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Southern Bluefin Tuna Case: Australia and New Zealand v. Japan

Leah Sturtz*

In 1999, Australia and New Zealand sued Japan for its overfishing of the southern bluefin tuna, in violation of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and the United Nations Convention for the Law of the Sea (UNCLOS). The International Tribunal for the Law of the Sea (ITLOS), in the first case of this kind, found for Australia and New Zealand and issued protective provisional measures while an ad hoc arbitral tribunal was formed. The arbitral tribunal, however, found it and ITLOS lacked jurisdiction as the case fell primarily under the CCSBT, to the exclusion of UNCLOS. The decision strikes a blow to the environmental movement, as well as throws the compulsory jurisdiction of the United Nations Convention for the Law of the Sea into jeopardy.

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INTRODUCTION

International law has traditionally turned on the concept that no nation can force another to submit to any court, law, or custom.\(^1\) Based on the concept that all nations are equal sovereigns, it is generally understood that state actors participate in the international sphere and court system on a consent-only basis.\(^2\)

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International law . . . is primarily concerned with the legal regulation of the international intercourse of states which are organized as territorial entities, are limited in number and consider themselves, in spite of the obvious factual differences in reality, in formal terms as 'sovereign' and 'equal'. Thus, international law is a horizontal legal system, lacking a supreme authority . . . .

. . . Since states are independent and legally equal, no state may exercise jurisdiction over another state without its consent.

2. See id.
The United Nations Convention for the Law of the Sea (UNCLOS) is an exception to this general rule. When UNCLOS came into power in 1993, it "established a new and comprehensive legal regime for all ocean space." To support this regime, it required all of its signatories to consent to compulsory jurisdiction. This provision is unique among treaties relating to the international law of the sea and rare in international agreements. The 150 states that negotiated UNCLOS only consented to the drastic step of compulsory jurisdiction out of fear for their maritime boundaries and their marine resources.

The negotiations that led to UNCLOS came at a time of great turmoil and maritime disputes. New technologies enabled fisherman to travel farther to fish in foreign waters, causing coastal states to claim broad protected zones to secure their food sources and livelihoods. UNCLOS was designed to be a powerful tool to allay these fears by providing a comprehensive regulatory scheme to manage and protect the world's oceans and natural resources. Anticipating varying interpretations of UNCLOS, parties saw an automatic and compulsory dispute resolution system as the only way to uphold this complex system.

To facilitate the peaceful settlement of disputes, UNCLOS created a system of tribunals to hear disputes arising under its compulsory jurisdiction. Article 1 of Annex VI of UNCLOS establishes the International Tribunal for the Law of the Sea (ITLOS) to hear all cases concerning the interpretation or implementation of UNCLOS, and to settle disputes arising...
under other treaties regarding the subject matter of UNCLOS.\textsuperscript{13} In addition to creating a judicial tribunal, UNCLOS also provided for the formation of ad hoc arbitral tribunals to be called upon by parties that prefer a more informal arbitration to the formal, twenty-one judge ITLOS panel.\textsuperscript{14} Recognizing the delay that may accompany the formation of one of these arbitral tribunals, UNCLOS empowered ITLOS to prescribe provisional measures to protect the rights of the parties and the health of the environment until such time as the arbitral tribunal could assemble.\textsuperscript{15}

One case that recently moved through these channels places UNCLOS' compulsory dispute resolution procedures in jeopardy and, in doing so, threatens the efficacy of the entire convention. In August 1999, Australia and New Zealand requested the formation of an ad hoc arbitral tribunal to hear their claims against Japan for over-fishing the southern bluefin tuna, a valuable and threatened sashimi fish.\textsuperscript{16} In 1993, Australia, New Zealand, and Japan signed a trilateral treaty that was intended to implement the provisions of the UNCLOS umbrella, the Convention for the Conservation of Southern Bluefin Tuna (CCSBT).\textsuperscript{17} Under the CCSBT, the parties established exact quotas of fish that each party could harvest, called a total allowable catch (TAC).\textsuperscript{18} Australia and New Zealand complained that Japan exceeded this quota by 1,464 metric tons as a result of its institution of a unilateral experimental fishing program (EFP).\textsuperscript{19} The parties attempted to resolve the issue through the dispute resolution framework of the CCSBT, but when Japan refused to halt its EFP during the negotiation process, they resorted to the compulsory jurisdiction provisions of UNCLOS.\textsuperscript{20}

\textsuperscript{13} The submission of disputes arising under other treaties requires the agreement of all parties to the dispute. \textit{Id.} Annex VI, art. 22.
\textsuperscript{14} \textit{See id.} Part XV, art. 287.
\textsuperscript{15} Per U.N. Convention for the Law of the Sea, art. 290(1), ITLOS can issue provisional measures if it determines that: (1) prima facie, it has jurisdiction, or the arbitral tribunal that is to be formed would have such jurisdiction; and that (2) urgency is required to protect either the interests of the parties, or to prevent serious harm to the marine environment. Section 5 of the same article limits the scope of these measures by allowing any subsequent tribunal to revoke or modify them. \textit{Id.} art. 290.
\textsuperscript{16} \textit{See Jurisdictional Award, supra} note 4, at 10.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{See Jurisdictional Award, supra} note 4, at 22.
\textsuperscript{20} \textit{See Southern Bluefin Tuna Case (Austl. v. Japan), Statement of Claim and Ground on Which It Is Based, International Tribunal for the Law of the Sea, July 15,
To protect their own interests and the marine environment while waiting for an arbitral tribunal to be formed, Australia and New Zealand requested and received provisional measures from ITLOS. These provisional measures remained in place for one year, yielding great benefits in environmental protection. The measures required that Japan immediately halt its unilateral experimental harvesting of the southern bluefin tuna and that all fish it had caught through the program be counted against its TAC. ITLOS' grant of the provisional measures was a groundbreaking and dramatic move. Environmentalists heralded ITLOS' judgment as the "teeth" that would finally shore up numerous fisheries agreements.

These hopes were dashed, however, when the Ad Hoc Arbitral Tribunal (Arbitral Tribunal) finally convened one year later in Washington, D.C. to consider the case. On August 4, 2000, the Arbitral Tribunal concluded that it lacked jurisdiction to authorize or ban such research fishing, and summarily revoked the provisional measures. The Arbitral Tribunal based its conclusion on its finding that the case arose primarily under the CCSBT. Limited by UNCLOS' policy of deference to other agreements between disputing parties, the Arbitral Tribunal held 21. Southern Bluefin Tuna Cases (Austl. & N.Z. v. Japan), Requests for Provisional Measures, Order, International Tribunal for the Law of the Sea, Aug. 27, 1999, at 15-18, available at http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm (last visited Mar. 19, 2001) [hereinafter ITLOS Order].
22. In the one year that the provisional measures were in place, Australia, New Zealand, and Japan moved forward and came close to a settlement between the three parties, as well as made progress on the issue of third-party fishing of the southern bluefin tuna. See Jurisdictional Award, supra note 4, at 108.
23. See ITLOS Order, supra note 21, at 15-17.
24. The move signaled a dramatic and hopeful step in the direction of marine wildlife conservation and also served to introduce ITLOS to the world as a potentially powerful tool for environmental justice. It sparked hope among environmentalists and states that believed the ruling, which was a first-ever for ITLOS, would send the message that entitlements would now be respected and enforced. Indeed, the mere threat of being brought before ITLOS for similar actions led New Zealand to accept a penalty for over-fishing the orange roughy and to agree to cooperate with Australia in keeping other countries' boats from the roughy zone. See Roughy Deal Ends Threat of Fight, AUSTRALASIAN BUS. INTELLIGENCE, Feb. 10, 2000, at A4, available at LEXIS, Nexis Library, Australia Publications; see also Tuna Ruling a Warning to Other Nations Says Truss, AAP NEWSPEED, Aug. 30, 1999, available at LEXIS: Australia Publications (quoting Australian Agriculture, Fisheries, and Forests Minister Warren Truss, "No country in the future will be able to claim that they can take greater than their entitlement on the grounds of experimentation.").
26. See Jurisdiction Award, supra note 4, at 93.
that the dispute resolution procedures under CCSBT must govern the dispute. The mere intersection of the treaties did not preclude jurisdiction; the problem was that the CCSBT specifically required consent in its dispute resolution proceedings. Therefore, the Arbitral Tribunal held that the parties could not continue further adjudication under the compulsory jurisdiction of UNCLOS and also comply with the CCSBT.

