 16 of the CSBT Convention "exclude[s] any further procedure" within the contemplation of Article 281(l) of the Law of the Sea Convention.[54]

Whereas this paramount conclusion merited deciding the issue of jurisdiction in the negative, it is noteworthy that as if in awareness of its position as the first Annex VII tribunal the Arbitral Tribunal found it appropriate to still explain two other considerations of a general character which it regarded as sustaining this conclusion.[55] One of them was the extent to which in pursuance of Article 286[56] compulsory procedures prescribed by Part XV, Section 2 were subject to limitations and (automatic and optional) exceptions laid down in Articles 297-299 of Section 3. The review of those provisions appeared to the Tribunal to justify its view that Part XV "falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions," which, in turn, supported its conclusion, based on the language used in Article 28(1).[57] In particular, it followed that states parties that have agreed to seek settlement of disputes by peaceful means of their own choice are permitted by

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[52] Award, para. 57. *See* also para.70.

[53] Award, para. 58. Cf. Japan's Memorial, paras. 3, 37 and 137, also referring to the same terms of Article 25 of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) of May 20, 1980, 1329 U.N.T.S. 47 (entered into force on April 7, 1982). But note that the 1991 Madrid Protocol, *infra* note 103, provides for a choice similar to Article 287, but limited to arbitration and the ICJ.

[54] Award, para. 59.

[55] The conclusion in the Award, para. 65, that the Tribunal lacks jurisdiction to entertain the merits of the dispute only follows after explanation of these two considerations in paras. 60-62 and 63-64 respectively.

[56] Award, para. 60. *See, also, supra* notes 35 and 51.

[57] Award, para. 62.

Article 9-81(l) to continue the applicability of compulsory procedures of Part XV, Section 2 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(l), when so read, provided a certain, presumably deliberately established, balance in the rights and obligations of coastal and non-coastal states in respect of settlement of disputes arising from events occurring within their 200-mile EEZs and on the high seas.[58]

Another consideration was the fact that a significant number of special treaties implementing or relating to the 1982 Convention exclude "with varying degrees of explicitness" unilateral reference of disputes to compulsory adjudication or arbitration. Many of these treaties effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, while others, as was the case with Article 16 of the CSBT Convention, in addition require the parties to continue to resolve the dispute by any of the various peaceful means of their own choice.[59] The Tribunal was of the view that the existence of such a body of treaty practice postdating as well as antedating the conclusion of the Law of the Sea Convention tended to confirm its conclusion that states parties to the Convention may, in accordance with Article 281(l), by agreement, preclude subjection of their disputes to Section 2 procedures. To hold otherwise "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."[60] The Tribunal did not exclude the possibility that there might be instances in which the continent of a state party to the Law of the Sea Convention and to its implementing fisheries treaty would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the Convention's obligations provide a basis for jurisdiction, having particular regard to the provisions of Article 300 on Good Faith and Abuse of Rights.[61]

A related consideration, which should be mentioned here and which the Arbitral Tribunal articulated separately only in the Award's end, is expressed by its remarking that when the 1995 UN Fish Stocks Agreement comes into force, it "should, for States Parties to it, not only go far towards resolving procedural problems that have come before this Tribunal but, if the Agreement is faithfully and effectively implemented, ameliorate the substantive problems that have

[58] *Id.* in fine.

[59] Award, para. 63.

[60] *Id.* in fine, and *supra* notes 40-42.

[61] Award, para. 64, noting that the applicants did not hold Japan to any independent breach of this fundamental obligation. Cf. para.41(c); A/NZ Reply, paras 38, 68 and 180-184. For reaffirmation of principle of good faith, *see* Cameroon v. Nigeria Land and Maritime Boundary Between Cameroon and Nigeria (Preliminary Objections) Judgment, 1998 I.C.J. 296-297 (June 11), paras. 38-39.

divided the Parties."[62] The Tribunal notes that while the Agreement's substantive provisions are more detailed and far-reaching than the pertinent provisions of Law of the Sea Convention or even of the CSBT Convention, the articles relating to settlement of disputes apply *mutatis mutandis* Part XV to any dispute between states parties to the Agreement (whether or not parties to the 1982 Convention) concerning the interpretation or application of a subregional, regional or global fisheries treaty relating to straddling or highly migratory fish stocks to which they are parties.

In his Separate Opinion, Judge Sir Kenneth Keith based himself on the premise adhered to by the applicants that effective dispute settlement under Part XV is "the pivot" upon which the delicate equilibrium of the compromise embodied in the Law of the Sea Convention must be balanced, and that "the development of a comprehensive system for the settlement of disputes" that may arise with respect of the interpretation or application of the Convention is one of the significant achievements of the UNCLOS III.[63] He considered that the ordinary meaning of Article 16 of the CSBT Convention "does not exclude any further procedure," because under Article 281(l) such exclusion requires "strong and particular wording" which is not found in Article 16. Sir Kenneth supported his position by the view of Shabtai Rosenne and Louis Sohn (not invoked by the applicants) that:

> The last phrase of article 281, paragraph 1, 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 procedures (including those under Part XV) may be resorted to even if the chosen procedure should not lead to a settlement.[64] (emphasis supplied)

However, it appears that the foregoing interpretation could indeed not convince the Tribunal's majority to reconsider its cautious finding that "the absence of an express exclusion of any procedure in Article 16 is not decisive" and its conclusion that Article 16 "exclude(s) any further procedure" in the meaning of Article 281(1).[65] In particular, Rosenne and Sohn's interpretation, which remains the only view expressed on the matter in otherwise vast doctrinal writings, is by itself too generally worded to conclude therefrom that the

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[62] Award, para.71, and *supra* note 42.

