THE SOUTHERN BLUEFIN TUNA ARBITRATION: PAPER BY PROFESSOR BARBARA KWIATKOWSKA*

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Professor Kwiatkowska's paper focuses on the Award of the Arbitral Tribunal in this case. She has described the Award in detail and offered a number of comments on it.

For my part I would like to place the Award in the broader context of the underlying dispute itself and make some comments about the significance of the legal proceedings in relation to the efforts to resolve that dispute. (As Counsel in the case I have not considered it appropriate at this time to express a view on the Award itself or the legal issues that were the subject of argument before the Tribunal).

Before I do so there is one point on which I must take issue with Professor Kwiatkowska. It will not surprise you to know that I have difficulty accepting the point she makes more than once in the paper that the litigation was won by Japan. It is true that the Tribunal accepted one, but only one, of the arguments put forward on behalf of Japan regarding jurisdiction and accordingly decided that it could not proceed to hear the merits of the case. But that means the Tribunal did not rule on the merits. Its views on the substantive aspects of the case can therefore be the subject only of speculation. It is interesting to note, however, that after reaching its conclusion on jurisdiction the Tribunal devoted five long and carefully crafted paragraphs to the importance of resolving the dispute, the steps the parties might take to do so and the need in that regard for abstaining from any unilateral acts.

The fact that the Arbitral Tribunal declined to hear the merits means that the only independent international body that heard and in effect pronounced on the substantive aspects of the case was the International Tribunal for the Law of the Sea ("ITLOS"). The ITLOS decision was of course in the context of

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provisional measures and not after a full hearing on the merits. But it had the benefit of three days of argument, the major part of which was related to substance rather than jurisdiction and its decision was overwhelmingly in favour of the Australia/New Zealand position on the substance. Accordingly, the only sense in which Japan won the litigation was the very narrow one of successfully blocking full consideration of the merits of the case against them.

Having made that point, I now want to say that the question of who won or lost this litigation is neither a particularly interesting nor particularly important feature of the litigation. There are a number of much more interesting features. Professor Kwiatkowska has discussed some of these in relation to the future development of the international regime for oceans. The feature on which I wish to offer some comment is what the case can tell us about the value of formal third party international legal dispute settlement procedures in the resolution of a dispute even where the underlying problem or disagreement is not really a legal one or capable of being resolved by a legal ruling.

My essential point is that, this case demonstrates very clearly that the initiation of international legal dispute settlement processes can be a very useful and effective step in the resolution of a dispute, particularly where there may be a power imbalance, in respect of that dispute, between the states concerned. In my view, it also shows that, in terms of assisting the resolution of the dispute, the dispute settlement process itself, including the comments and signals from the relevant Tribunal or Tribunals, may be of more importance than the formal elements of any decision.

What was the underlying problem here? In effect, the working relationship within the Commission for the Conservation of Southern Bluefin Tuna had broken down and it was not able to operate effectively. Since 1997, the Commission had been unable to agree on a total allowable catch ("TAC"). Japan believed the existing TAC should be increased by 3,000 tonnes. Australia and New Zealand believed that the stock assessment did not support such an increase. The scientists of all three countries were agreed that the stock was at historically low levels and below the threshold for biologically safe fish populations. But there was fundamental disagreement between the Japanese scientists on the one hand and the Australian and New Zealand scientists on the other about the prospects for the recovery of the stock.

Despite extended discussions, the disagreement continued and became more intense when Japan indicated that it would undertake an experimental

fishing programme or EFP in addition to its existing allocation and would do so unilaterally if necessary. Protests, counter measures and negotiations to find an acceptable form of EFP, all failed to resolve the problem and positions became entrenched to the point that the work of the Commission was essentially paralysed.

Following the first of Japan's unilateral EFPs, Australia and New Zealand invoked the formal dispute settlement process under the SBT Convention. That led to consultations but no agreement. And then after Japan commenced its second EFP, Australia and New Zealand filed arbitration proceedings against Japan under Part XV of the United Nations Convention on the Law of the Sea ("UNCLOS"), accompanied by a request for provisional measures including the cessation of the EFP.

So the trigger for the legal proceedings was the unilateral EFP, but the underlying problem that needed to be fixed was the disagreement about the future of the stock and the consequent inability of the Commission to function as intended.