By relinquishing its jurisdiction and reversing the provisional measures, the Arbitral Tribunal has cast doubt on the efficacy and credibility of UNCLOS' entire compulsory dispute resolution system, and especially on ITLOS. First, if the holding of the Southern Bluefin Tuna Case is taken as precedent, it supports the conclusion that parties can now circumvent UNCLOS' compulsory jurisdiction through the adoption of consent-based, side agreements. Second, the reversal, by itself, casts doubt on ITLOS' ability to deliver consistent judgments on which parties can rely, a concern that can be fatal to a tribunal. These fears, if realized, will have a dramatic impact on the environment and the law of the sea. Should UNCLOS bow out of any dispute also governed by a consensual jurisdiction treaty, compulsory jurisdiction would be a thing of the past, leading to uncertainty, diplomatic strife, and unilateral self-help, not only in fisheries law but in other areas of international law as well. These concerns threaten to sabotage a valuable tribunal. ITLOS has attributes that make it a very effective forum for the resolution of environmental disputes: speed, specialized chambers, the power to issue binding provisional measures, and a forum uniquely open to non-states.

27. See id. at 87. UNCLOS attempts to reduce conflict with the many other treaties governing the world's oceans by a principle of deference to those other treaties in the area of dispute resolution, so long as these other treaties provide for binding decisions. UNCLOS, supra note 3, art. 282. In such cases as this, when another treaty exists between the parties that could settle the dispute, UNCLOS' compulsory jurisdiction and dispute resolution will only kick in once the parties have unsuccessfully exhausted the remedies provided under the other treaty, and so long as the other treaty does not exclude any further procedure. Id. art. 281.

28. See CCSBT, supra note 17, art. 16(2) (stating "any dispute of this character not so resolved [by negotiations or other peaceful means of their choice] shall, with the consent of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration." (emphasis added)).

29. See Jurisdictional Award, supra note 4, at 99.


31. See id. at 17.

32. See id. (describing Professor Oxman's prediction that this decision could also have impact in the areas of international civil aviation and military activities).
This Note examines the *Southern Bluefin Tuna Case* and its repercussions for UNCLOS and ITLOS. Part I outlines dispute resolution under UNCLOS, focusing on UNCLOS' compulsory jurisdiction, the formation of ITLOS, and UNCLOS' interaction with other treaties, especially the CCSBT. Part II explores the case of Australia and New Zealand versus Japan, its path through ITLOS and the Arbitral Tribunal, and where the dispute currently lies. Part III analyzes the effects of both decisions, reviewing the benefits of the ITLOS, as illustrated in the first decision, and the repercussions of the Arbitral Tribunal's reversal. Finally, Part IV looks to possible solutions to the challenges that this case raises for ITLOS and UNCLOS. The benefits offered by ITLOS for environmental protection outweigh any difficulties posed by its questionable compulsory jurisdiction, thus calling for a quick resolution enabling ITLOS to again protect the world's seas.

I

DISPUTE RESOLUTION UNDER UNCLOS

A. Compulsory Jurisdiction

UNCLOS' compulsory jurisdiction is a novelty within the sphere of the international law of the sea. "While the ICJ and international arbitral bodies have decided many law of the sea cases before [UNCLOS] entered into force, their jurisdiction generally depended on a special [jurisdiction granting] agreement . . . entered into after the dispute had arisen." As mentioned, times were difficult when UNCLOS was ratified, however, and the signatories were looking for a means to ensure that UNCLOS would be effective. Developing countries sought the third-party dispute settlement provisions to counterbalance the political, economic, and military pressures of the developed nations, while the United States supported the provisions as a way to deter unilateral state claims over marine resources. Former UNCLOS President H. S. Amerasinghe felt that UNCLOS' dispute resolution proceedings were essential merely to hold the convention together: "[T]he provision of effective dispute settlement procedures as essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention . . . [absent these] . . . the

33. See Noyes, supra note 6, at 114.
34. See id. at 115.
compromise will disintegrate rapidly and permanently." The compulsory nature, in particular, was viewed as necessary to ensure that reluctant parties could not hold the dispute settlement process hostage with their lack of consent. This compulsory aspect was considered so integral to the Convention that three of its nine annexes are dedicated to compulsory dispute resolution.

The core of UNCLOS' dispute settlement system is found under Part XV, Section 2: "Compulsory Procedures Entailing Binding Decisions," and specifically in Article 286. Article 286 establishes that, subject to certain limitations, if parties are unable to reach an alternative settlement proceeding on their own, "any dispute concerning the interpretation or application of this Convention shall... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." When signing, ratifying, or acceding to the Convention, a party is given the choice as to which forum it prefers to use under these compulsory proceedings: (a) the International Tribunal for the Law of the Sea, (b) the International Court of Justice (ICJ), (c) an arbitral tribunal constituted under Annex VII of the Convention, or (d) a special arbitral tribunal under Annex VIII. A party to a dispute without a declaration in force will be considered to have accepted arbitration under Annex VII.

The Southern Bluefin Tuna Case illustrates how a small trilateral, regional agreement, designed merely to implement UNCLOS, a convention to which all three parties had consented, can actually supercede the compulsory adjudication of UNCLOS' comprehensive legal regime. The foundations of the answer are

36. See Jurisdictional Award, supra note 4, at 65.
37. See ITLOS Order, supra note 21, at 7 (separate opinion of Judge Laing).
38. UNCLOS, supra note 3, art. 286 (emphasis added).
39. Id. art. 287.
40. Id.
41. UNCLOS came into force for Australia, New Zealand, and Japan in 1996, three years after they ratified the CCSBT, but the Ad Hoc Arbitral Tribunal explains that the CCSBT was actually crafted with UNCLOS in mind:

[The 1993 Convention [CCSBT] was prepared in light of the provisions of the 1982 United Nations Convention for the Law of the Sea and the relevant principles of international law. UNCLOS had not come into force in 1993, and in fact did not come into force for the three Parties to the instant dispute until 1996, but the Parties to the [CCSBT] regard UNCLOS as an umbrella or framework Convention to be implemented in respect of Southern Bluefin Tuna by the adoption of [CCSBT].]
found in the concessions that had to be made to convince 130 nations\footnote{42} to submit to compulsory adjudication. First, there are severe limitations on the compulsory adjudication to which coastal states must submit. They need not submit to settlement of any dispute arising within their own Exclusive Economic Zones (EEZs)\footnote{43} regarding marine research or their sovereign rights with respect to living resources, including setting TACs, harvesting capacities, and the allocations of surpluses.\footnote{44} Second, Article 298 of UNCLOS allows additional exceptions to compulsory jurisdiction for disputes concerning boundaries, military activity, or police activity.\footnote{45} Third, parties may always choose any other peaceful means to settle a dispute between them concerning the interpretation or application of this Convention without submitting to the compulsory adjudication of ITLOS or any of UNCLOS' specialized chambers.\footnote{46} In the eyes of the justices, the CCSBT fell within this third exception, but only after several other factors weakened the compulsory nature of the dispute resolution process to the point that they could read the exception this broadly.

