The *Southern Bluefin Tuna* Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?

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The *Southern Bluefish Tuna* dispute between Australia/New Zealand and Japan has given rise to an order by the International Tribunal for the Law of the Sea (ITLOS) and to an award by an Arbitral Tribunal (AT) established according to Annex VII of the UN Convention on the Law of the Sea. While the ITLOS order found *prima facie* jurisdiction, the award rendered by the Arbitral Tribunal declining jurisdiction on the merits is not convincing.

One might ask whether these conflicting results point to a regionalization or rather to a universalization of the settlement of disputes arising within the purview of UNCLOS. However, regionalization vs. universalization may be a false dichotomy. The approach favored in this article takes UNCLOS as a functional constitutional order in which the regional arrangements for dispute settlement are administrative in nature. This perspective has substantive as well as procedural consequences. Substantively, UNCLOS law would form an integral part of the legal order under the regional arrangements. Procedurally, the dispute settlement mechanisms provided for by regional arrangements are both entitled and obligated to apply UNCLOS law. This could lead ITLOS not to exercise its jurisdiction in a given case.

I. The Cases

The *Southern Bluefin Tuna* case (*SBT*) originally arose out of a dispute under the trilateral Convention for the Conservation of Southern Bluefin Tuna (CSBT Convention) of 10 May 1993 between Australia and New Zealand, on the one hand, and Japan, on the other, regarding a unilateral experimental fishing program (EFP) carried out by Japan on the high seas in 1998-1999 with respect to southern bluefin tuna. Southern bluefin tuna is a highly migratory species. The CSBT Convention sets up a Commission that may take binding decisions on, *inter alia*, a total allowable catch (TAC) and its allocation among the member states.

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1. ITLOS

On 15 July 1999 New Zealand and Australia initiated the dispute settlement provisions of UNCLOS, notifying Japan of their intention to institute arbitral proceedings respecting the experimental fishing for southern bluefin tuna. On 30 July, New Zealand and Australia requested ITLOS to prescribe provisional measures in this dispute. The provisional measures sought by the applicants were that Japan cease the experimental fishing; that the Japanese quota be the amount last agreed upon in the CSBT Commission and that the experimental fishing undertaken should be counted against the Japanese quota; and that the parties act consistently with the precautionary principle pending resolution of the dispute. ITLOS prescribed that the parties take no action that might aggravate the dispute or prejudice the carrying out of a decision made on the merits by the arbitral tribunal. ITLOS further prescribed that the parties not exceed the harvest quotas that had existed between 1989 and 1997 but had expired in 1997. Moreover, it was prescribed that each of the three states should refrain from conducting an experimental fishing programme. What remains somewhat unclear is whether the order extends to the waters under territorial or functional jurisdiction of the parties to the dispute. Orrego Vicuña has contested such a proposition, arguing that the application by New Zealand and Australia relied on article 64 and articles 116-119 of UNCLOS, which jointly relate to the high seas.[1] It seems, however, correct to see the order as paralleling the CCSBT. Article 297(3)(a) UNCLOS would not stand in the way since this provision ensures that a coastal state enjoying functional rights may not be forced to submit a dispute concerning fisheries to dispute settlement. But the coastal states in question here, Australia and New Zealand, initiated the proceedings and can thus be deemed to have waived their immunity under Part XV Section 3.

ITLOS was satisfied that the requirements of article 290(5) were met. Consistent with the jurisprudence of the International Court of Justice, ITLOS asked whether the provisions of UNCLOS would actually be dispositive. In the view of the ITLOS, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests". Further, the provisions of UNCLOS invoked by Australia and New Zealand appeared to ITLOS to afford a basis on which the jurisdiction of the arbitral tribunal might be founded. Under article 64, read together with articles 116-119, of the Convention, States parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species. ITLOS considered that the conduct of the parties, both within the Commission for the Conservation of Southern Bluefin Tuna and in their relations with non-parties to that Convention, was relevant to an evaluation of the

[1] Orrego Vicuña, From the 1993 Bering Sea Fur Seals Case to the 1999 Southern Bluefin Tuna Cases: A Century of Efforts at Conservation of the Living Resources of the High Seas, in: 10 Y Int'l Env L 40, 42 (1999).

extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea.

