THE SOUTHERN BLUEFIN TUNA ARBITRATION*

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I have read the excellent paper entitled *The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award* just presented by its author Dr. Barbara Kwiatkowska. I have also read the more detailed version of the paper, to be published shortly in the International Journal of Marine and Coastal Law.

My comments will first focus on her paper. I shall then discuss an aspect of another paper, written by Prof. Bernard Oxman, which is very critical of the Arbitral Award, and then conclude by referring briefly to the recently adopted Honolulu Convention on highly migratory fish stocks in the Pacific.

I must first say that Dr. Kwiatkowska's paper, particularly its detailed version, contains a masterly analysis of the Arbitral Award, together with references to a large amount of related precedents of international tribunals, scholarly works and other materials, in a well-established standard characteristic of the author's works. I have therefore not much to say about the paper. I agree generally with her analysis of the case and her views on the Award. My comments will therefore be limited to only one point in the paper.

In the concluding section of her paper, Dr. Kwiatkowska asserts that there exists a growing number of special treaties which provide for resort to compulsory procedures at the request of any party *and which under article 282 of the Law of the Sea (LOS) Convention will apply in lieu of Part XV, Section 2, procedures* with respect to disputes falling under both the LOS Convention and such treaties, unless the parties otherwise agree. She goes on to say that the variety of compulsory dispute settlement clauses to that effect may be found in about a dozen multilateral treaties which she quotes. She then concludes that those treaties suggest that the incorporation by reference and application to other

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agreements *mutatis mutandis* of Part XV of the LOS Convention by the UN Fish Stocks Agreement was not an exception to an otherwise dominant principle of free choice of means, and that "this development should be seen as reflecting a remarkable trend in favour of compulsory procedures under influence of the UNCLOS III *travaux* and the ensuing adoption of the LOS Convention and its entry into force." She notes correctly that Japan had argued in the Arbitration that such *mutatis mutandis* application of Part XV was indeed an exception.

With due respect to her analysis, I am not ready to draw such a clear-cut conclusion as hers. First, I do not think that all the treaties she quotes clearly provide for resort to compulsory procedures entailing a binding decision at the request of any party, as required by article 282; and secondly, I do not consider such treaties as reflecting "a remarkable trend in favour of compulsory procedures" for settling disputes.

First, let us see what article 282 of the LOS Convention provides:

> If the States Parties which are parties to a dispute...have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part [Part XV], unless the parties to the dispute otherwise agree.

Do the treaties quoted contain such procedures? Some of them do not, according to my interpretation:

One of them is the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. In article 16 (1), it empowers any party to eventually submit the dispute to arbitration. It further provides in Article 16 (2), however, that each State Party may at the time of signature or ratification, declare that it does not consider itself to be bound by such procedure. In other words, any Party may opt out of the compulsory procedure. So this cannot strictly be regarded as a compulsory system.

A similar opting-out procedure is also built into article 32 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Another treaty she quotes, the Convention on Biological Diversity, provides in Article 27(3) that when ratifying, accepting, etc., or at any time thereafter, a State may declare that for a dispute not resolved through negotiation or other means of their choice, it accepts compulsory submission to either

arbitration or the ICJ, or both. Thus not all States Parties are required to make a declaration to accept compulsory judicial procedure. It further provides, in Article 27(4), moreover, that if the parties to the dispute have not accepted the same or any procedure, the dispute shall be submitted to conciliation, which is not binding. Thus any State which does not wish to accept compulsory procedure entailing a binding decision may freely choose to do so.

A similar procedure is found in Article 14 of the UN Framework Convention on Climate Change, which applies also *mutatis mutandis* to the Kyoto Protocol (Article 19).

Lastly, the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution provides in Article 25 that if the parties cannot settle the dispute through peaceful means of their choice, it shall be submitted to the Judicial Commission for the Settlement of Disputes, which composition and terms of reference were to be established by the Council. So it is not clear from the Convention if the Judicial Commission has been given the power of rendering binding decisions. (I have not been able to find out the procedures the Council has adopted).

The above analyses show that only five of the treaties quoted have clear provisions for compulsory dispute settlement clause entailing binding decisions without exceptions. These are the Convention on the Protection of the Rhine against Pollution by Chlorides, the Madrid Protocol on Environmental Protection to the Antarctic Treaty, the Convention on the Marine Environment of the North-East Atlantic, the 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the Galapagos Framework Agreement for the Conservation of the Fisheries Resources on the High Seas of the South-Eastern Pacific, and the Honolulu Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. Among these conventions, I wonder if any dispute under the Convention on the Protection of the Rhine may cause any which also falls under the LOS Convention.