\textit{B. The Formation of ITLOS}

One of the factors that has eaten away at UNCLOS' compulsory nature is the undetermined edge of ITLOS' jurisdiction. To counteract a possible shortage of business created by the listed exceptions, UNCLOS granted ITLOS a broad range of cases to hear.\footnote{47} The boundaries of this jurisdiction are,

\begin{itemize}
\item \textbf{Jurisdictional Award, supra note 4, at 26.}
\item \textbf{42. See Noyes, supra note 6, at 111.}
\item \textbf{43. UNCLOS III approves a twelve-mile territorial sea in which a country can exercise exclusive jurisdiction (Art. 3), as well as a 188-mile exclusive economic zone in which coastal states have a preferential right to fish and exploit the minerals below the seabed (Arts. 56-57). The word "exclusive" is actually a misnomer because, if a state is unable to fully exploit these resources, it must make arrangements to share the surplus with other states. See Malanczuk, supra note 1, at 183-84.}
\item \textbf{44. See UNCLOS, supra note 3, arts. 297(2), 297(3). Despite these many exceptions to compulsory jurisdiction over coastal states, a complaining party can bring a coastal state to non-binding "compulsory conciliation" for actions within the coastal state's own EEZ. Although these awards are not binding, they are often an invaluable tool in reaching settlement. See Noyes, supra note 6, at 123.}
\item \textbf{45. UNCLOS, supra note 3, art. 298(1). Parties must request such an exception in writing, though they can do so at any time.}
\item \textbf{46. Id. art. 280 (stating "Nothing in this Part impairs the right of any State parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice").}
\item \textbf{47. See id. art. 290.}
\end{itemize}
however, fuzzy at best, resulting in situations like the Southern Bluefin Tuna Case where it is uncertain whether a dispute falls under ITLOS' jurisdiction, that of another tribunal, or both.

As far as subject matter, the purview of ITLOS was meant to cover expansive territory. As ICJ President Schwebel stated:

The International Tribunal for the Law of the Sea will deal not only with the interpretation of the United Nations Convention on the Law of the Sea, and not only with claims of individuals, corporations and public authorities in that immense sphere, but with the law of the sea—essentially the Inter-State law of the sea—as the World Court has contributed to shaping it. Inevitably, it will also deal with subjects such as interpretation of treaties . . . .

ITLOS was granted jurisdiction over all disputes submitted to it concerning the interpretation and application of UNCLOS and also disputes arising under any international agreement related to UNCLOS.\textsuperscript{49} The Straddling Fish Agreement also applies UNCLOS' dispute resolution provisions and may produce cases for ITLOS.\textsuperscript{50} In addition, ITLOS may hear "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."\textsuperscript{51} Finally, it may hear any dispute concerning the interpretation or application of any international agreement related to the purposes of this Convention.\textsuperscript{52}

ITLOS may hear disputes among states, international organizations, corporations, and individuals.\textsuperscript{53} In structuring ITLOS' jurisdiction in such a manner, UNCLOS increased the potential claims that might be brought before ITLOS. This wide jurisdiction over non-state parties is unlike the International Court of Justice (ICJ), which can only entertain disputes


\textsuperscript{49.} UNCLOS, supra note 3, art. 288(1).


\textsuperscript{51.} UNCLOS, supra note 3, Annex VI, art. 21.

\textsuperscript{52.} \textit{Id.} art. 287, Annex VI, art. 22 (emphasis added).

\textsuperscript{53.} See Noyes, supra note 6, at 111. Individuals can only be heard in the specialized chambers of ITLOS and not by the Tribunal, en banc. See UNCLOS, supra note 3, art. 187.
between nation-states. For instance, under UNCLOS, individuals can sue directly for release of a seized vessel, whereas under most other treaties such a claim would have to be espoused by the citizen's state.

To further broaden ITLOS' case jurisdiction, UNCLOS endowed ITLOS with two functions in addition to its normal judicial role. As it did in the Southern Bluefin Tuna Case, ITLOS can issue provisional measures to preserve respective rights of the parties, or to prevent serious harm to the marine environment. These measures are uniquely binding, unlike the merely suggestive provisional measures offered under other treaties. Provisional measures concerning a dispute that has not been accepted by ITLOS can be issued even against a party who is not an UNCLOS signatory; the only requirement is that the dispute is being submitted to an UNCLOS arbitral tribunal. In addition to provisional measures, ITLOS can give advisory opinions, though only if an international agreement related to UNCLOS' purposes specifically provides for such a submission.

ITLOS' expansive jurisdiction is generally untested, and thus its limits are vague. ITLOS has heard only four cases; therefore,

54. See Noyes, supra note 6, at 111.
55. UNCLOS, supra note 3, art. 292, ¶ 2. But see UNCLOS, supra note 3, art. 20 (explaining that UNCLOS prefers states as primary users of the Tribunal and therefore allows states to take up the cases of their nationals).
56. Id. art. 290, ¶ 2.
57. Id. art. 290.
58. ITLOS' President Thomas A. Mensah writes:

[T]he Convention gives to the Tribunal a special [residual] competence to prescribe provisional measures even in a dispute between Parties which have not accepted the Tribunal's jurisdiction. And the jurisdiction applies to a dispute which [sic] is not being submitted to the Tribunal on the merits. This happens where the parties in a dispute have decided to submit it to an arbitral tribunal established under Annex VII to the Convention. Paragraph 5 of Article 290 of the Convention provides that in such a case, and pending the constitution of the arbitral tribunal to which the dispute is to be submitted, the International Tribunal for the Law of the Sea may prescribe (and modify or revoke) provisional measures in the case if it considers that "prima facie the tribunal which is to be constituted would have jurisdiction and the urgency of the situation so requires."

Thomas A. Mensah (ITLOS President), The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment, 8 RECIEL 1 (1999).
it is difficult to predict how each of these authorizations will play out when they are found to overlap with another treaty's jurisdiction. The unpredictability of this arrangement is compounded by the choice of law that ITLOS is given on which to base its decisions. Article 293 of UNCLOS states that ITLOS may apply "this Convention and other rules of international law not incompatible with this Convention." These vague and largely undefined "other rules of international law" include customary international law and other non-treaty sources of international law.

C. The Heart of the Problem: Interaction with Other Treaties

The imprecise boundaries of ITLOS' jurisdiction make it quite common for a dispute to arise within the intersection of ITLOS and one or more other treaties. In order to prevent conflict, UNCLOS adopted a stance of deference to other treaties. In particular, UNCLOS applies deference to all treaties that are "compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention." This deference is carried so far as to require ITLOS to bow out of adjudication when the conflict arises under an intersection of treaties, even when the other treaty also attempts to be deferential?. This is exactly the situation that arose in the Southern Bluefin Tuna Case, despite the fact that Article 4 of the CCSBT, like Article 311 of UNCLOS, specifically states that it will not supercede any obligations that the parties may have under other treaties. Even with CCSBT's deferential language, the Arbitral Tribunal believed that UNCLOS' jurisdiction was trumped by a regional, trilateral agreement that was originally intended to implement UNCLOS.

By prioritizing deference, Article 311 of UNCLOS disassembles the Convention's critical compulsory jurisdiction.

61. UNCLOS, supra note 3, art. 293. Article 293(2) goes on to explain that "paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree."

62. Noyes, supra note 6, at 124 (quoting Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993 (listing sources of international law generally used even outside the ICJ)).

63. UNCLOS, supra note 3, art. 311(2).

64. "Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea." CCSBT, supra note 17, art. 4.
Specifically, Article 311 states that "two or more State parties may conclude agreements modifying or suspending the operation of provisions of this Convention." The agreements are applicable solely to the relationship between these two parties, provided that such derogation is neither incompatible with UNCLOS nor is in conflict with its basic principles. The problem with permitting derogation that is not "incompatible" with UNCLOS is that this exception is not only vague but also overly broad. It results in a situation in which parties can effectively "opt out" of compulsory jurisdiction under UNCLOS Part XV which, by definition, is not meant to be consensual.