In the view of ITLOS article 280 had been complied with to a sufficient degree by the applicant, which considered that there was no more room for resolving the dispute by political means.

Substantively, the case did not concern the CCSBT, with which there was no problem. The *SBT* case was about its application – or rather lack of application (implementation) by the parties. Substantively, the order of ITLOS must be understood as relying on the precautionary approach or principle as a norm of international law. The petitioners expressly founded their request for provisional measures before ITLOS on the precautionary approach, while Japan denied the relevance of this principle in this case. ITLOS did not expressly address the issue but, in prescribing the measures, made use of the concept and its implications. In developing the rationale for the measures it prescribed, ITLOS linked the conservation of the living resources of the sea with protection and preservation of the marine environment. ITLOS referred to the need to act "with prudence and caution" in order to ensure the effective conservation of the stocks. While starting from the agreed fact that the stock was in serious decline, ITLOS referred expressly to the scientific uncertainty surrounding the measures required for the appropriate conservation of the stock. This is, of course, the central premise of the precautionary approach on which the reversal of the burden of proof is based. A failure effectively to cooperate among the members of the Commission for the Conservation of SBT, at both the scientific and governmental levels, and the increase, during this same period, of catches by non-members of the Commission and new entrants to the fishery would thus require taking specific measures under article 64. Judge Wolfrum, at least, thought so in the *SBT* case declaring that "[i]n the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the Convention lays down, as stated in the Order, a duty to cooperate to that end." In fact, both the *SBT* and the *MOX* cases indicate that the precautionary principle is capable of generating specific obligations and corresponding rights for States concretizing the obligation to cooperate set forth by UNCLOS.

2. AT

The establishment of the Arbitral Tribunal paralleled the ITLOS order of 27 August 1999 just discussed. In addition to the prior appointments of Sir Kenneth Keith by Australia and New Zealand and of Ambassador Chusei Yamada by Japan under article 3(b)-(c) of UNCLOS Annex VII, three neutral arbitrators, then ICJ President Stephen Schwebel and Judges Florentino Feliciano and Per Tresselt were appointed by November 1999 under an agreement pursuant to article 3(d) of Annex VII. After the appointment of Judge Schwebel as the Tribunal's President, a number of procedural matters were agreed and the International

Centre for the Settlement of Investment Disputes (ICSID) at the World Bank, Washington D.C., accepted the invitation to serve as the registrar. In an unprecedented move, public access to the hearing was allowed.[2] In the award of August 2000[3] the Arbitral Tribunal decided by a 4:1 vote that it was without jurisdiction to rule on the merits of the dispute and, pursuant to article 290(5) UNLOS, it unanimously revoked the provisional measures in force under the 1999 ITLOS order. Arbitrator Keith dissented.

The Arbitral Tribunal first ruled that the dispute had not become moot. Japan had proposed to fish experimentally for no more than 1.500 tons, but it did not undertake for the future to forego or restrict what it regarded as a right to fish on the high seas for SBT in the absence of a decision by the CSBT Commission on a TAC and its allocation among the parties. In reaching this result, the Arbitral Tribunal proceeded through a two-step analysis, asking first whether the case contained a dispute concerning UNCLOS and then whether the further requirements of Part XV Section 2 UNCLOS were met. In turning to the first question, the Arbitral Tribunal identified it as an essential issue whether the dispute with which the Applicants had seised the Tribunal was a dispute over the interpretation of the CCSBT, or UNCLOS, or both. The Tribunal concluded that it was both a dispute under the CCSBT and UNCLOS. However, in its view, the "most acute elements of the dispute between the parties turn on their inability to agree on a revised total allowable catch and the related conduct by Japan of unilateral experimental fishing in 1998 and 1999, as well as Japan's announced plans for such fishing thereafter". Those elements of the dispute were clearly within the mandate of the Commission for the Conservation of Southern Bluefin Tuna. In the negotiations in that body, the parties failed to agree on a TAC, the unilateral experimental fishing program was announced by Japan and protested by New Zealand and Australia. But the dispute fell also within the provisions of UNCLOS, most prominently article 64 on the duty to cooperate through appropriate international organizations.