[63] Separate Opinion of Sir Kenneth, paras 25 and 29, citing Rosenne and Sohn, *supra* note 23, at 5. Cf. Award, para.41(b), referring to the view of UNCLOS III President Amerasinghe relied upon by A/NZ.

[64] Separate Opinion of Sir Kenneth, paras 17-19, *citing* 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 - A COMMENTARY 240 (311.8) (M.N. Nordquist, S. Rosenne & L. Sohn eds., 1989), at 23 (281.5). This view was repeated, without citation of the work and without any further comments, in EIRIKSSON, *supra* note 3, at 135.

[65] Award, paras. 57 and 59, *supra* notes 50 find 54.

respective phrase of Article 281(l) should be read: "the agreement between the parties does not [expressly] exclude any further procedure." Such conclusion does not seem supported by the ordinary meaning of Articles 280-281, of which - as Shabtai Rosenne pointed out during the *Southern Bluefin Tuna (Jurisdiction and Admissibility)* oral hearing[66] - Article 281(l) is merely a specific application of the general rule laid down in the pivotal Article 280.[67] Nor does such conclusion appear to be sufficiently substantiated by the *travaix preparatoires* of UNCLOS III[68] and by a single instance in the subsequent practice of states.[69]

E. WAS THE DISPUTE INADMISSIBLE? DID ARTICLE 282 JUSTIFY DISMISSAL OF JURISDICTION BY BOTH THE ITLOS AND THE ARBITRAL TRIBUNAL? WAS THE DISPUTE COVERED BY AUTOMATIC EXCEPTION LAID DOWN IN ARTICLE 297(3)?

Having concluded that it lacked jurisdiction to entertain the merits of the dispute, the Arbitral Tribunal did not find it necessary to pass upon questions of the admissibility of the dispute. However, it expressed its affirmative view to this effect (as previously held by the ITLOS) by observing that its analysis of the provisions of the Law of the Sea Convention that brought the dispute within that

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[66] *See* Oral Hearings, Vol.1 (Counsel Rosenne, May 7, 2000), criticizing A/NZ Reply for being silent about this point, stating that: "There is no need for any interpretation of Article 280. It rings loud and clear." stressing the fundamentally consensual basis of the jurisdiction under Part XV, and concluding that the second requirement of Article 281(l) was met because Article 16 excludes recourse to compulsory procedures.

[67] But note that according to Professor B.H. Oxman (email message of Aug. 11, 2000, on computer file with author), these two articles should be construed as applying to express agreement.

[68] For the only evidence (not invoked by the applicants) of a very early stage of those *travaux*, *see* J.R. Stevenson & B.H. Oxman, *The UNCLOS III 1974 Caracas Session*, 69 AM. J. INT'L. L. 1,29 (1975); REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 77 (M.N. Nordquist & Choon-ho Park eds., 1983), stating with respect to Working Paper on the Settlement of Law of the Sea Disputes, cosponsored by the United States, UN Doc. A/CONF.62/L.7 (1974), in UNCLOS III Official Records, Vol.111, 1975, 85, that it resulted from constructive meeting Chaired by Ambassadors Galindo Pohl (El Salvador) and Ralph Harry (Australia), Louis Sohn (USA) Rapporteur, which dealt with 11 points, including: "3. Clause relating to other obligations: the issue dealt with is whether, in the absence of *express* agreement to the contrary, precedence is given to the procedures in the Convention or other procedures accepted by the parties entailing a binding decision." (emphasis supplied)

[69] This single instance is the US interpretation (not invoked by the applicants), in Message From the President of the United States of 7 October 1994 Transmitting the United Nations Convention on the Law of the Sea to the U.S. Senate With Commentary 103 Congress, 2d Sess., Treaty Doc. 103-39, at 51, *reprinted in* 34 I.L.M. 1393 (1995), referring to the 1994 Pollock Convention, *infra* note 94. Other high seas fisheries treaties, to which the United States is a party, listed in this Message, at 47, include, *inter alia*, the 1946 ICRW, *infra* note 97, the 1980 CCAMLR, *infra* note 96, the 1989 Driftnets Convention, *infra* note 97, and the 1993 FAO Agreement, *infra* note 96. *See, also,* the Honolulu Convention, *infra* note 115. But note rather remote prospects for the US ratification of the 1982 LOS Convention.

Convention's substantive reach suggested that the dispute was not one that was confined to matters of scientific judgment only.[70]

The Award's Chapter VII did not address contention of Japan that if the Tribunal were to find that the dispute also fell under the 1982 Convention, it should have adjudged that the applicants acted inconsistently with their duty of submitting the dispute to the ICJ, in reliance on Optional Clause under Article 36(2) of the Court's Statute, which all three parties adhered to and which was covered by the phrase "or otherwise" of Article 282.[71] The questions of whether the Arbitral Tribunal considered or not Japan's request and what are the reasons of the Award's silence on the matter will remain unanswered. But the fact that the Tribunal proceeded with consideration of the terms of Article 281(l) may be interpreted as implying its support for the reasons relied upon by the applicants with respect to non-applicability of Article 282 in the instant dispute.[72]

Nor did the Award's Chapter VII refer to Article 297(3), except noting that it is one of limitations on the applicability of compulsory procedures insofar as coastal states are concerned. During the oral hearing, Australia and New Zealand reaffirmed that automatic (without requiring any declaration) exclusion under Article 297(3) from compulsory jurisdiction of coastal state fisheries in the EEZ was not in point in the instant dispute, even though they saw no jurisdictional barrier to the Tribunal's taking account of A/NZ practices in fishing SBT in their EEZs, to the extent that this was relevant in considering the dispute.[73] Whereas

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[70] Award, para.65. Cf. A/NZ contentions to this effect, para.41(a) and (c), para.43, and *supra* note 22; A/NZ Relying on Advisory Opinion, Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. 234 (July 8), at para. 13; ITLOS Order, para.43.

