

Comment: A Re-Internationalisation of Dispute Settlement in the Law of the Sea

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The title of the presentation we have just heard was “The *Bluefin Tuna* Arbitration: A Re-Regionalisation of Dispute Settlement in the Law of the Sea”. Although barely a year has passed since the Award in the *Bluefin Tuna* Arbitration was rendered, time has brought about another change.

Yesterday and today we already heard a few words about the *MOX Plant* order¹ in regard to the jurisdiction of ITLOS in the *Swordfish* case. But regarding the *Southern Bluefin Tuna* Award,² this order calls for special attention. As in the *Southern Bluefin Tuna* cases, ITLOS was called upon to prescribe provisional measures pending the constitution of an arbitral tribunal. The case raises several questions, among them – and a central question as such – the relationship between the dispute settlement regime created by UNCLOS and those of other agreements. This is the third time this question comes before the Tribunal, which we have heard about in the *Southern Bluefin Tuna* cases, the *Swordfish* case and now the *MOX Plant* case. Considering the title of this symposium “International Law Enforcement and Dispute Settlement: Recent Developments and the Law of the Sea”, the *MOX Plant* case is certainly the most recent development, leaving aside the entry into force of the Straddling Fish Stocks Agreement on Tuesday.³

The crucial element in the order reads – and I know that it has been cited before, but do allow me to bring it to your attention once more – “even if [other agreements] contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention”.⁴ This statement parallels the finding in the *Bluefin Tuna* Award that “there is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder”.⁵ ITLOS draws from this the conclusion that every

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¹ International Tribunal for the Law of the Sea, The *MOX Plant* case (*Ireland v. United Kingdom*) Request for Provisional Measures, Order of 3 December 2001. The text of the Order can be found at <<http://www.itlos.org/>>.

² *Southern Bluefin Tuna* case (*Australia and New Zealand v. Japan*), Arbitral Award of 4 August 2000. The text of the award can be found at <<http://www.worldbank.org/icsid/bluefintuna/main.htm>>.

³ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks entered into force on 11 December 2001, i.e., 30 days after the date of deposit of the thirtieth instrument of ratification or accession, in accordance with article 40 (1) of the Agreement.

⁴ *MOX Plant* case, Order, para. 50.

⁵ *Southern Bluefin Tuna* case, Arbitral Award, para. 52.

treaty needs to be interpreted in its own right and – as Professor Wolfrum yesterday put it in his comment – that even though the provisions might be similar or even identical, they retain an identity of their own. Having regard to the objective of Part XV, any exclusion of the application of the dispute settlement mechanism under UNCLOS – in the words of the President of the conference “the pivot upon which the delicate equilibrium of the compromise must be balanced”⁶ – needs to be expressly stated. Here ITLOS not only differs from the finding of the *Southern Bluefin Tuna* Award, but sets the record straight.

The Arbitral Tribunal had found that a dispute settlement procedure in another treaty excludes the application of Part XV of UNCLOS though that provision did not expressly say so and perhaps did not even implicitly say so. Yet, the Arbitral Tribunal stated “[t]he absence of an express exclusion [...] was not decisive”,⁷ thus giving a preference to other, mainly regional dispute settlement mechanisms.

In searching for reasons why the Ad-Hoc Arbitral Tribunal decided the way it did, one might have the thought, that the Tribunal was moved by the fact that there was an imbalance between the parties.⁸ Japan – had it brought the proceedings – would have been stopped by Article 297, para. III (a), of UNCLOS,⁹ which exempts coastal states from compulsory jurisdiction in regard to their own exclusive economic zone. While Japan could not have brought the same dispute before the Arbitral Tribunal – Australia and New Zealand are coastal states for Southern Bluefin Tuna – Australia and New Zealand could have and even did. Thus, in denying jurisdiction, the Arbitral Tribunal might have regarded the relevant provisions of UNCLOS as providing a balance between coastal and non-coastal states’ rights. That is certainly a point. But at the same time the Arbitral Tribunal knew that it was not only deciding on the given dispute, but also on – in its own words – “the processes of peaceful settlement of disputes embodied in UNCLOS and in treaties implementing or relating to provisions of that great law-making treaty.”¹⁰ Thus, its decision would be closely scrutinised and considered in future decisions.