Importantly, the Arbitral Tribunal expressly concluded that the CCSBT was not *lex specialis* with respect to UNCLOS. While the CCSBT was designed to implement article 64 UNCLOS it was not clear that it exhausted the content of the applicable UNCLOS provisions. Also, UNCLOS contained a number of provisions that had no equivalent in the CCSBT such as articles 117 and 119.

The Arbitral Tribunal then turned to the question of whether the further elements of Part XV Section 2 were fulfilled. Jurisdiction under Section 2 was subject to Section 1. Article 281 contains two requirements in case that the parties to the dispute had agreed to settle it by a peaceful means of their choice: (1) that no settlement had been reached and (2) that the agreement does not exclude any further procedure. The Arbitral Tribunal found it necessary to deal with the expression "and the agreement between the parties does not exclude further procedure" contained in article 281, para. 1. The Tribunal came to the conclusion "that Article 16

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[2] See S.M. Schwebel, Justice in International Law, 1994, 228-229.

[3] The *Southern Bluefin Tuna* Award, 39 ILM 1359 (2000).

of the 1993 Convention excluded any further procedure within the contemplation of article 281(1)" – though not expressly,[4] because it considered that the three parties were grappling not with two separate disputes under the CSBT and the LOS Convention but with what was in fact "a single dispute arising under both Conventions".

Justice Sir Kenneth Keith in his separate opinion relating to the same requirement in article 281 came to a different conclusion, holding that article 16 of the Convention for the Conservation of Southern Bluefin Tuna did "not 'exclude' the jurisdiction of this Tribunal in respect of disputes arising under UNCLOS".

3. The Sequel – the MOX Plant Case

The decision handed down by ITLOS in the *MOX Plant* case on December 3, 2001 is the answer to the challenge presented by the Arbitral Tribunal in the *SBT* case, taking up the gauntlet without hesitation. This case concerned the planned operation of the MOX Plant by the United Kingdom; Ireland feared the release of radioactive material into the Irish Sea and prayed for provisional measures interdicting the start of the operation of the plant.

In its *MOX* decision ITLOS restates that article 282 UNCLOS is concerned with general, regional or bilateral agreements which provide for the settlement of disputes concerning "the interpretation or application of this Convention". Neither OSPAR nor the EC treaty provide so. For this conclusion, the Tribunal advances three arguments.[5] First, the dispute settlement mechanisms under the said treaties are concerned with disputes concerning the interpretation or application of these agreements, and not with disputes arising under the Convention. This held true even for provisions that may be "similarly or identically worded" since each treaty needs to be interpreted in the light of its specific object and purpose. Clearly, this is a direct response to the Arbitral Tribunal in the *SBT* case and its claim that the disputes arising under UNCLOS and under the CCSBT were the same. To judge from the decision's broadly worded paras. 49-51, such will rarely be the case. The *MOX Plant* case furthermore gave ITLOS the opportunity to clarify its understanding of the urgency requirement provided for by article 290(5). ITLOS is required not only to conclude that there is the possibility of "irreparable prejudice" to the rights of one or other of the parties (or serious damage to the marine environment), but also that this possibility might occur in the period "pending the constitution of the [Annex VII] arbitral tribunal" to which the substance of the dispute is being submitted. Among other things this requires that the Tribunal be convinced that the Annex VII Arbitral Tribunal has the requisite powers to prevent the harm alleged by the applicant in praying for provisional relief.[6] With respect to the