Was the relief that Australia and New Zealand sought in their statements of claim likely to fix that underlying problem? On the face of it, no. In essence, what they sought was a finding that Japan's action in conducting unilateral EFP's was contrary to its obligations under UNCLOS, together with an order that it should refrain from such action in the future. Clearly, a finding and order of that kind could not of itself restore the functionality of the Commission. It is true that they also sought an order that Japan should negotiate and cooperate with them in the Commission, with a view to agreeing future conservation measures and an appropriate TAC. But, even if obtained, compliance with an order to cooperate is not easy to monitor, measure or enforce. In fact, I think, it is reasonably clear that there was no formal decision or order a court or tribunal could make in this case that was likely, by itself, to resolve the underlying problem.

However, a year and three quarters after the legal proceedings were filed, the atmosphere in Commission meetings is constructive; considerable progress has been made on a number of important issues, the most important non-party fishing state has given formal notice of its intention to become party to the Convention and a mechanism involving independent external scientists has been agreed for the development of a scientific programme that will help to resolve the uncertainties about the future prospects for the stock.

Few of those who have been involved would have any doubt that the legal proceedings have played a major role in this turnaround, and yet the only formal outcome of those proceedings is a decision by the Arbitral Tribunal that it did not have jurisdiction to hear the merits of the case. Why is this? People may have different views. But I would offer the following thoughts.

In the first place, the initiation of legal proceedings is seen as a significant step in relations between states. It engages the attention of higher levels of government and ensures that the issues involved are examined in a broader context than may have been the case previously. This alone may bring about a greater impetus for resolution of disagreement and ensure that the highest levels of knowledge and experience about the techniques that may assist in that resolution are brought to bear.

Secondly, the submission of the dispute to third party legal consideration and determination immediately levels the playing field between the parties. They become aware that their actions will be considered against objective legal standards, rather than the relative power they possess in respect of the issue.

Thirdly, the sense of a watching eye can help to ensure that parties avoid actions that might escalate the dispute, and can generally act as a moderating influence on their behaviour.

Fourthly, the process of preparing and arguing a case before an international tribunal or tribunals forces the parties to analyse the issues and the differences between them in greater detail, from a wider range of perspectives and with the involvement of additional people. It also brings those issues and differences into public focus. Some of the important effects of this process in the Southern Bluefin Tuna ("SBT") case were the following:

i) the development of a wider understanding of the special nature of this species, the important gaps in existing knowledge about it, the currently depleted status of the stock, and the uncertainties about its prospects for recovery;

ii) the realisation by all the parties that, while they continued to argue about the appropriate level of their own catch, a greater threat to the stock was developing through the

increasing and unregulated catch of non-parties to the Convention;

iii) the associated recognition that the future of the stock was in fact dependent on the cooperation of all three parties and their ability to bring other states and fishing entities into the Convention; and

iv) the gradual acceptance on all sides that in the face of ongoing scientific disagreement amongst the parties, the only way forward was to bring in independent external scientists and accept their recommendations.

The process the parties must go through to prepare and argue their case can help the parties to see their dispute in clearer terms or in a bigger picture, and the approach adopted by the Tribunal can also assist that process. What is particularly interesting in this case is the way both ITLOS and the Arbitral Tribunal saw their roles as going beyond consideration of the legal issues and the formal relief sought and pointing the parties in the right direction to resolve their underlying difficulties.

For example, ITLOS prescribed, amongst other things, that the parties "should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna." It also prescribed that they "should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilisation of the stock." And it decided that each party should submit a report to it within a little more than a month after its decision. In my view there can be little doubt that the full range of interim measures ordered by ITLOS were a key factor in moving the parties forward towards a resolution of the issues at the heart of the dispute.

In compliance with the ITLOS Order, the parties held negotiations the following month. The negotiations were held in a positive atmosphere and a conscious effort was made to return to a cooperative approach to the management of SBT. In particular, commitments were made to work towards bringing the other major fishers of SBT within the Convention.