[71] Award, para.39(c); Oral Hearings, Vol.I (Counsel Rosenne, May 7, 2000), Vol.111 (Counsel Lowe, May 10, 2000), admitting that Japan would have challenged the Court's jurisdiction on the ground of reservations to the Optional Clause.

[72] Oral Hearings, Vol.11 (Counsel Burmester, May 8, 2000), and Vol. IV (Burmester, May 11, 2000), who agreed that the words "or otherwise" referred to by Rosenne have the potential to cover Optional Clause, but only if the relevant declarations cover dispute under the 1982 Convention and do not contain reservations which mean that the dispute is not in fact able to be settled by the ICJ.

Cf. President Schwebel's emphasis on "fundamentally and loudly consensual" nature of the ICJ jurisdiction. (*infra* note 89) For confirmation that the provisions of the 1969 Vienna Convention on the Law of Treaties apply only analogously to the interpretation of the Optional Clause declarations, to the extent compatible with their *sui generis* character of unilateral acts, *see* Fisheries Jurisdiction (Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4), at para.46, *reported in* 93 AM. J. INT'L. L. 502-507 (1999), http://www.icj-cij.org, Cameroon v. Nigeria Land and Maritime Boundary Between Cameroon and Nigeria (Preliminary Objections) Judgment, 1998 I.C.J. 296-297 (June 11), at paras 25 and 30. Cf. Fifth Report on Reservations to Treaties by Special Rapporteur Alain Pellet, UN Doc. A/CN.4/508/Add. 1 (2000), at paras 90, 183-196.

[73] Award. para. 41(b)(c); A/NZ Reply, paras. 29-30, 35 and 116; Oral Hearings, Vol.11 (Counsel Burmester, May 8, 2000), Vol. IV (Counsel Crawford, May 11, 2000). *See, also,* rebuttal arguments of Counsel Lowe, *supra* note 71. Cf. Message From the President of the United States of 7 October 1994

the Award (as did ITLOS Order) established that the dispute over the high seas part of straddling and highly migratory stocks is by itself justiciable under procedures of Part XV, Section 2, it also implied that such a dispute necessitates consideration of the broad range of rights, freedoms and interests of all states concerned.[74]

F. HOW WILL THE DISPUTE BE RESOLVED?

The Award stressed that the proceedings brought before ITLOS and before Arbitral Tribunal were not (as Japan maintained) an abuse of process, but on the contrary, have been constructive.[75] In the context of its unanimous decision to revoke the 1999 ITLOS Order, the Arbitral Tribunal held that this did not mean that the parties may disregard the effects of that Order or their own decisions made in conformity with it.[76] This Award's holding was commended in the Joint Statement of Australia's Federal Minister for Agriculture, Fisheries and Forestry, Warren Truss, and Federal Attorney-General, Daryl Williams of August 5, 2000.[77] Significantly, the Award went on to explore what it perceived as a "constructive" impact which the proceedings before the ITLOS and before this Tribunal have had not merely in terms of the suspension of Japan's unilateral EFP during the period that the Order was in force, but also on the perspectives and actions of the parties.[78]

The Award notes that the parties "have increasingly manifested flexibility of approach to the problems that divide them," that their strenuous efforts pursued within the framework of the CSBT Convention have already succeeded in narrowing the gap between them, and that an agreement on the principle of

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Transmitting the United Nations Convention on the Law of the Sea to the U.S. Senate With Commentary 103 Congress, 2d Sess., Treaty Doc. 103-39, at 51, *reprinted in* 34 I.L.M. 1393 (1995).

[74] *See* reference in the Award, para.62, *supra* note 58, to "a certain ... balance in the rights and obligations" of states, and in para.71, *supra* note 62, to the UN 1995 Fish Stocks Agreement. Cf. remarks of Kwiatkowska on the ITLOS Order, *supra* note 3, at 154; and of L.D.M. Nelson, *The Development of the Legal Regime of High Seas Fisheries*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT, 113 at 124-125 and 132, n.83 (A. Boyle & D. Freestone eds., 1999), on application of Article 297(3) (including UN Doc. A/CONF.62/L. 114, [1982]) to disputes arising under Articles 6-7 of the 1995 Agreement involving both the EEZ and the high seas.

[75] Award, para.65 in fine.

[76] Award, paras 66-67.

[77] *See* http://www.affa.gov.au/affa/pr/releases/truss/00/00153wtj.html.

[78] Award, paras 67-70, resembling the paramount concept of "preventive diplomacy" which has been welcomed in Statements of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, UN Doc. A/52/PV.36 (1997), at 2-3. On significance of the Award's impact in this respect, *see Comment: The Southern Bluefin Tuna Arbitration: Paper by Professor Barbara Kwiatkowska*, William R. Mansfield, 75 PHIL. L. J. 504; and S. Sucharitl, *New Approaches to Inter-State Dispute Settlement*, *in* SEAPOL INTER-REGIONAL CONFERENCE ON OCEAN GOVERNANCE AND CHALLENGES IN THE NEW MILLENIUM, Bangkok, March 21-23, 2001 (forthcoming)

having an EFP and on the tonnage of that programme appears to be within reach. Not only is the possibility of renewed negotiations on other elements of their differences real, but Japan also affirmed its willingness to work with Australia and New Zealand with a view of submitting their differences to an Arbitration Tribunal in pursuance of Article 16 of the CSBT Convention and of simultaneously establishing a mechanism in which experts and scientists could resume consultation on a joint EFP and related issues.[79] At the same time, Australia acknowledged a significant role which the ITLOS Order had played in encouraging the parties to make progress on the issue of third-party fishing, while both applicants expressed their hope that progress already achieved in settling the dispute would continue and declared their readiness to explore all productive ways of finding solutions.[80]