[4] Para. 59, p. 1390, ibid.
[5] Paras. 49-51.
[6] Separate Opinion Mensah, p. 1.

substantive norm underlying its prescription of provisional measures, ITLOS did not use the precautionary approach. In fact, and this was a major difference with the *SBT* case where the ITLOS preferred solution – TAC and calculation of any experimental fishing – was evident as was the threat to the environment undisputed, here neither of these conditions were fulfilled. Thus, ITLOS resorted to the duty to cooperate, the "Grundnorm" of international environmental law, codified in, *inter alia*, article 123 UNCLOS.[7] ITLOS ordered the parties provisionally to cooperate on the basis of prudence.

4. Analysis

Upon closer analysis, thus, there is disagreement on one – albeit fundamental – point between ITLOS and the Arbitral Tribunal in the *SBT* case: the function of article 281.

To this observer it seems highly doubtful that article 281 was applicable at all. Article 283 UNCLOS can be read the most specific norm regarding dispute settlement mechanisms provided by a regional arrangement. It is only if the requirements of this provision are met, most notably compulsory jurisdiction for any such mechanism, that article 286 is triggered.

The AT's model cannot be squared with Part XV UNCLOS since it allows States parties to the Convention to opt out of the compulsory adjudication of disputes concerning the interpretation or application of the Convention. In fact, under the AT's approach, a claim under UNCLOS that also raises issues under the regional agreement cannot be adjudicated by the global system. For even provision for non-binding peaceful settlement of disputes – which is provided for by article 55 UN Charter – will preclude resort to the global system. Furthermore the Arbitral Tribunal view seems to ignore the approach underlying Part XV: that there is compulsory third party DS combined with a free choice of procedure for States parties.

Technically, the Arbitral Tribunal confounds the concept of disputes when it says that there was a "single dispute". Clearly the term dispute refers to the dispositive norms, and thus the dispute arises either under UNCLOS or under the regional arrangement even though it may concern the same set of facts.

The proliferation of regional courts and tribunals as much as that of specialized institutions of third-party dispute settlement has of course been warned about by important voices.[8] It is not devoid of irony that this specter is raised as a consequence of the AT's approach.

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[7] See Separate Opinions of Judges Nelson and Wolfrum in the *MOX Plant* case.

[8] See H.E. Judge Stephen Schwebel, Opening Address to the ILA, July 25, 2000, summarized in Report of the 69th International Law Association Conference, London, 25-29 July 2000, 135-136. Cf. Statements of H.E. Judge Stephen Schwebel, President of the International Court of Justice, UN Doc. A/52/PV.36 of 17 October 1997, 1-5.

Finally, it is highly doubtful whether an Annex VII arbitral tribunal that considers itself not to have jurisdiction over the dispute can actually revoke the measures prescribed on the basis of an – albeit *prima facie* – jurisdiction of such an AT.

II. A Model of Constitutional Adjudication

Underlying the award of the Arbitral Tribunal in the *SBT* case, however, is the more fundamental question regarding the relation between UNCLOS and the regional arrangement. Three models can be distinguished: (1) Strict separation of the two legal orders or (2)&(3) a unitary approach, which can be subdivided into: a) supremacy of the regional system b) supremacy of the global system. A unitary approach based on the supremacy of the global system would have to be based on the premise that UNCLOS is the constitution of the oceans in a legal sense. We can then proceed in four steps:

1. The Substantive Law

In principle, this question of hierarchy can receive an equally authoritative answer in either legal order. Taking the point of view of UNCLOS, I propose that the Convention assumes the hierarchical superiority of its norms across the board, something that may conveniently be called supremacy of the Convention. The proposition can be supported on the grounds of the wording of a number of crucial provisions as well as object and purpose of the Convention. Article 293 provides for a hierarchical relationship between UNCLOS and other treaties concerning law of the sea issues.[9] Through UNCLOS, States parties pursue common objectives creating the public goods such as environmental protection. UNCLOS as a public order presupposes that States parties cannot contract out of it. Correspondingly, the ITLOS order in the *SBT* case presupposes that the parties to the CSBT Convention have, by virtue of their duty to cooperate under article 64 UNCLOS, to take account of the impact that the activities of States not party to the CSBT Convention have on the southern bluefin tuna stock, and vice versa. That may be seen as not devoid of procedural problems – these States were not heard in the proceedings – but it does correspond to the substantive law side just outlined.

