Letter to the Editor

The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska’s Article*

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

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

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

The fact that the Arbitral Tribunal declined to hear the merits means that the only independent international body that heard and in effect pronounced on the substantive aspects of the case was ITLOS. The ITLOS decision was of course in the context of provisional measures and not after a full hearing on the merits. But it had the benefit of three days of argument, the major part of which was related to substance rather than jurisdiction and its decision was overwhelmingly

* These comments were first made as a response to a presentation by Professor Barbara Kwiatkowska of a version of her article at the SEAPOL Inter-Regional Conference on “Ocean Governance and Sustainable Development in the East and Southeast Asian Seas: Challenge in the New Millennium”, Bangkok, Thailand, 21–23 March 2001.
in favour of the A/NZ position on the substance. Accordingly the only sense in which Japan won the litigation was the very narrow one of successfully blocking full consideration of the merits of the case against them.

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

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

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

Despite extended discussions the disagreement continued and became more intense when Japan indicated that it would undertake an experimental fishing programme or EFP in addition to its existing allocation and would do so unilaterally if necessary. Protests, counter measures and negotiations to find an acceptable form of EFP, all failed to resolve the problem and positions became entrenched to the point that the work of the Commission was essentially paralysed.

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