The Arbitral Tribunal recalled that under Article 16(2) failure to reach agreement on reference to arbitration was not to absolve the parties from the responsibility of continuing to seek to resolve their dispute by any of the various means - including negotiation, mediation and arbitration - referred to in Article 16(l). The content and *modus operandi* of the third-party procedures, which conform to traditional diplomatic precedent, can be refined and developed by the parties to meet their specific needs. In the view of the Tribunal: "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."[81] Whatever the mode or modes of peaceful settlement chosen by the parties, the Arbitral Tribunal - as if conscious of its particular responsibility - emphasized 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".[82]

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[79] Award, para. 68; Oral Hearings, Vol.1 (Agent Yachi, May 7, 2000), Vol.111 (Counsel Ando, Agent Yachi, May 11, 2000).

[80] Award, para. 69; Oral Hearings, Vol. IV (Agents Campbell and Caughley, May 11, 2000).

[81] Award, para.70.

[82] *Id.* in fine. Note that this holding, commended in Australia's Statement, *supra* note 77, corresponds to that of a broadly worded classic provisional measure being indicated by the ICJ, which was also prescribed as the first measure by the SBT Order, operative para.90(l)(a), as now revoked. *See, also,* the Award's concluding para.71, *supra* note 62.

III. ACTUAL AND PROSPECTIVE IMPACTS OF THE PARAMOUNT ANSWERS OF THE SOUTHERN BLUEFIN TUNA ARBITRAL TRIBUNAL

An impact of the Southern Bluefin Tuna Arbitral Tribunal can be assessed in two obvious ways indicated by President Stephen M. Schwebel with respect to the ICJ and equally applicable to ITLOS and other courts - directly, as between the parties to the instant case, and "indirectly, across a broader canvas and in the longer term, as an important contributor to an international order influenced if not shaped by the application and development of rules of law" [83]

The importance of the first of those impacts led in international arbitration to the long-established practice of referring a dispute to a powerful arbitrator who can be useful when pressure or inducements are needed to encourage a party to accept an unfavourable decision.[84] In the instant case, the high-power membership of the Arbitral Tribunal certainly alleviated disappointment of Australia and New Zealand by the Tribunal's decision that it was without jurisdiction to rule on the merits of the dispute, as coupled with their appreciation that the *Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* had in any event affirmed a number of their major contentions.[85] The Tribunal's distinguished membership likely also increased satisfaction of Japan by its winning this first international litigation which it was involved in since over 60 years. At the same time, it could be not without influence on the perceptions of the parties, that the Award now balanced their losing/winning positions which resulted from the 1999 *Southern Bluefin Tuna (Provisional Measures)* Order. However, since the differences between the parties over the merits of their dispute have remained unresolved, perhaps the most important aspect of the impact in question consists in inducements provided by the Arbitral Tribunal for reaching by the parties of a successful settlement in the future.

The second of impacts of the Southern Bluefin Tuna Arbitral Tribunal referred to above, namely that "as an important contributor to an international order influenced if not shaped by the application and development of rules of law,"

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[83] S.M. Schwebel, *The Impact of the International Court of Justice*, *in* Liber Amicorum Boutros Boutros- Ghali, 1998, 663-674, at 668. Cf. SCHWEBEL, *supra* note 9, at 10-11. As he observes, whereas Article 59 of the ICJ Statute provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case" (as mirrored by Article 296(2) of the LOS Convention and Article 33(2) of the ITLOS Statute), it is undeniable that the decisions of the ICJ (and other courts and tribunals) may have the influence extending beyond the particular case.

[84] Cf. J.G MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 81 (1991).

[85] *See* Australia's Statement, supra note 77.

merits special and careful attention.[86] As a result of this first exercising of *la competence de la competence* pursuant to Article 288(4) of the Law of the Sea Convention, the Southern Bluefin Tuna Arbitral Tribunal confirmed the practice of the ICJ noted by President Schwebel of giving the defendant the benefit of the doubt in deciding jurisdiction over the merits, thereby counterparting the opposite tendency evidenced by the 1999 ITLOS Order of giving the applicant the benefit of the doubt in deciding jurisdiction over provisional measures.[87] At the same time, the Award, which marked the unprecedented dismissal by an arbitral tribunal of jurisdiction over the merits of an inter-state dispute,[88] substantiated the respectful opinion that "although jurisdictional questions are less prominent in the work of arbitral tribunals than in proceedings before the International Court of Justice, when such questions do arise they are treated with the same scrupulous regard for the principle of consensuality."[89] However, it is noteworthy that in deciding its own jurisdiction with the scrupulous regard for the fundamental principle of the consent of the parties, the Arbitral Tribunal unanimously upheld and importantly clarified and expanded all the unanimous findings made previously by ITLOS with respect to the jurisdiction *prima facie*; and that it ultimately gave (by majority vote) the defendant the benefit of the doubt with respect to one critical issue which was not addressed in the proceedings before ITLOS (unless in its by their very nature confidential deliberations).

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[86] *See* President Schwebel's view quoted in the main text accompanying *supra* note 83. Cf. Award, para.44, and *supra* note 14.

[87] Military and Paramilitary Activities In And Against Nicaragua (Provisional Measures) (Nicar. v. U.S.) 1984 I.C.J. 206-207 (May 10) (dissenting opinion of Judge Schwebel), as discussed by Kwiatkowska, *supra* note 3, at 154. In addition to Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4), the tendencies noted by Judge Schwebel were further confirmed by three decisions rendered by the ICJ in 2000, *i.e.*, Aerial Incident of 10 August 1999 (Pak. v. India) 2000 I.C.J. (forthcoming) (June 21) *at* http://www.icj-cij.org/icjwww/idocket/ipi/ipiframe.htm, and the rulings in Armed Activities in the Territory of the Congo (Congo v. Uganda) (Provisional Measures) 2000 I.C.J. (forthcoming) (Order of July 1) and in Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Provisional Measures) 2000 I.C.J. (forthcoming) (Order of December 8), which gave the defendant and the applicant the benefit of the doubt respectively.