Under a constitutional approach little room is left for traditional rules on treaty conflict as set forth in the Vienna Convention on the Law of Treaties. The arbitral award in the *SBT* case, in this respect, is of interest. By expressly ruling out the

[9] Article 293 UNCLOS sets forth the "applicable law" in dispute falling under Part XV. It provides that "a court or tribunal having jurisdiction under this section shall apply this Convention and – in a well-known formulation – other rules of international law not incompatible with this Convention". This provision presupposes a substantive hierarchy between the Convention and the other rules. Thus, the Convention is the standard. Other rules can be applied insofar as the standard directs the court or tribunal having jurisdiction under Part XV to do so.

simple *lex specialis/lex generalis* mechanism "critical to Japan's case" and firmly placing its jurisdictional base within Part XV UNCLOS, the arbitral tribunal underlined the public law nature of UNCLOS.

The relation between two international legal regimes is often conceived as one of conflicting rules. In the context of UNCLOS, though, the question is whether the UNCLOS provision in question is intended to be directly applied in the context of an implementing treaty. A main import of UNLOS is that it is directional, to be implemented by further bodies of law. As Judge Wolfrum points out in his separate opinion in the *MOX Plant* case: "The obligation to co-operate with other States whose interests may be affected is a 'Grundnorm' of Part XII of the Convention as of international customary law for the protection of the environment." The qualification of UNCLOS as a constitutional order does not denote that its provisions cannot be directly applicable. The standards may reach considerable depth and precision. Thus, in the *SBT* case, article 64 UNCLOS could be interpreted to provide a test for the actual operation of the CCSBT as a regional arrangement. It is only in the case of directly effective – or applicable – norms that constitute standards against which to measure norms originating under a different legal order that the question of hierarchy arises.

Regional arrangements, then, are functionally agencies and the dispute settlement mechanisms under these arrangements functionally provide administrative adjudication. The Convention is to be considered as a framework agreement; it provides for further rules to be enacted by, in particular, international organizations. Those rules, to the extent they are in accordance with the Convention, supplement the Convention. It is to be expected that the regional arrangement will contain, at least, more specific provisions. Thus it may contain the precautionary principle. Under the constitutional approach this means that the precautionary principle must not necessarily be set forth on the level of UNCLOS, but only that it must not be excluded by UNCLOS. The legislator promulgates statutes that implement the constitutional principles. This is the case for OSPAR in the field of environmental management and it is the case for regional fisheries management organizations concluded pursuant to the Fish Stocks Agreement. Regional fisheries management organizations (RFMOs) have increasingly come to be regarded as the "vehicles of good governance" in international fisheries. RFMO can be regarded as international regimes constituted by agreement outlining principles and norms for the management of fisheries, and establishing rules and procedures for how to fulfil the organisation's objectives and functions. Their main functions are to gather and assess scientific information about the fish stocks, establish regulatory measures, and to ensure compliance through appropriate enforcement mechanisms. The expectation is that it will be easier to reach agreement within the Commission, where the political stakes will be lower, and the issue of establishing precedents less critical.