The Arbitral Tribunal made just such a determination in the Southern Bluefin Tuna Case by concluding that:

The Tribunal is of the view that the existence of such a body of treaty practice—postdating as well as antedating the conclusion of UNCLOS—tends to confirm the conclusion that States Parties to UNCLOS may, by agreement, preclude subjection of their disputes to Section 2 procedures in accordance with Article 281(1). To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the [CCSBT]—as such disputes typically may—must be brought within the reach of section 2 of Part XV of UNCLOS 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.

With this holding, the Arbitral Tribunal effectively curtailed the broad jurisdiction intended for ITLOS. Any treaty providing for an alternate form of dispute resolution proceedings now supercedes UNCLOS. Even the Arbitral Tribunal recognized the troubling implications of such a holding when it stated that: "It thus appears to the Tribunal that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions."

65. UNCLOS, supra note 3, art. 311.
66. See id. art. 311(3).
67. Jurisdictional Award, supra note 4, at 104.
68. See id. at 102.
A. The Dispute

The southern bluefin tuna (SBT) is a highly migratory and valuable species of pelagic fish listed with other highly migratory species in Annex I of UNCLOS.\textsuperscript{69} It is considered to be one stock, though it is distributed widely across the oceans in the Southern Hemisphere.\textsuperscript{70} The species is found throughout the high seas of the Southern Hemisphere, as well as within the exclusive economic zones and territorial seas of several countries, including Australia and New Zealand, but not Japan.\textsuperscript{71} The fish is extremely valuable as a food source, especially in Japan where it is coveted as a delicacy for sashimi.\textsuperscript{72} In addition to being fished by the three parties to this dispute, SBT is also fished extensively by third-party countries.\textsuperscript{73} Though the southern bluefin tuna is not yet listed as an endangered species, it is on the World Conservation Union's Red List of Threatened Animals, and conservationists are urging its inclusion as an endangered species under the Convention on International Trade in Endangered Species.\textsuperscript{74}

Commercial harvesting of the southern bluefin tuna began in earnest in the 1950's. By 1985, the total SBT stock had dropped so dramatically that Australia, New Zealand, and Japan agreed to annual global total allowable catches (TACs) to conserve the species and work towards rebuilding its numbers.\textsuperscript{75} The parties lowered the TACs again in 1989, in response to the

\textsuperscript{69} Jurisdictional Award, supra note 3 (per UNCLOS art. 64, coastal states and other states whose nationals harvest a highly migratory fish listed in Annex I must cooperate directly or through international organizations to ensure conservation and optimum utilization of such species throughout the region, both within their EEZ's and beyond).

\textsuperscript{70} See Australia's Statement of Claim, supra note 18, at 3.

\textsuperscript{71} See id.

\textsuperscript{72} See Jurisdictional Award, supra note 4, at 10.

\textsuperscript{73} See Andrew Darby, Japan Ordered to Halt Bluefin Tuna Take, ENVTL. NEWS SERVICE, Aug. 30, 1999, at http://ens.lycos.com/ens/ aug99/1999L-08-30-02.html (last visited Apr. 4, 2001) (explaining that Indonesia, Korea, and Taiwan also fish the southern bluefin tuna in increasing numbers, primarily for the Japanese sashimi market).

\textsuperscript{74} See id.

\textsuperscript{75} See Jurisdiction Award, supra note 4, at 10.
species' continuing decimation.\textsuperscript{76} Despite these measures, however, the number of adult fish continued to decrease. Estimates in 1997 revealed that the SBT was only at 7-15\% of its 1960 biomass.\textsuperscript{77} In a renewed effort at conservation, the three countries participated in the 1993 ratification of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT).\textsuperscript{78} Additionally, the countries signed onto UNCLOS in 1996. These two treaties provide the foundation for the dispute at hand.

The conflict that brought the parties to ITLOS arose in June 1998 when Japan, after unsuccessful efforts to raise the countries' respective TACs and establish a joint experimental fishing program (EFP), revealed its plans to commence its own unilateral EFP.\textsuperscript{79} Australia and New Zealand immediately notified Japan that a dispute existed between the parties over Japan's EFP.\textsuperscript{80} Australia and New Zealand stated that Japan had breached international law, specifically its obligations under: (a) CCSBT, (b) UNCLOS, and (c) customary international law, including the precautionary principle.\textsuperscript{81}

The parties participated in a first round of consultations on November 9, 1998 in Canberra, Australia.\textsuperscript{82} At this time, the parties scheduled further negotiations in hopes of ending the dispute under Article 16(1)\textsuperscript{83} of the CCSBT.\textsuperscript{84} At the negotiations,

\textsuperscript{76.} The slow growth and long life span of the species makes it extremely vulnerable to overfishing and slow to recover from stock reductions. The species does not reach maturity until at least 8 years of age and has a life span which recent research indicates to be approximately 40 years. Overcapitalisation of the global fleet and the great economic value of the species has been driving continuation of the fishery in the face of scientific uncertainty.


\textsuperscript{77.} See Jurisdiction Award, \textit{supra} note 4, at 10.

\textsuperscript{78.} CCSBT, \textit{supra} note 17.

\textsuperscript{79.} See Australia's Statement of Claim, \textit{supra} note 20, at 9.

\textsuperscript{80.} Disputes over fishing rights between the three countries have existed for decades and were partially responsible for Australia and New Zealand's protestation of the swift rehabilitation of Japanese fisheries and whaling industries following WWII. For a thorough background to and analysis of this ongoing dispute over fisheries between these parties, see Harry N. Scheiber, \textit{Inter-allied Conflicts and Ocean Law, 1945-53: The Occupation Command's Revival of Japanese Whaling and Marine Fisheries} (Oct. 2000) [unpublished manuscript, awaiting publication by Academia Sinica Press, Taiwan, on file with author].

\textsuperscript{81.} See Australia's Statement of Claim, \textit{supra} note 20, at 8.

\textsuperscript{82.} See \textit{id.} at 9.

\textsuperscript{83.} Article 16 of the CCSBT establishes a peaceful dispute resolution mechanism for disputes arising between parties concerning the Convention. Section 1 reads:
held in Tokyo between December 20 and 23, 1998, the parties were again unsuccessful in resolving the dispute, though they were able to agree to establish a working group to work towards a settlement. The working group met four times, and the parties met several more times, but no consensus was reached. On June 1, Japan declared by diplomatic note that it would immediately commence its unilateral EFP, but that it would adjust the program once consensus was reached.

B. The International Tribunal for the Law of the Sea

Australia and New Zealand responded that they considered Japan’s EFP to be a unilateral termination of the negotiation process, and that they were now seeking formal proceedings to address the legal issues. Japan requested mediation under CCSBT Article 16(2), but Australia and New Zealand refused to participate in the mediation because Japan would not cease its EFP in the interim. Australia and New Zealand then notified Japan that they were instituting arbitral proceedings under Part XV of UNCLOS. Following the required two-week waiting period, Australia and New Zealand brought the dispute before ITLOS. The parties claimed that Japan had breached its duties as per the conservation and management of the southern bluefin

If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall 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.

CCSBT, supra note 17, art. 16(1). The Article goes on to state that failure to do so shall result in the dispute being referred to the International Court of Justice (ICJ) or arbitration constituted under the Annex of the Convention but only with the Parties’ consent. Id. An interesting caveat to the CCSBT is that, per Article 16(2), referral to the ICJ or an arbitral tribunal does not absolve the parties of their responsibility of “continuing to seek to resolve [the dispute] by any of the various peaceful means referred to in paragraph 1.” CCSBT, supra note 17, art. 16(2).