[88] Such dismissals by Iran-US Claims Tribunal concerned national claims.

[89] MERRILLS, *supra* note 84, at 89. *See, also,* appraisal of the Nottebohm principle in the Nottebohm Case (Preliminary Objections) 1953 I.C.J. 119 (November 18), as reaffirmed by 1991 I.C.J. 68-69 by SCHWEBEL, *supra* note 9, at 197-199; and in Stephen M. Schwebel, *International Law in Ferment: A New Vision for Theory and Practice*, 94th ASIL, Washington D.C., April 5-8, 2000 172, 175, stressing "fundamentally and loudly consensual" character of the Court's jurisdiction. Cf. remarks on commitment of President Schwebel to consensualism *in* Judge P. Kooymans, *Two Remarkable Men Have Left the International Court of Justice*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 343, 346-347, 351 (2000), including his remark, at 347, that in Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 448-449 (December 4), the cautiousness of President Schwebel "with regard to the Court's assuming jurisdiction when the common intention of both parties to accept that jurisdiction is doubtful was not the result of rigid formalism but was caused by his fear that an overly ambitious attitude on the part of the Court might be counter-productive in the long run, in that it might lead States to resort to the Court or to accept its jurisdiction less frequently."

The unquestioned contribution of the *Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* to the evolution of peaceful settlement of disputes consists in its exposition of the paramount doctrine of parallelism between the umbrella Law of the Sea Convention and many compatible special treaties, such as the CSBT Convention, with respect to disputes arising within the framework of those treaties (including their institutional components) and also falling under the former Convention.[90] Equally fraught with guiding impacts for the courts and tribunals, which will be seized in the future in pursuance of Part XV, Section 2 with respect to disputes arising within the mandate of fisheries, environmental and other special treaties, are findings made expressly and impliedly by the Arbitral Tribunal with respect to procedural effects of this parallelism, as enabling resort at the request of any party under Article 286 to compulsory procedures.[91] Moreover and perhaps most importantly, were a special treaty to include a dispute settlement clause similar to that of Article 16 of the CSBT Convention, the compulsory jurisdiction might be barred in reliance on the Award's holdings related to the second requirement, of Article 281(l) that "the agreement between the parties does not exclude any further procedure".[92] This raises a question as to which of innumerous special treaties do those paramount holdings apply.

It appears that the Arbitral Tribunal meant by treaties excluding "with varying degrees of explicitness" unilateral referral of disputes to compulsory adjudication or arbitration[93] those which provide generally for resolving disputes by mutually agreed means of own choice of the parties (*e.g.*, Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Article XIII) of 16 June 1994[94]) or by consultations or negotiations (*e.g.*, Iceland/Norway/Russia Barents Sea Loophole Agreement (Article 10) of 15 May 1999,[95] and many maritime delimitation and other treaties). The Tribunal also may have meant treaties which - like the CSBT Convention (Article 16), based

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[90] *See* main text accompanying supra notes 25-31. Note that compatibility of the 2000 Galapagos Framework Agreement, *infra* note 110, with Articles 64 and 116-119 of the 1982 Convention is at issue in the new Chile/EC Swordfish dispute, concerning access for EC (Spanish) fishing vessels to Chilean ports as well as scientific and technical cooperation on conservation of swordfish stocks.

[91] *See* main text accompanying *supra* notes 34-38 (Articles 281(l) and 283), *supra* note 70 (admissibility), *supra* notes 71-72 (Article 282) and notes 73-74 (Article 297(3)). Note that the Award's holdings on Article 283 could be relevant in the Chile/EC Swordfish case, in which the EC argued that the terms of this provision were not fulfilled. On suspension in 2001 of both the ITLOS and WTO procedures, *see* http://www.europa.eu.int/comm/trade/ miti/dispute/swordfish.htm.

[92] *See* main text accompanying *supra* notes 47-69; and on exception of serious breach of the fundamental obligation of good faith, *see supra* note 61.

[93] Award, para.63, *supra* note 59.

[94] 34 I.L.M. 67 (1995); 10 IJMCL 114 (1995), 114.

[95] 14 IJMCL 484 (1999).

on the 1959 Antarctic Treaty (Article XI) and the 1980 CCAMLR (Article 25)[96] - contain more detailed clauses providing for resort to a variety of peaceful means, including to those entailing binding judicial and/or arbitral settlements, but only with the consent of all parties to the dispute. The question whether the Tribunal meant in addition treaties which - like the 1946 ICRW[97] - do not contain any dispute settlement clauses, remains open.