2. The Single Adjudicatory Function

The first question, of course, is the function of the dispute settlement system provided for by Part XV of UNCLOS. Is it "the whole object of section 1 of Part XV of the Convention ... to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention"? The AT's decision in the *SBT* case has pushed this view to its logical extreme. In fact, under this view, the global system is excluded even if, in the instance, agreement has not been achieved and the dispute continues. Or is it rather – in the sense of a genuine constitutional function adjudicating an objective competential order – that the very balance of rights and obligations of the States parties to the Convention requires that there be compulsory third-party dispute settlement with the relatively expensive standing International Tribunal at its apex? ITLOS has so far avoided speaking unequivocally to the issue, and the views on the bench may be divided. Under the view favored here, Part XV is meant primarily to vest the institutions referred to in article 287 UNCLOS with the function to decide disputes on the interpretation and the application of the Convention unless parties to a dispute have agreed otherwise.

a) Procedures under Section 2 – the horizontal adjudicatory structure

This horizontal adjudicatory structure was in full display in the *MOX Plant* case. The case had already been submitted to binding arbitration under OSPAR. The same facts can be submitted to an Annex VII arbitral tribunal, which tribunal is one of the "procedures" of Section 2 of Part XV UNCLOS, but the facts are to be evaluated under the distinct legal provisions of UNCLOS. ITLOS underlined the unitary structure of dispute settlement under Part XV when it declined to prescribe the provisional measures requested by Ireland on the ground that there was no urgency to do so given the impending establishment of the Annex VII Arbitral Tribunal. This unity of the procedures supports a functional distinction between provisional relief and proceedings on the merits. These two functionalities of any adjudicatory system are here allocated by UNCLOS and the States parties' decisions to two separate bodies or – in the language of Part XV – procedures.

b) Universal and regional dispute settlement mechanisms – the vertical adjudicatory structure

The question arises, though, whether the claim needs to raise a specific provision of UNCLOS that does not have an equivalent in the regional system. In the *SBT* case such may have been the case with respect to the precautionary principle. Ireland's submission in the *MOX* case emphasized that UNCLOS contained such provisions that were not part of OSPAR. But the ITLOS order unequivocally sta-

ted that even if the provisions were identical, there would be UNCLOS questions. Orrego Vicuña's comment is therefore true that "in the tribunal's view (in the *SBT* case) any matter dealt with under a fisheries convention can be brought into a relationship with the LOSC and, thus, can be transformed into a dispute on the interpretation or the application of the latter, which is enough to find jurisdiction under article 298(1)".

(1) Exclusive jurisdiction of the regional mechanism?

UNCLOS itself makes it possible for a regional dispute settlement mechanism to interpret and apply UNCLOS. Under OSPAR, the Arbitral Tribunal has to apply the Convention and other international law, which may be understood as including UNCLOS. The OSPAR Convention refers to UNCLOS in several prominent places, not least the preamble. Notably absent is a qualification of the applicable international law as to its compatibility with the convention. The OSPAR convention thus may be read as incorporating the directly applicable and "supreme" UNCLOS law.

Provided the requirements of UNCLOS article 282 are met, that jurisdiction of the regional mechanism is exclusive. The requirements are as follows. First, the dispute between the parties must concern the interpretation or application of UNCLOS. Second, the parties must have entered into an agreement – general, regional, bilateral or otherwise – to submit such dispute to a procedure that entails a binding decision. Wording, context and objective of article 282 indicate that, third, the regional arrangement needs to contain an express provision conferring the dispute exclusively to the regional arrangement at the exclusion of the global dispute settlement mechanism. The crucial question here, then, is whether there is a further requirement that the regional mechanism be explicitly made exclusive. As ITLOS Vice-President Nelson points out in his separate opinion in the *MOX Plant* case, support can be found both in the *travaux préparatoires* and in the literature for the position that the presumption should work the other way round, i.e. the exclusivity of the regional mechanism would be presumed. But Part XV is meant primarily to vest the institutions referred to in article 287 UNCLOS with the function to decide disputes on the interpretation and the application of the Convention unless parties to a dispute have agreed otherwise. If the objective of Part XV of the Convention is taken into account such agreement among the parties to a conflict cannot be presumed but must be expressed explicitly in the respective agreements. In fact such exclusivity cannot be presumed, but rather to the contrary would be deemed exceptional since it raises questions as to the compatibility with the spirit if not the letter of Part XV; a clear statement of the legislator's intent to provide for exclusivity is required. This is true with respect to article 282 as well as article 281. This would certainly be the case if, as Judge Wolfrum hypothesizes in his separate opinion in the *MOX Plant* case, the States parties actually agree on a system for the settlement of disputes under the Convention different from the one envisaged in Part XV, Section 2, of the Convention. But what if they mirror the