84. See Australia’s Statement of Claim, supra note 20, at 9.
85. See id.
86. See id. at 10.
87. See id. at 13.
88. See id. at 11.
89. Part XV of UNCLOS outlines the Convention’s ground-breaking dispute resolution procedures. The qualities that most likely attracted Australia and New Zealand to use this Convention, as opposed to the CCSBT, are that: (1) under UNCLOS, unlike the CCSBT, one party in dispute can unilaterally initiate compulsory proceedings which will provide a binding decision (the CCSBT dispute resolution system is based on consent, as are most treaties); and (2) UNCLOS provides for binding provisional measures to protect the interests of the parties and to preserve the environment until such time as an ad hoc arbitral tribunal can address the issues. UNCLOS, supra note 3, arts. 286, 290.
tuna stock, and under Article 64 and Articles 116 to 199 of UNCLOS. Japan objected on grounds that ITLOS lacked jurisdiction because: (1) the dispute arose solely under the CCSBT; (2) the issue concerned only scientific disagreements; and (3) UNCLOS did not provide for consideration of specific conservation measures, nor did it "establish any specific cooperation requirements for conservation." The proceedings continued despite these objections.

Australia and New Zealand specifically alleged that Japan: (1) neglected to adopt necessary conservation measures to protect the southern bluefin tuna from its nationals fishing on the high seas; (2) carried on unilateral experimental fishing above its TAC; (3) took unilateral actions contrary to the rights of Australia and New Zealand; (4) failed to cooperate with Australia and New Zealand in an effort to protect the southern bluefin tuna; and (5) otherwise fell short of meeting its obligations under UNCLOS to conserve and manage the fish populations.

Pending the formation of the arbitral tribunal, the governments of Australia and New Zealand sought several provisional measures from ITLOS to protect their rights and the environment. They requested that ITLOS order Japan to: (1) refrain from further experimental fishing; (2) negotiate and cooperate with Australia and New Zealand in an effort to agree to future conservation efforts; (3) ensure that its nationals do not take more than the total annual catch that Japan is allotted; and

90. See ITLOS Order, supra note 21, at 5.
91. Article 64 of UNCLOS is the members' pledge to cooperate with other states and international organizations in the conservation of highly migratory species. UNCLOS, supra note 3, art. 64. Articles 116 to 119 describe members' general commitments to the conservation of living resources on the high seas. Id. arts. 116-119.
92. Japan argued throughout the dispute that both Australia and New Zealand, as well as itself, "consistently and from the outset treated the dispute as one concerning the implementation of the CCSBT. This is evident both from [Australia and New Zealand's] actions and from their words." ITLOS, Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Government of Japan, Memorial on Jurisdiction, ¶ 101 [hereinafter Japan's Memorial]. Japan went on to state that Australia and New Zealand continued to rely on the CCSBT as the grounds for the dispute up until June 7, 1999 in diplomatic notes and only switched to UNCLOS as the basis for its contentions when they submitted their statements of claim to ITLOS. See id. at 52, ¶ 103.
94. ITLOS Order, supra note 21, at 7.
(4) restrict its total southern bluefin tuna catch to its national allocation as last agreed.\footnote{Id.}

Per Article 290 of UNCLOS, a party to a dispute that has been submitted to a court or tribunal may request that ITLOS prescribe provisional measures.\footnote{UNCLOS, supra note 3, art. 290.} ITLOS will prescribe such measures if: (1) it considers that the body that will eventually determine the conflict \textit{prima facie} has jurisdiction; and (2) the circumstances of the situation require such action to protect the rights of the parties or protect the marine environment from serious harm.\footnote{UNCLOS Article 290 reads:}

ITLOS agreed with Australia and New Zealand's request for provisional measures, confirming that the measures were necessary to ensure that severe harm would not be done before the arbitral tribunal could review the allegations.\footnote{See ITLOS Order, supra note 21, at 12-14, \$ 48-89.} ITLOS cited the failed attempts by the parties to negotiate an agreement, and the parties' consensus that the tuna's stock was severely depleted and that its numbers were at a historical low. Although Japan's current year's experimental fishing was almost over, Japan had made no guaranties as far as its future programs.\footnote{Id. at 14, 83-84.} In all, ITLOS handed down six broad provisional measures.\footnote{Id. at 13.}

ITLOS' orders granted the applicants' requests and, in some respects, even went beyond their requested provisional measures. ITLOS ordered that: (1) each party should ensure that no action would be taken that would aggravate or extend the dispute submitted to the Arbitral Tribunal; (2) the parties would take no actions that would prejudice the carrying out of any decision on the merits which the Arbitral Tribunal might render; (3) the parties should ensure that none of their annual catches would exceed the TACs last agreed upon by the parties; (4) the
parties shall each refrain from any experimental fishing and any such fishing already completed should be counted against the annual total allowable catches; (5) the parties should resume negotiations with each other without delay; and (6) the parties should make further efforts to reach agreements with other states with a view toward the conservation of the southern bluefin tuna.\textsuperscript{101}

The decision was seen as globally significant because it was the first time ITLOS had arbitrated such a dispute between nations.\textsuperscript{102} The decision was heralded as not only protecting the southern bluefin tuna, but also as beneficial to the environment because it could frighten other parties into compliance with other fisheries agreements. Australia's Agriculture, Fisheries, and Forests Minister Warren Truss said:

This decision is also important, not just for those who are choosing to fish bluefin tuna but for others who fail to honour [sic] the spirit of the agreement in relation to the Orange Roughies fisheries in the South Tasman, but to others who are seeking to ignore obligations that we all have to ensure that the world's fishing stocks are sustainably managed. No country in the future will be able to claim that they can take greater than their entitlement on the ground of experimentation.\textsuperscript{103}

Japan, though immediately complying with the provisional measures, still asserted that ITLOS lacked the jurisdiction to declare such measures, as the dispute was more properly committed to the framework of the CCSBT.\textsuperscript{104}

C. The Ad Hoc Arbitral Tribunal: Provisional Measures Revoked

The Ad Hoc Arbitral Tribunal that eventually commenced under the registrar, the International Centre for Settlement of Investment Disputes (ICSID),\textsuperscript{105} agreed with Japan. In May 2000, the Arbitral Tribunal convened in Washington, D.C., at the offices of the World Bank, to address the question of its

\textsuperscript{101} Id. at 15-17.
\textsuperscript{102} See Darby, supra note 73, at 1.
\textsuperscript{103} FED: Tuna Ruling a Warning to Other Nations says Truss, AAP NEWSFEED, Aug. 30, 1999, available at LEXIS, Nexis Library, Australia Publications.
\textsuperscript{104} Jurisdictional Award, supra note 4, at 33.
\textsuperscript{105} Though ICSID acted as Registrar, the judges were chosen by the parties. They were Judge Stephen M. Schwebel, President, H. E. Judge Florentino Feliciano, The Rt. Hon. Justice Sir Kenneth Keith, DBE, H. E. Judge Per Tresselt, and Professor Chusei Yamada. See id. at title page.
It was the first time that an ad hoc arbitral tribunal had been constituted under Part XV, Annex VII of UNCLOS, and it certainly made history. After four days of hearings and two and a half months of deliberations, the Arbitral Tribunal overturned ITLOS' finding of prima facie jurisdiction and subsequently ruled that neither ITLOS nor the Arbitral Tribunal had the power to either authorize or ban such research fishing. The Arbitral Tribunal therefore revoked the provisional measures.

The Arbitral Tribunal based this revocation upon a finding that the conflict arose primarily under the CCSBT and, therefore, it concluded that CCSBT's dispute resolution procedures must govern the dispute. The Arbitral Tribunal did not contest the allegations of Australia and New Zealand that some or much of the dispute arose under portions of UNCLOS; instead the Arbitral Tribunal focused its analysis on determining under which treaty the "most acute elements of the dispute" centered. Reviewing the points of contention between the parties—the TAC and EFP—the Arbitral Tribunal concluded that, "in short, it [was] plain that the main elements of the dispute between the parties had been addressed within the Convention for the Conservation of the Southern Bluefin Tuna."