In its Annex 47, Japan listed 107 such special bilateral and multilateral treaties in total and even if some of them would not be relevant, a number of other could certainly still be added.[98] Whereas this points out at considerably limited scope the applicability of compulsory dispute settlement under Part XV, Section 2 to the advantage of self- contained procedures of those treaties, the jurisdictional effect of each of these treaties is to be assessed on its own merits and might differ from that of the CSBT Convention. The limitations clarified by the Award's holdings are now added to automatic exceptions laid down in Section 3 with respect to disputes over coastal fisheries and marine scientific research (Article 297(2)-(3)), as well as to optional exceptions envisaged with respect to disputes over maritime delimitation, historic bays and titles, military activities, law enforcement (in areas automatically exempted) and disputes falling within competence of the UN Security Council (Article 298).[99]

Moreover, there exists the growing number of special treaties, which provide for resort to compulsory procedures at the request of any party and which under Article 282 will apply in lieu of Section 2 procedures with respect to disputes falling under both the 1982 Convention and such treaties, unless the parties otherwise agree. Apart from the prominent GATT/WTO system referred

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[96] *See supra* note 53. *See, also, e.g.*, the UNEP Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Article 23) of March 24, 1983, 22 I.L.M. 221 (1983) (entered into force on October 11, 1986); the UNEP Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP, Article 26) of Nov. 25, 1986, 26 I.L.M. 38 (1987); 1982 U.N.T.S. 4 (entered into force on Aug. 22, 1990); the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Article 9) of Nov. 24, 1993, 33 I.L.M. 968 (1994); and Agreement on the Conservation of Cetaceans of Black Sea, Mediterranean Sea and Continuous Atlantic Oceans (Article XII) of Nov. 24, 1996, 36 I.L.M. 777 (1997).

[97] *See supra* note 40. *See, also, e.g.*, the Wellington Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific Ocean of Nov. 24, 1989, 29 I.L.M. 1449 (1990) (entered into force on May 17, 1991), and Protocols I and 11 of October 20, 1990, 29 I.L.M. 1462, 1463 (1990) (entered into force on Feb. 28, 1992 and October 5, 1993); and the Nine Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region of July 9, 1992, 32 I.L.M. 136 (1993) (entered into force on May 20, 1993).

[98] *See supra* note 41; and dispute settlement clauses listed in *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, UN Doc. FAO/FIPL/C940 (1999) and *Compliance Mechanisms and Dispute Settlement in Global and Regional Environmental Conventions*, UN Doc. UNEP/EC/WG.3 (1999).

[99] Award, para.61, and main text accompanying *supra* note 55-58.

to earlier,[100] the variety of compulsory dispute settlement clauses to this effect - even though simpler and less far reaching than Part XV, Section 2 - may be found in, e.g., Convention on the Protection of the Rhine Against Chemical Pollution (Article 15 and Annex B) of December 3, 1976,[101] the UNEP Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment (Article XXV) of April 24, 1978 and its related Protocols,[102] the Madrid Protocol on Environmental Protection (Articles 18-20) of October 4, 1991 to the Antarctic Treaty,[103] the IMO Convention for the Suppression of Unlawful Acts Against 1988,[104] the Safety of Maritime Navigation (Article 16) of March 10, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Article 32) of December 20, 1988,[105] two post-UNCED global treaties - UNEP Convention on Biological Diversity (Article 27) of June 5, 1992[106] and the UN Framework Convention on Climate Change (Article 14) of the same date and its 1997 Kyoto Protocol (Article 19),[107] Convention on the Protection of the Marine Environment of the North-East Atlantic (Article 32) of September 22, 1992,[108] the London Protocol of November 8, 1996 (Article 16) to the 1972 IMO Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[109] the Galapagos Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific (Article 14) of August 14, 2000,[110] and draft of at least one more global treaty.[111]

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[100] *See supra* note 46.

[101] 16 I.L.M. 242 (1977) (entered into force on Feb. 1, 1979). In the pending France/Netherland case (PCA) under this Convention, the Arbitral Tribunal is presided over by President Skubiszewski of the Iran-US Claims Tribunal and includes Judges Guillaume and Kooymans of the ICJ.

[102] 17 I.L.M. 511 (1978); 1140 U.N.T.S. 133 (entered into force on June 30, 1979).

[103] 402 U.N.T.S. 71; 30 I.L.M. 1455 (1991)(entered into force on Jan. 14, 1998); *supra* note 50.

[104] 27 I.L.M. 668 (1998); 1678 U.N.T.S. 201 (entered into force on March 1, 1992).

[105] 28 I.L.M. 493 (1989) (entered into force on Nov. 11, 1990).

[106] 31 I.L.M. 818 (1992) (entered into force on Dec. 29, 1993), and its 2000 Cartagena Biosafety Protocol, 39 I.L.M. 1027 (2000).

[107] 31 I.L.M. 809 (1992); 1771 U.N.T.S. 108 (entered into force on March 21, 1994); and 37 I.L.M. 22 (1998).

[108] 32 I.L.M. 1069 (1993) (entered into force on March 25, 1998). Note that Japan's Memorial, paras. 139 and 151, mistakenly included this Convention into its Amex 47 treaties. *See, also, e.g.*, Convention on the Conservation of European Wildlife and Natural Habitat (Article 18(2)) of Sep. 19, 1979, European TS No. 104 (May 1994) (in force: June 1, 1982); Convention for the Protection of the Ozone Layer (Article 11) of March 22, 1985, 26 I.L.M. 1520 (1987); 1513 U.N.T.S. 293 (entered into force on Sep. 22, 1988); European Energy Charter (Article 27) of Dec. 17, 1994, 34 I.L.M. 360 (1995); and Convention for the Establishment of the Lake Victoria Fisheries Organization (Article XXII) of May 24, 1996, 36 I.L.M. 667 (1997).

[109] 36 I.L.M. 1 (1997).

[110] The Convention's signatories are Colombia, Chile, Ecuador and Peru. Text obtained from the Permanent Commission of South Pacific (on computer file with author). Cf. *supra* note 90.