mechanisms provided for in Section 2? Would it then be enough that the mechanism may apply UNCLOS law in deciding the dispute submitted to it?

(2) Interpretation or application of a regional arrangement by court or tribunal within the meaning of Section 2 Part XV

The more interesting question is whether and under what conditions the court or tribunal having jurisdiction under Part XV may also interpret and apply any regional arrangements.

The important point here is that the rationality requirement is a constitutional standard to be administered by the constitutional court. If the constitutional issue cannot be decided without the regional arrangement, then the Part XV procedure should stop its proceedings and wait for the regional mechanism to render its decision on the regional arrangement. Under Part XV nothing stands in the way of seising the Part XV court or tribunal with a dispute concerning the interpretation or application of UNCLOS after a decision by a regional mechanism. Article 282 requires the express exclusion of Part XV procedures. Article 281(1) does not apply unless the parties to the dispute have excluded *ad hoc* any further proceedings after the regional mechanism's decision.

3. The Fish Stocks Agreement

It is evident from even a cursory reading of UNCLOS that the Convention attaches great importance to regional arrangements for its implementation. This approach was re-confirmed by the Fish Stocks Agreement that recently entered into force and purports to "implement" the Convention. Its emphasis is on the cooperative management of the fish stocks covered by coastal states and distant water fishing States through the appropriate regional arrangements and organizations. The model advocated here seems to be borne out by the Agreement. Its main function is to spell out the duty to cooperate on the management and conservation of certain fish stocks. Pursuant to this objective, the Agreement establishes standards and mechanisms of cooperation, chief among them regional arrangements and organizations.[10] Of considerable interest here are the dispute settlement provisions. This Agreement provides, in article 32, for compulsory settlement of disputes arising under it through the procedures provided for by Part XV Section 2 of UNCLOS. The procedure will have jurisdiction over UNCLOS, the Agreement and any regional arrangement.

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10 SEAFO is the first convention to be adopted to manage straddling fish stocks following the UN Fish Stocks Agreement in 1995. Its detailed and binding provisions were narrowed down gradually in the negotiating process. See A.K. Sydnes, New Regional Fisheries Management Regimes: Establishing the South East Atlantic Fisheries Organisation, 25 Marine Policy 353 (2001).

So article 30 really operates on a constitutional and on a statutory plane. Insofar as it itself confers jurisdiction over the Agreement to the procedures under Part XV, it enlarges the function of constitutional adjudication. Insofar as it provides a model for regional arrangements to confer jurisdiction, it propagates the use of the Part XV mechanisms as functional regional tribunals. The South East Atlantic fisheries organisation, the first RFMO to be negotiated and concluded pursuant to the Fish Stocks Agreement, contains an express references to the Agreement's dispute settlement provisions, article 24(4),(5).[11]

III. Conclusion

All in all, the *SBT* case may require some new thinking about the adjudicatory function under UNCLOS. UNCLOS has been rightly hailed as a constitution for the oceans. The *SBT* cases and the *MOX Plant* case denote that this claim now needs to be taken seriously. It is the conceptual underpinning for properly allocating jurisdiction and substantive law issues to the Convention and any implementing regimes.

[11] Currently there are several processes under way to reform or establish similar organisations in other parts of the world. See A.K. Sydnes, Regional Fishery Organisations: How and why Organisational Diversity Matters, in: ODILA forthcoming.