⁶ A/Conf.62/WP.9/Add.1, Third United Nations Conference on the Law of the Sea: Documents, Vol. V, 122, para. 6.

⁷ *Southern Bluefin Tuna* case, Arbitral Award, para. 57.

⁸ *Southern Bluefin Tuna* case, Arbitral Award, para. 62. “In the Tribunal’s view, Art. 281(1), when so read, provides a certain balance in the rights and obligations of coastal and non-coastal States in respect of settlement of disputes arising from events occurring within their respective Exclusive Economic Zones and on the high seas, a balance that the Tribunal must assume was deliberately established by the States parties to UNCLOS.”

⁹ Article 297 III (a), UNCLOS reads: “Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.”

¹⁰ *Southern Bluefin Tuna* case, Arbitral Award, para. 44.

ITLOS – as a permanent body – revisited this question. It found that it needs a lot more than an implicit indication to validly exclude the application of Part XV of UNCLOS. This attitude was already foreshadowed in 1999 in the Order of the *Southern Bluefin Tuna* cases¹¹, though not expressly mentioned.

These two different approaches can be understood as the outcome of two fundamentally different perceptions of Part XV. Bernard Oxman categorises these two as the regime-building conception or substantive model and the Westphalian conception or procedural model.¹² For the substantive model, Part XV of UNCLOS and its compulsory jurisdiction stand at the heart of the order of the oceans, whereas for the procedural model the main aspect lies in the implementing agreements. Looking at this categorisation, one could say that regionalisation of dispute settlement is an expression of the procedural approach – as witnessed in the *Southern Bluefin Tuna* Award. The decisions of ITLOS in its orders in the *Southern Bluefin Tuna* cases and the *MOX Plant* case on the other hand would stand for the substantive approach. In deciding the way it did, ITLOS strengthened its position – and that of the other available recourses – at the centre of Part XV.

Whatever trend the *Southern Bluefin Tuna* Award might have given way to, it was re-routed by the straightforward position of ITLOS. In the words of Professor Wolfrum in his separate opinion “[a]n intention to entrust the settlement of disputes concerning the interpretation and application of the Convention to other institutions must be expressed explicitly in respective agreements”.¹³ With the order in the *MOX Plant* case, ITLOS affirmed the supremacy of UNCLOS for matters which concern the interpretation and application of the Convention in regard to regional agreements containing similar or even identical provisions.

To conclude: the near future will tell what the Arbitral Tribunal in the *MOX Plant* case thinks about the position of Part XV in today’s world of dispute settlement regimes. Will it hand down a decision on the merits and thus share the opinion of ITLOS? Or will it deny jurisdiction? Part XV does not contain any rule as to how conflicting decisions of the available courts and tribunals for the Law of the Sea Convention relate. There is no central permanent adjudicative body. On the contrary, ad-hoc arbitral tribunals have to be established when parties cannot otherwise agree to a judicial body.¹⁴ To underline the central role of UNCLOS for promoting peace and security on the world’s oceans, it needs to be interpreted consistently. Regional dispute settlement certainly has its positive aspects. But interpreting rules of UNCLOS through regional dispute settlement is to be avoided. Yesterday, we already talked about the risk of getting different interpretations of basically the same questions of law from different courts, and Professor Wolf-

¹¹ International Tribunal for the Law of the Sea, *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*) Request for Provisional Measures, Order of 27 August 1999. The text of the Order can be found at <<http://www.itlos.org/>>.

¹² Bernard Oxman, Complementary Agreements and Compulsory Jurisdiction, *American Journal of International Law*, 95 (2001), 277.

¹³ *MOX Plant* case, Order, Separate Opinion of Judge Wolfrum, p. 2.

¹⁴ Article 287 V, UNCLOS.

rum called for co-ordination in such a case. He concluded that this might be a topic for further discussion.

So, allow me to propose a title for a presentation in times to come: *The MOX Plant case: A Re-Internationalisation of Dispute Settlement in the Law of the Sea.*