Those treaties suggest that the incorporation by reference and application to other agreements *mutatis mutandis* of Part XV of the Law of the Sea Convention by the 1995 UN Fish Stocks Agreement, whose significance was noted by the Southern Bluefin Tuna Arbitral Tribunal,[112] was not - as Japan argued - an exception to an otherwise dominant principle of free choice of means.[113] This development should instead be seen as reflecting a remarkable trend in favour of compulsory procedures under influence of the UNCLOS III *travaux* and of the ensuing adoption of the Law of the Sea Convention and its entry into force.[114] The trend is further reinforced by application *mutatis mutandis* of Part XV under the 1996 IMO London Protocol referred to above, the Honolulu Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Article 31) of September 5, 2000[115] and drafts of two other regional treaties providing for application at the request of any party to compulsory procedures of the 1982 Convention or the 1995 Agreement.[116] These treaties, along with the 1995 Agreement, exemplify international agreements related to the purposes of the Law of the Sea Convention that pursuant to Article 288(2) may confer jurisdiction on a court or tribunal competent under Part XV, Section 2. However, such an appreciable

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[111] Revised Draft Protocol Against the Smuggling of Migrants by Land, Air and Sea (Article 17), UN Doc. A/AC. 254/4/Add. 1 /Rev. 6, (2000), to the UN Convention Against Transnational Organized Crime (Article 25), UN Doc.A/AC.254/4/Rev.9 (2000).

[112] *See supra* notes 62, 74, 82, and *infra* notes 116, 128-129.

[113] *See supra* note 42. Note that after the Award's delivery, Japan denied even this exception when in its Opening and Closing Statements on the Honolulu Convention, it stressed that this Convention's dispute procedures require the consent of all the parties concerned. *See* Report, *infra* note 115, Annexes 3 and 9; and Annex 8: *Closing Remarks of Ambassador Satya N. Nandan*, stating that: "The unfortunate aspect was that the Japanese delegation was completely new and not familiar with the history of the negotiations over the past five years. This created an added problem in the dialogue and communication." *See, also,* D. Struck, *Japan: Many Blame the System for Tokyo's Leadership Crisis*, INTERNATIONAL HERALD TRIBUNE, March 13, 2001, at 1.

[114] For recommendation that if neither mutually agreed means of own choice, nor compulsory conciliation as an interim stage, have led to settlement, the dispute shall be submitted to arbitration or judicial settlement at the unilateral request of any party, *see* J. G. LAMMERS, PRINCIPLE 22 IN ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT - PRINCIPLES AND RECOMMENDATIONS 130-133 (1987); *International Covenant on Environment and Development*, IUCN 1995, Article 62, at 21, 164-165. For an excellent overview, *see* T. Treves, *Recent Trends in the Settlement of International Disputes*, I CURSOS EUROMEDITERRANEOS - BANCAJA DE DERECHO INTERNATIONAL 401-436, esp. 402,-411 (1997).

[115] *Report of the 7th Session of Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific*, Honolulu, August 30-September 5, 2000 (on computer file with author). The final text was adopted by 19:2 vote, with Japan and the Republic of Korea having voted against. (Cf. supra note 113.) A/NZ, Canada and the USA casted - along with the Pacific states and entities - their votes in favour.

[116] Draft Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (Article 23) of May 12, 2000, and Draft Agreement for the Establishment of a South West Indian Ocean Fisheries Commission (Article XVII) of July 12, 2000. (Both texts on file with author.)

mutatis mutandis application of Section 2 (directly or through the 1995 Agreement) does not change any of its serious limitations resulting from exceptions set out in Section 3, from compulsory procedures applicable in lieu of Section 2 under Article 282, or from self-contained dispute settlement clauses of special treaties applicable under the second requirement of Article 281(l) to the exclusion of Section 2. It appears that it was the combined scope of all these limitations and exceptions that led the Arbitral Tribunal to concluding that Part XV "falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction."[117]

Along with its paramount impacts referred to above, *the Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* is significant in its raising the question of the exact scope of all such limitations of Part XV, Section 2, which except for those laid down in Articles 297-299 of Section 3, have not been so far addressed in doctrinal writings and decisions of other courts and tribunals. While, recalling the often quoted words of the UNCLOS III President Tommy Koh that: "The world community's interest in the peaceful settlement of disputes and the prevention of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the Convention,[118] then ITLOS President Thomas A. Mensah remarked: "It may, of course, be argued by purists that the regime does not have 'enough teeth' because it does not subject every possible dispute to the compulsory judicial process. That is indeed true. However, it is very doubtful that the purists can reasonably claim something more radical would have been as acceptable to so many states as the regime currently embodied in the Convention."[119] Similarly, Bernard H. Oxman appreciated the fundamental importance of the principle of consensuality in matters of jurisdiction as now reaffirmed by the Award, when he stressed that: "From the perspective of strengthening the rule of law in international affairs and peaceful resolution of disputes, our primary goal must be to promote compulsory arbitration or adjudication *wherever it appears plausible for states to accept it*" (emphasis supplied).[120]

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[117] Award, para.62, *supra* note 57.

[118] For reliance on this Ambassador Koh's Statement, *see. also.* Separate Opinion of Sir Kenneth Keith, para.27, and *supra* note 63.

[119] T.A. Mensah, *The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law, in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 81, 93-94 (D. Vidas & W. Ostreng eds., 1999).