I must therefore conclude that, strictly speaking, treaties recognizing compulsory dispute settlement procedure entailing binding decisions in matters related to the law of the sea are still an exception. In my opinion, therefore, it is a little too premature to conclude that there is a "remarkable trend in favour of compulsory procedures under influence of the UNCLOS III *travaux*" and the LOS Convention. The dominant trend is still the principle of free choice of means.

Let me turn now to Prof. Oxman's paper, which he presented at the Third Trilateral Conference in Ottawa on 26 October last year. The paper, entitled "Who Won the Southern Bluefin Tuna Arbitration?", expresses a serious concern about the considerable weakening by the Arbitral Award of the effects of Part XV of the LOS Convention on other related treaties with respect to its compulsory and binding procedures, and particularly about negative impact on Japan's interests in law of the sea questions. He argues that if the Award broadly influences other tribunals in other cases, it substantially weakens what Japan sought from and has abiding interests in receiving from the compulsory and binding procedures of Part XV, and consequently from the LOS Convention as a whole. He recalled that Japan had expressly criticized the optional protocol approach of the 1958 Geneva Conventions on the law of the sea, and it was one of the very first States to support the inclusion of compulsory and binding dispute settlement as an integral part of the new LOS Convention. Prof. Oxman thus seriously questions whether Japanese interests are furthered by the Arbitral Tribunal's view that its conclusion is reinforced by the large number of agreements relating the sea that do not provide for compulsory jurisdiction.

I have no quarrel with Prof. Oxman in his excellent analysis of Japan's basic positive attitude towards compulsory and binding procedures for settling disputes, including its strong support for Part XV of the LOS Convention. However, I do not agree with his concern that the Award would be contrary to Japan's interests because it would limit considerably the opportunities for utilizing Part XV procedures in the context of other treaties which are related to the law of the sea. What I cannot agree with him is the interpretation of Article 281(l) to mean that Part XV applies to obligations under other treaties related to the law of the sea unless they contain an express provision to exclude compulsory jurisdiction under the LOS Convention. This interpretation was the one espoused by Judge Kenneth Keith in his dissenting opinion in the Arbitral Award.

My disagreement with Prof. Oxman is mainly based on my observation of State practice, according to which Governments tend to distinguish technical and scientific questions which are normally regulated under specialized treaties from State obligations of a general nature that are laid down in the LOS Convention. This is particularly true for Japan, which definitely prefers to settle technical disputes like the setting of TAC and quota allocation as far as possible through mutually agreed means on the basis of scientific facts, and not through compulsory judicial means, as it is the case for the Convention for the Conservation of Southern Bluefin Tuna. This is true also in cases of other fisheries treaties. Most recent examples include the Convention on the Conservation and Management

of Pollock Resources in the Central Bering Sea (Article 13) and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Article 9). Such position is, in my view, not contradictory at all with Japan's basic support for Part XV of the LOS Convention. Nor does it contradict with the Tribunal's general argument on "parallelism of treaties" with respect to disputes pertaining to two related treaties simultaneously. The Tribunal says that there is frequently such a parallelism of treaties. The Tribunal did recognize it in the particular subject-matter under dispute between the parties. It does not say, however, that such parallelism exists between all the provisions of the CCSBT and the LOS Convention. And I think this is an important point to bear in mind. There may well be a tendency to expand such parallelism broadly, and argue that a breach of every obligation under specialized treaties would also constitute a breach of obligation under LOS Convention. This I believe is not what the Tribunal intended. I would therefore caution that the existence and the extent of such parallelism should be examined carefully in each particular case.

This brings me to my last comment, on the Honolulu Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, to which Prof. Oxman also makes reference. Japan, together with the Republic of Korea, voted against the Convention because of several unacceptable provisions, including those on the settlement of disputes. The dispute settlement provisions incorporate, in a sweeping manner, *mutatis mutandis* those of the 1995 UN Fish Stocks Agreement, which is in turn based on the compulsory and binding dispute settlement provisions of the LOS Convention. Japan's position was to settle any dispute through mutually agreed procedures, just as it intended under the CCSBT. I do not deny the possible impact of the Southern Bluefin Tuna dispute, including its provisional measure phase at the International Tribunal for the Law of the Sea, on the position of Japan *vis-a-vis* the Honolulu Convention. It is, however, based essentially on the more fundamental belief that the kinds of dispute which might occur under the Convention are more likely to be settled in a more reasonable manner by technical or scientific experts and in any case through mutually agreed means, rather than a tribunal of judges.

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