The Arbitral Tribunal made special note of the fact that parallel treaties can and do exist and that this fact alone is not

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106. See id. at 3. A second session was meant to follow the jurisdictional inquiry, to hear and decide upon the merits of the situation.
107. See id. at 83.
108. See id. at 105-06.
109. See Japan off Hook on Tuna Fishing, supra note 25.
110. See Jurisdictional Award, supra note 4, at 87.
111. The Tribunal actually agreed with Australia and New Zealand that the dispute arose under both treaties: [T]he Tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centered in the [CCSBT], also arises under the United Nations Convention on the Law of the Sea.... [T]he parties [are] grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.
112. Id. at 87.
113. Id. at 88.
always fatal to its jurisdiction. In fact, it extolled the virtues of this parallelism, explaining that modern international law actually benefits from this accretion and accumulation. The Arbitral Tribunal concluded that, especially in the case of subsequent treaties that implement the broad mandates of a prior treaty (such as the CCSBT does for UNCLOS), implementing conventions do not necessarily vacate the obligations imposed by the framework convention. Specifically concerning the CCSBT, the Arbitral Tribunal declared that, "[a] dispute concerning the interpretation and implementation of the CCSBT will not be completely alien to the interpretation and application of UNCLOS for the very reason that the CCSBT was designed to implement broad principles set out in UNCLOS."

The Arbitral Tribunal did not deny UNCLOS' jurisdiction merely because there was an intersection between the two treaties and the facts of the situation committed the dispute to the CCSBT more than UNCLOS. The fatal blow came from the fact that the CCSBT's dispute resolution procedures excluded compulsory proceedings under the framework of UNCLOS. Specifically, Article 16(2) of the CCSBT states that disputes can be adjudicated only with the consent of all parties. In addition, Article 16(3) requires that any arbitral tribunal constituted under the provisions of the CCSBT must be purely consensual, reinforcing the CCSBT's explicit rejection of compulsory jurisdiction. Because UNCLOS relies upon the compulsory jurisdiction to which all of its signatories have previously consented, the Arbitral Tribunal concluded that, because the jurisdiction was not consensual, Article 16 of the CCSBT

114. See id. at 91.
115. See id.
116. Id. One must assume by the use of the modifier necessarily that the Tribunal foresaw at least some situations when an implementing treaty would in fact vacate the provisions of the framework convention that preceded it. This could have critical ramifications for UNCLOS, as many treaties and organizations that postdate the Convention were designed to implement its broad mandates.
117. Id. at 93.
118. Id. at 98.
119. Id.; see also CCSBT, supra note 17, art. 16.
120. See Jurisdiction Award, supra note 4, at 97, 99. The Annex for an Arbitral Tribunal to the Convention for the Conservation of the Southern Bluefin Tuna does not specifically address compulsory versus consensual adjudication, but it does outline a process by which the parties discuss and appoint the arbitrators. The Tribunal reads these provisions to reinforce an interpretation that the Annex calls for autonomous and consensual arbitration. For the Annex for an Arbitral Tribunal, see CCSBT, supra note 17.
121. See Jurisdictional Award, supra note 4, at 94. The Tribunal also felt that Article 281 of UNCLOS necessitated the exhaustion of remedies under the CCSBT.
excluded further procedures within the contemplation of the dispute resolution mechanisms provided by UNCLOS Article 281(1). With this holding, the Arbitral Tribunal dismissed itself from the case.

III

ANALYSIS OF THE TWO DECISIONS AND THEIR EFFECTS ON ITLOS AND UNCLOS

A. The First ITLOS Decision Illustrates ITLOS’ Tools for Preserving the Marine Environment

Prior to the judgment of the Arbitral Tribunal, the ITLOS decision demonstrated some of ITLOS’ unparalleled qualities that are specially designed to assist in the protection of the marine environment.

1. ITLOS Operates with Unusual Speed and Efficiency

ITLOS offers speed and efficiency, which is critical when the environment is at stake. Only forty-four days passed between the filing of the claims and the issuing of the provisional measures in the Southern Bluefin Tuna Case. The Arbitral Tribunal called to adjudicate the same dispute took over a year to hear and decide the jurisdictional issues alone. Unlike other tribunals, ITLOS acts with sufficient speed to actually protect portions of the marine environment that are at risk of imminent harm. If the harm is sufficiently imminent, UNCLOS additionally provides that ITLOS can establish a special expert or summary judgment dispute resolution system before the issue could be raised under UNCLOS, though the Tribunal found that this requirement was met. The Tribunal judges state that they are satisfied that exhaustion of remedies per CCSBT’s article 16 has occurred. They write that “in the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding for purposes of Articles 281(1) and 283 [UNCLOS’ compulsory jurisdiction], that no settlement has been reached.” Id. at 97.

122. See id. at 100. Article 281(1) establishes the procedure for peaceful settlement of disputes where none has been reached by the parties (the avenue through which Australia and New Zealand had originally brought the suit before ITLOS because the parties could not agree upon conditions for mediation or arbitration). Article 281(1) reads:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
chamber to further expedite the process. In addition, the ITLOS’ Rules of the Tribunal stipulate that requests for provisional measures shall be given priority over all claims and shall be decided at the earliest possible date.

Advisory opinions are also a crucial tool in the environmentalist’s arsenal because they can quickly clarify or interpret a treaty provision without having to submit the issue to a full adjudication. Through this process, advisory opinions can deter future destructive behavior without having to wait for the harm to occur before taking action, thus further protecting the environment. ITLOS’ Rules of the Tribunal also provide for the acceleration of the process of giving advisory opinions should a party request an urgent answer.

One final attribute of the International Tribunal for the Law of the Sea that contributes to the speedy resolution of environmental claims is the forum’s accessibility to non-State parties. ITLOS has jurisdiction to hear individuals within its chambers for litigation arising out of contractual obligations. Although this is a narrow exception, it is a unique allowance in international law. For example, individuals are completely excluded from the World Court and from World Trade Organization dispute resolution proceedings. Where there are contracts concerning TACs, or a contractual obligation to follow particular environmental regulations in the process of transporting goods by ship, this exception has real meaning. If an individual can bring a claim, the suit can perhaps proceed much faster without the necessity of motivating the machinery of state action.

123. UNCLOS, supra note 3, Annex VI, art. 15. ITLOS President Thomas Mensah notes that parties to a dispute may choose a chamber, rather than the whole Tribunal, to avoid particularly serious and imminent environmental damage because the chambers are faster than the more extended proceeding with the participation of all twenty-one judges of the Tribunal. See Mensah, supra note 58, at 4.

124. ITLOS Rules, supra note 59, arts. 90(1), 90(2). The one exception to this rule is that the release of seized vessels and crews take priority over all proceedings before the Tribunal. Id. art. 112.

125. Id. art. 132.

126. UNCLOS, supra note 3, art. 187.

127. Id.

2. **ITLOS' Chambers are Specifically Prepared to Address Environmental Claims**

ITLOS used the alternative standard of "preventing serious harm to the environment" for the first time with its issuance of provisional measures in this case. ITLOS' power to issue provisional measures solely to protect the environment illustrates UNCLOS' commitment to environmental preservation and protection. UNCLOS internalizes this concern for the environment into ITLOS' structure by providing for specialized chambers that may hear certain types of disputes.

One of the two permanent, specialized chambers of ITLOS is the Chamber for Marine Environmental Disputes. The seven-member chamber can adjudicate on the interpretation and application of: (1) issues arising under UNCLOS that concern marine environment protection and preservation; (2) special conventions under Article 237 that relate to marine environment protection; and (3) any agreement on marine environment protection that confers jurisdiction on the ITLOS. The Chamber therefore provides a specialized panel to hear most disputes relating to the protection and preservation of the marine environment.

The subject area expertise of the chambers is not the only draw for parties. The specialized chambers of ITLOS can create ad hoc chambers to deal with particular disputes, providing a


130. See id. ("This first application of the alternative standard...reflects the judges' awareness of and responsiveness to, the environmental rights and duties of states in modern international law.").