[120] Oxman, *supra* note 35, at 370; and *supra* note 89. *See, also,* Message From the President of the United States of 7 October 1994 Transmitting the United Nations Convention on the Law of the Sea to the U.S. Senate With Commentary 103 Congress, 2d Sess., Treaty Doc. 103-39, at 83; and E.D. Brown, *Dispute Settlement and the Law of the Sea: The UN Convention Regime*, 21 MARINE POLICY 17, 19 (1997), remarking that: "The very fact that the attitude of States to dispute settlement has apparently been radically

There are reasons to believe that the prospects for serving by the rationale of compulsory dispute settlement of its purpose, in terms of providing procedural means of exercising pressure on states to behave within the limits set out in the substantive, often vague and sometimes open to diverging interpretations, rules, and thereby of contributing to strengthening the rule of law, should be viewed with optimism. One of those reasons is a steadily expanding "judicial habit," which has been repeatedly commended by President Stephen M. Schwebel in his Statements to the UN General Assembly in the context of proliferation of international courts and tribunals,[121] and which may prevent states from contesting jurisdiction in disputes - including those involving parallelism between the LOS Convention and fisheries, environmental or other special treaties - that may be submitted for settlement under Part XV, Section 2 in the future. Such optimism also seems supported by a growing trend in favour of compulsory mechanisms of dispute settlement[122] and encouraging reliance on the Optional Clause under Article 36(2) of the ICJ Statute,[123] as paralleled by increasing number of unilateral referral of cases to international adjudication and arbitration.[124]

Did the dismissal of jurisdiction by the Arbitral Tribunal substantiate the doubt raised by Judge Andre Gros in his 1974 Fisheries Jurisdiction (Merits) Dissenting Opinion and recently entertained by ITLOS Vice-President Dolliver Nelson that the role of courts in settling disputes concerning fisheries - or for that matter, environment, of which fisheries forms an inherent part[125] - may be limited?[126] It appears that it did not. The scope of this role (envisaged by Judge Nelson himself) would have of course been broader if the *Southern Bluefin Tuna*

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transformed overnight by the UN Convention must at least suggest the need for caution in assessing the prospects for the successful implementation of the new scheme."

[121] Statements of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, UN Doc. A/53/PV.44 (1998), at 4, *at* http://www.icj-cij.org, and UN Doc. A/54/PV.39, at 3. Cf. Statement of President Rao, UN Doc. A/55/PV.44 (2000), at 2, and ITLOS/Press No.39, November 14, 2000.

[122] *See supra* note 100-116.

[123] *See* Statements of H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, UN Doc. A/52/PV.36 (1997), at 1-5; UN Doc. A/53/PV.44 (1998), at 1-5; and UN Doc. A/54/PV.39 (1999), at 1-5, *at* http://www.icj-cij.org. For a list of 62 adherents to the Optional Clause and reliance thereupon in the current cases, *see* Reports of the International Court of Justice, August 1 1998-July 31, 1999 and August 1, 1999-July 31, 2000, UN Docs A/54/4 (1999) and A/55/4 (2000), *available at* http://www.icj-cij.org.

[124] Note that during President Schwebel's triennium 1997-2000, 21 of 23 new cases in total were brought by unilateral applications. Cf. Armed Activities in the Territory of the Congo (Congo v. Uganda) (Provisional Measures) 2000 I.C.J. (forthcoming) (Order of July 1) (Declaration of Judge Oda).

[125] *See* ITLOS Order, para.70, *supra* note 3; Message From the President of the United States of 7 October 1994 Transmitting the United Nations Convention on the Law of the Sea to the U.S. Senate With Commentary 103 Congress, 2d Sess., Treaty Doc. 103-39, at 41.

[126] Nelson, *supra* note 74, at 132-133, citing 1974 I.C.J. 138 (Gros).

case had proceeded to the phase of merits, which could have had impact comparable to the magnificent influence of the 1972/1974 Fisheries Jurisdiction cases on the development of modem fisheries law and shaping the provisions of the Law of the Sea Convention which were now under the Arbitral Tribunal's consideration. However, within - as President Schwebel put it - the "unquestioned contributions" of the ICJ to the development of international law of the sea and environmental law, even the cases which, like *Spain v. Canada Fisheries* (Jurisdiction) case, did not proceed to the merits, have had their impact in terms of certain substantial findings made by the Court while considering the procedural issues and in terms of value retained by the respective pleadings.[127] Such impacts of the present Award are particularly pronounced because of its emphasis on the importance of effective implementation of the 1995 UN Fish Stocks Agreement, including within the framework of regional organizations such as the CCSBT,[128] and because there is public access not only to the Award but also to written and oral pleadings. Upon its entry into force, the 1995 Agreement should, as the Award pointed out, ameliorate the procedural and substantive problems that revealed themselves in the *Southern Bluefin Tuna* case.[129] This includes the strengthening of the role of fisheries organizations in settlement of disputes of primarily technical nature, to be likely paralleled by increased appreciation of the propriety of Annex VIII - rather than Annex VII - for solving such disputes.[130] It is to be hoped that the Award's paramount contributions will assist governments and other courts and tribunals in promoting solutions which will ultimately strengthen the modern oceans regime and, thereby, the fabric of general international law.

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[127] S.M. Schwebel, *The Impact of the International Court of Justice, in* Liber Amicorum Boutros Boutros- Ghali, 1998, at 669-670; and S.M. Schwebel, *The Inter-Active Influence of the International Court of Justice and the International Law Commission, in* Liber Amicorum Judge Josg Maria Ruda, 2000, at 483, 487-488, 504-505.

[128] The Award may incline the three parties to ratify the 1995 Agreement (*supra* note 112), similarly as Fisheries Jurisdiction ([Spain v. Can.], 1998 I.C.J. 448-449 [December 4]) led to its ratification by Canada, *supra* note 42. The Judgment has also induced the parties and the EC to elaborating specific dispute settlement procedures of the Northwest Atlantic Fisheries Organization (NAFO). See Report of the NAFO Working Group on Dispute Settlement Procedures, Copenhagen, May 29-31, 2000, NAFO/GC Doe.00/4 (2000). On the inducements provided by the Award to solve the instant dispute within the framework of the CSBT Convention, *see* main text accompanying *supra* note 75-82.

[129] Award, para.71, *supra* note 62.

[130] Note that Montreux clause of Article 287(5) concerning Annex VII, *supra* note 3, was primarily devised for navigational disputes, which under Article 297(l), are subjected to procedures of Part XV, Section 2, without any exceptions.