As I mentioned earlier, for its part, the Arbitral Tribunal devoted the final part of its order to the resolution of the underlying problem. It noted that the ITLOS Order had had an impact, not just in the suspension of Japan's unilateral EFP, but also on the perspectives and actions of the parties. It recalled the statements the parties made about the progress they had made in narrowing their differences, and reminded them that in terms of the SBT Convention, they were under an ongoing obligation to seek to resolve the remaining differences. It spelled out the techniques they could use for this purpose, especially the ways in which they could be assisted by independent bodies. And it emphasised that they should refrain from any unilateral act that might aggravate the dispute before its final resolution. The message to the parties could hardly have been clearer, and, given the weight of the panel, it was a message that could hardly be ignored.

In this regard I think it might be fair to suggest that the effective outcome might not have been very different if the Tribunal had concluded that it did have jurisdiction to hear the merits of the case. In light of the progress that had been made following the ITLOS Order, it had become increasingly apparent to us that, if as we expected the Tribunal found it had jurisdiction, it was likely to put pressure on the parties to resolve their remaining differences rather than proceed to the merits phase of the case. If the differences could now be resolved through negotiation, assisted where necessary by independent third parties, this obviously made more sense than spending a great deal of time and money arguing before the Tribunal as to whether Japan's previous unilateral EFPs were or were not in contravention of their legal obligations. The fact that a ruling on that question would not in itself resolve the underlying difficulty and restore functionality to the Commission, could only reinforce that logic. In saying this, I would wish to be very clear that I am not inferring that in my view, the Tribunal was correct in its decision on jurisdiction. Rather, my point is that, in light of the progress made following the ITLOS Order, a decision that the Tribunal had jurisdiction in the case would not necessarily, or even desirably, have led to a full hearing on the merits.

In any event all three of the parties have in fact heard and responded to the message from the Tribunal. Following the Award by the Tribunal, Japan advised Australia and New Zealand that it wished to see a return to consensus and cooperation in the Commission. It proposed high level negotiations for that purpose and indicated that it did not intend to conduct a further unilateral EFP. The subsequent negotiations were held in a positive and constructive atmosphere and considerable further progress was made. In particular, it was agreed that the way to resolve the disagreement about the appropriate nature and extent of

experimental fishing, was to engage independent external scientists to devise a scientific programme which would best contribute to reducing the uncertainties in relation to the stock.

Accordingly, at the following meeting of the Commission in November last year, terms of reference for the external scientists were adopted. It was also agreed that unless there was an agreement on changes to the scientific programme the external scientists recommended, it would be their recommendations that would become the decision of the Commission. Their report is being discussed by the Scientific Committee this week and will be done before the next meeting of the Commission next month.

Obviously, there are still some steps to complete before we can be confident that the Commission has been restored to full functionality. But the signs are positive.

If those signs are realised, I believe the international community can take some encouragement from the role the formal third party dispute settlement proceedings played as a catalyst in bringing about the resolution of a significant dispute in the difficult area of fisheries between three friendly countries.

The final point I want to make is that the circumstances that gave rise to this case highlight a challenge that faces Foreign Ministries today.

One of the inevitable effects of globalisation is the direct contact between interest groups and government agencies in all fields with their counterparts in other countries. On the whole, this is probably a beneficial development. It is true, of course, that the traditional task and training of Foreign Ministries has been to ensure that differences of interest and objectives are handled in ways that cause minimum difficulty in the overall relationship between the countries concerned. Other agencies or interest groups may not have the same training or experience. But it is no longer feasible, even if it were desirable, for all major inter-country contacts to be managed through Foreign Ministries and we have to accept that, from time to time, these contacts will run into difficulty.

The challenge for Foreign Ministries today is to develop techniques or mechanisms to enable them to maintain an effective overview of the range of direct contacts and relationships that can affect the overall relationship between their country and other countries. This means, amongst other things: i) being in a position to identify at an early stage when one of these component relationships is

running into serious difficulty; and ii) having the domestic standing or positional authority, as well as the traditional knowledge and experience, to be able to ensure that all appropriate techniques are employed in a timely way to resolve the difficulty, including where necessary the involvement of third parties.

In that regard, I think that paragraph 70 of the Tribunal's Award is a very useful and timely reminder to us all of the wide range of techniques involving third parties that can be used to help resolve the elements of a dispute. In my experience, many of us are often too slow to see that seeking the help of third parties is not a reflection on our negotiating skills, but instead, may be a wise and constructive step in the resolution of a complex dispute.

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