132. UNCLOS Art. 237 provides for "Obligations under other conventions on the protection and preservation of the marine environment." UNCLOS, *supra* note 3, art. 237. Article 237 ensures that UNCLOS does not prejudice against any other treaty provisions that already provide for marine environment protection, but states that those obligations under other treaties must be "carried out in a manner consistent with the general principle and objectives of [the] Convention." *Id.*


134. There is one drawback to the specialized Chamber for Marine Environment Disputes in that the determination of whether the dispute affects the environment may be contentious. This could explain why neither of the two specialized environmental chambers offered by major world courts (ITLOS' Chamber for Marine Environment Disputes and ICJ's five-member environmental dispute chamber) has yet to hear a case. *See* Tullio Treves (ITLOS Judge), *Dispute-Settlement Clauses in the Law of the Sea Convention and Their Impact on the Protection of the Marine
more informal adjudication process that may be preferred by hesitant parties because parties can influence the composition of the ad hoc chambers’ panels of judges.\textsuperscript{135} ITLOS President Thomas Mensah states that, “[t]his is one way in which the Tribunal can be ‘user-friendly’ in respect of cases relating to the protection and preservation of the marine environment.”\textsuperscript{136}

\textbf{B. The Ad Hoc Arbitral Tribunal’s Decision May Prove Detrimental to the Future of UNCLOS and ITLOS}

The vacating of the provisional measures not only shocked the international community and concerned environmentalists, it also challenged the viability of the continuing compulsory nature of UNCLOS’ dispute resolution regime.

1. The Proliferation of Treaties and Tribunals Threatens to Substantially Reduce the Number of Cases That Will Fall Within ITLOS’ Jurisdiction

The obvious result of UNCLOS’ deference to any other dispute resolution system is that as more treaties and tribunals are established, less cases will fall under ITLOS’ jurisdiction. Further challenging ITLOS’ viability, many recent international treaties and conventions have focused on creating and implementing peaceful dispute settlement proceedings. In the last decade alone, the ranks of international courts and tribunals have expanded with the creation of a new World Trade Organization system, ITLOS, two ad hoc international criminal tribunals, the United Nations Compensation Commission, the World Bank Inspection Panel and its Asian and Inter-American Development Bank counterparts, NAFTA, the Andean and Mercosur systems, and several other regional economic tribunals.\textsuperscript{137}

In addition to the treaty intersection problem, there is also the problem of ITLOS’ concurrent jurisdiction with other tribunals. Unlike the concern of a dispute arising within the

\textit{Environment: Some Observations}, 8 RECIEL 1 (1999); see also UNCLOS, \textit{supra} note 3, Annex VI, art. 36.

\textsuperscript{135} See Mensah, \textit{supra} note 58, at 5 (UNCLOS, Annex VI, Art. 36 states that the Sea-Bed Disputes Chamber will determine the composition of the Chambers “with the approval of the parties .... If the parties do not agree on the composition of an ad hoc chamber, each party to the dispute shall appoint one member, and the third member shall be appointed by them in agreement”).

\textsuperscript{136} See id.

intersection of numerous treaties— that was only first raised in the present case— several jurists have written about the fear of inconsistent adjudication caused by overlapping jurisdiction. The possibility of inconsistent jurisprudence and forum shopping arises whenever there is a choice of forum. In addition, as every tribunal forms its own self-contained system, no general rules exist to sort out questions of coordination and conflict with other tribunals. Real conflict could arise if one party chooses one forum, while the other chooses another. There are already many places where the law overlaps and parties can easily choose either the International Court of Justice or the International Tribunal for the Law of the Sea.

ITLOS Judge Tullio Treves feels that concurrent jurisdiction is not a true worry for ITLOS. Judge Treves emphasizes that Article 282 provides that ITLOS shall bow out when faced with any other agreement between parties, thus eliminating conflict. He feels the real concern lies in the competition between tribunals and arbitration. Only 19 of the 130 State Parties to UNCLOS have selected one of the two tribunals (ITLOS or ICJ) for compulsory adjudication. For those who have not chosen a tribunal, the default is arbitration. Therefore, Judge Treves feels that competing jurisdiction is not as great a concern as the possibility that ITLOS' jurisdiction will by preempted by arbitration.

2. Conflict with Itself: The Curse of Unpredictability

After the show of inconsistency and unpredictability in the Southern Bluefin Tuna Case, ITLOS is likely to lose even more cases because parties will be wary of submitting disputes to it. Although the ITLOS order on provisional measures was not unanimous, its finding of prima facie jurisdiction was. Despite protests by Japan that the dispute was committed to the jurisdiction of the CCSBT, all twenty-two ITLOS judges agreed

138. See Noyes, supra note 6, at 175.
140. See id. at 813.
141. See id. at 811.
142. See id. at 811-12.
143. Id. at 818.
144. See id.
145. Jurisdictional Award, supra note 4, at 48.
that the arbitral tribunal that was to be formed would have jurisdiction.\textsuperscript{146} Four out of five of the Arbitral Tribunal's judges, however, disagreed.\textsuperscript{147}

Such a reversal puts ITLOS' credibility in question and discourages parties from relying on ITLOS' holdings or submitting their disputes to it for adjudication. One of the primary benefits of formal third-party adjudication is that it provides a negotiated body of law that parties can utilize in the settlement of disputes without needing to institute formal proceedings.\textsuperscript{148} In addition, authoritative pronouncements of law—international or domestic—are used by parties to predict the outcomes of future suits and then guide their actions to be in accordance with these predictions, also resulting in a lesser need for adjudication.\textsuperscript{149} This holding, however, clearly will make parties think twice about relying on an ITLOS decision.

The Arbitral Tribunal further weakened its credibility by adding on a modifier to its holding. Attached to the proclamation that UNCLOS must step aside whenever a regional agreement's dispute resolution proceedings require consent is a statement by the Arbitral Tribunal that even this rule is not definite:

The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS.\textsuperscript{150}

The only guidance that a party could adopt from this pronouncement is that, whenever an implementing treaty allows for consensual jurisdiction, ITLOS will not hear their case unless ITLOS deems the breach to be sufficiently egregious. As "egregious" is obviously a question of degree and judgment, the Arbitral Tribunal ruins any chance of establishing a standard by which parties could predict whether ITLOS would even hear their case, let alone how it would decide the dispute. The implications of this inconsistency are especially significant for the international environmental community that applauded ITLOS'

\begin{thebibliography}{99}
\bibitem{146} See ITLOS Order, \textit{supra} note 21, at 13.
\bibitem{147} See Jurisdictional Award, \textit{supra} note 4, at 105.
\bibitem{148} See Kingsbury, \textit{supra} note 137, at 686 (citing Jonathan I. Charney, \textit{Is International Law Threatened by Multiple International Tribunals?}, 271 \textit{Recueil des Cours} 101 (1998)).
\bibitem{149} See \textit{id.} at 686.
\bibitem{150} Jurisdictional Award, \textit{supra} note 4, at 105.
\end{thebibliography}
provisional measures as the answer to urgent environmental problems.

The threat alone of provisional measures can be very effective. For example, after the success of the provisional measures against Japan, Australia pressured New Zealand into accepting a penalty for over-fishing the orange roughy.\textsuperscript{151} New Zealand agreed to the penalty in the face of a threat by the Australian government to take the matter to ITLOS.\textsuperscript{152} New Zealand was aware that provisional measures could be quickly obtained and powerfully written (as they were against Japan). The mere threat of being exposed to such measures affected New Zealand’s response; without this threat, it is unlikely that Australia would have been able to get such rapid concessions. In the absence of a certain amount of predictability that the provisional measures can and will be issued, the threat has no force.

### IV

**POSSIBLE SOLUTIONS TO THE JURISDICTIONAL DAMAGE CAUSED BY THE SOUTHERN BLUEFIN TUNA CASE**

The fate of UNCLOS is perhaps in even greater jeopardy than the fate of the southern bluefin tuna, and the solutions available to the Convention’s compulsory jurisdiction may be as difficult to attain as a viable multilateral agreement restoring the southern bluefin tuna to healthy numbers. The power of UNCLOS’ compulsory jurisdiction could be reestablished in three ways: (1) future meetings of ITLOS could confine the Southern Bluefin Tuna Case to its facts; (2) the state parties to UNCLOS could elect to amend the Convention’s policy of deference; or (3) states could use future agreements and treaties to remedy UNCLOS’ procedural weaknesses.

The best hope for UNCLOS may be to prove that this holding relied on a very specific set of circumstances. Several exceptional factors existed in the Southern Bluefin Tuna Case that make it possible to understand why the Arbitral Tribunal was comfortable with its decision in this situation, and argue that it would not be as ready to come to the same conclusion in a different case. First, the parties agreed to work towards settlement of the dispute regardless of the provisional measures. Specifically, Japan agreed to submit the differences to

\textsuperscript{151} See Roughy Deal End Threat of Fight, supra note 24.
\textsuperscript{152} See id.
arbitration under the CCSBT.\textsuperscript{153} It is quite possible that the Arbitral Tribunal was more comfortable revoking the provisional measures in this situation because the parties were already close to settlement and therefore the need for the provisional measures had greatly diminished. Second, the Arbitral Tribunal made judicial note of Japan's contention that Australia and New Zealand changed the foundation of their claims from CCSBT to UNCLOS very late in the game.\textsuperscript{154} Though the Arbitral Tribunal stated neither its agreement nor disagreement with this observation, the mere mention of this fact can be used to distinguish this case from later disputes where the parties state their claims under UNCLOS from the beginning. Third, although with regard to the high seas fisheries UNCLOS is an "umbrella" or "framework" treaty that relies on implementing agreements and treaties, this is not the case with other subject areas of UNCLOS, at least not to the same degree.\textsuperscript{155} Therefore, it could be argued that UNCLOS needs to be especially deferential in the area of high seas fishing as the waters are muddied with many implementing treaties, whereas it could be more assertive in other fields where there are fewer treaties with which to conflict.

A second way of solving UNCLOS' jurisdiction dilemma would be for its 130 signatories to attempt to draft and ratify an amendment to Article 311's stance of absolute deference. A possible amendment could permit one party to a dispute to invoke UNCLOS' compulsory jurisdiction when an issue takes place at the intersection of UNCLOS and another treaty and the parties to the dispute cannot agree on dispute settlement provisions per the other treaty, or one party refuses to voluntarily participate in negotiations at all. Another option would be to always ensure the right for a state party to call on UNCLOS' compulsory jurisdiction when it has exhausted remedies available through other treaties.\textsuperscript{156}

Amending UNCLOS is by far the most difficult and least likely to succeed of the three solutions. The debate leading up to

\begin{itemize}
\item \textsuperscript{153} See Jurisdictional Award, supra note 4, at 107.
\item \textsuperscript{154} See id. at 34. Japan asserted that Australia and New Zealand had focussed their objections to Japan's behavior on the CCSBT throughout the dispute, only adding UNCLOS as an additional basis when they finally submitted the issue to ITLOS. See Japan's Memorial, supra note 92, ¶ 104. For further discussion of this point see supra, note 92.
\item \textsuperscript{155} See Oxman, supra note 30, at 11.
\item \textsuperscript{156} One problem with relying on exhaustion of remedies to initiate compulsory jurisdiction is that there would be infinite questions as to what exactly constitutes exhaustion. For instance, as happened in the SBT case, at what point does one party's failed attempts to get another to the negotiating table equate to exhaustion?
\end{itemize}
the adoption of UNCLOS involved 150 nations and lasted for nine years, and this was preceded by six years of the U.N. committee preparatory work. The amendment process outlined in UNCLOS promises no less of a battle, requiring the convening of a conference to discuss the proposal in some instances, and in no case allowing voting until "all efforts at consensus have been exhausted." Then, in the unlikely event that consensus is reached among 130 disparate nations, each nation would have to submit the amendment to its individual, national ratification procedures. This process, though potentially the most effective in actually remedying UNCLOS' procedural weaknesses for the long term, is prohibitively difficult and time consuming.

The last possible solution would be for state parties to draft UNCLOS implementing treaties that contain resolutions to this procedural dilemma. This is the solution that the Ad Hoc Arbitral Tribunal used to soften the blow of its judgment. It turned, with high hopes, to the newest treaty to protect the southern bluefin tuna: the Straddling Fish Stocks Agreement (the Agreement). The Agreement provides exhaustive details on the duties of states to research, preserve, and sustainably harvest fish stocks that exist in waters crossing several national jurisdictions, or located within the high seas. The Arbitral Tribunal felt that, when it comes into force, the Agreement should "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 divided the parties." As rationale for this belief, the Arbitral Tribunal cited that the Agreement has "more detailed and far-reaching [substantive provisions] than the pertinent provisions of UNCLOS or even of the CCSBT."

The Straddling Fish Agreement illustrates the difficulty of adopting implementing treaties to resolve UNCLOS' jurisdictional concerns. The Agreement will likely lead to fewer disputes than the CCSBT, because it is far more explicit in its requirements and duties, and therefore will require less interpretation. Should a dispute arise, however, the Agreement offers no solution other than the exact provisions of UNCLOS that caused the problems

157. See Noyes, supra note 6, at 114.
158. UNCLOS, supra note 3, art. 312.
159. Id. arts. 306, 315.
160. Straddling Fish Agreement, supra note 50.
161. See generally id.
162. Jurisdictional Award, supra note 4, at 110.
163. Id.
in the *Southern Bluefin Tuna Case*.' The deference to other dispute resolution systems is also identical. Therefore, although this is probably the option that will be chosen to resolve the problem of UNCLOS' denial of its own compulsory jurisdiction, future implementing treaties will have to be careful to employ dramatically different dispute settlement procedures so as not to fall into the same quandary again. This will make the treaties harder to draft and thus more difficult to use as the cure-all for UNCLOS' jurisdictional woes.

V

CONCLUSION: AN UNCERTAIN FATE FOR UNCLOS AND THE SOUTHERN BLUEFIN TUNA

The year of provisional measures had an important and far-reaching impact that was felt throughout the Southern Hemisphere. In addition to the threat-inspired agreement between Australia and New Zealand on the orange roughy, ITLOS' order also played a significant role in inspiring the Parties to progress on the issue of third-party fishing of the southern bluefin tuna. Australia and New Zealand, once criticized for relying too heavily on ITLOS for relief, have now promised to seek other avenues to save the fish.

The revocation of the provisional measures had, however, negative implications for the future of UNCLOS far greater than the short-lived benefits of the provisional measures for the tuna. Although it seems to rest on a solid legal foundation and therefore cannot be criticized as "bad law," many critics, especially environmentalists, wonder if the decision had to be one that resulted in such a threat to the environment. UNCLOS,

164. *See Straddling Fish Agreement, supra* note 50, art. 30(1) ("[t]he procedures relating to the settlement of disputes set out in Part XV of [UNCLOS] apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of the Agreement, whether or not they are also Parties to [UNCLOS].").

165. *See id., art. 30(3) (stating that any dispute procedure accepted by State Parties, pursuant to Article 287 of UNCLOS, shall apply to the dispute).*

166. *See Jurisdiction Award, supra* note 4, at 108. Interestingly, the judicial note of this progress may be one reason that the Tribunal felt comfortable in revoking the provisional measures. Perhaps it reasoned that so much progress had been achieved that the provisional measures were no longer necessary.

167. *See Fed: Southern Bluefin Tuna Loss Blamed on Govt.*, AAP NEWSFEED, Aug. 7, 2000, available at LEXIS, Nexis Library, Australia Publications ("The Humane Society International said the Australian government had wrongly relied solely on the international court case to keep a check on Japan's fishing level, instead of protecting the fish when it had a chance.").

ITLOS, and the benefits they offer in the area of marine preservation and protection are unparalleled among ocean law treaties. The solutions offered seem, at best, difficult to achieve, but a solution must be found or we face the loss of important tools for saving not only a species near extinction, but also an environment teetering on the brink of collapse.