

The Precautionary Principle in International Environmental Law: A Study of the Cases No. 3 & 4 of the International Tribunal for the Law of the Sea — The SBT Cases

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Abstract: The aim of this paper is to study cases n. 3 and 4 of the International Tribunal for the Law of the Sea (ITLOS) — “The SBT Cases”, and to verify the extent to which they have contributed to the improvement of the precautionary principle at the international level. The relevance of this research is demonstrated by the need to analyze the limitations faced by the international legal regime to ensure the effectiveness of measures for the management and conservation of the marine environment in a comprehensive way, especially in the framework of the United Nations Convention on the Law of the Sea of 1982. After all, this is a case where, even though it was initially recognized that a restriction on fishing is a precautionary measure ordered by ITLOS; it had been afterwards repealed by the Arbitral Tribunal because of a procedural discussion to the detriment of the importance of the fish stocks themselves. This work is presented in the form of a case study, for which the inductive method is applied; with respect to the approach, a descriptive-exploratory method is adopted; and as far as the form of analysis is concerned, a qualitative bibliographical and documental revision regarding the proposed theme is made.

Key words: The SBT Cases, precautionary principle, International Tribunal for the Law of the Sea, United Nations Convention on the Law of the Sea

1. Introduction

Thunnus maccoyii, commonly known as Southern Bluefin Tuna (SBT), is a fish with a high economic value. The price of an adult specimen weighing about 200kg is normally estimated between US\$30,000 to US\$50,000. Populations can be found throughout the Southern Pacific Ocean, usually in waters between 30 to 50 degrees, crossing the Economic Exclusive Zone (EEZ) of several coastal States, such as Australia, New Zealand, Indonesia and South Africa.

Its commercial fishing began in the mid-1950s, reaching unsustainable levels in the early 1980s. Recent surveys carried out by the International Union for Conservation of Nature (IUCN) estimate that the spawning stock biomass has declined approximately 85% between the measurements made in 1973 and 2009. Therefore, the species appears in its famous Red List classified as *critically endangered*, indicating no signs of recovery. The specialists are unanimous in considering this kind of tuna already exhausted or severely overfished.

Australia, New Zealand and Japan are the biggest responsible for the SBT harvesting, since the spawning is restricted to a relatively small area off northwestern Australia, in the eastern tropical Indian Ocean.

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However, because it is a delicacy for its traditional cuisine, Japan consumes about 90% of the final product of the entire market [1].

Aware of the drastic decline in the SBT stock's levels, in 1982 Australia and New Zealand initiated informal discussions on a mechanism to limit catches to achieve a sustainable pattern of exploitation. In 1985, Japan joined the negotiations and proposed the introduction of a Total Allowable Catch (TAC) to be apportioned between the parties. Initially set at 38,650 tons, in 1989 this TAC was readjusted to a total of 11,750 tons, but the SBT populations continued to decay.

Thus, intensifying its cooperation efforts, in 1994 the three countries signed the *Convention for the Conservation of Southern Bluefin Tuna* (CCSBT). This Convention, in line with the spirit of the negotiations initiated in 1985, aims to ensure the conservation and optimum utilization of SBT. For this purpose, it establishes a Commission, which shall prescribe, considering scientific evidence, the TAC to be allocated between the parties.

In May 1994, when the CCSBT came into force, the tones allocated to Japan were not sufficient to supply its domestic consumption. Hence, in subsequent years the country began to insist on the TAC's renegotiation and in the development of an Experimental Fisheries Program (EFP), claiming the need to achieve greater scientific certainty about the actual conditions of the SBT stock.

Although in 1996 the Commission could adopt a set of objectives and principles for the design and implementation of an EFP, significant differences in the Program's guidelines persisted. Japan initially proposed the capture of 6,000 tons per year for experimental purposes, in addition to those for commercial utilization. Australia and New Zealand, on the other hand, considered it unreasonable to carry out an EFP that exceeded the TAC's limits, putting at risk such severely compromised species.

The conflict worsened when, in 1998, Japan stated that would unilaterally initiate the EFP. Immediately, Australia and New Zealand notified the country requesting formal consultations under the provisions of the CCSBT. Despite vigorous protests from Australian and New Zealand, Japan conducted a pilot program in the summer, obtaining around 1,464 tons of SBT above its national allocation. Diplomatic negotiations persisted, but in a meeting held at the Commission's headquarters in Canberra, in May 1999, Australia and New Zealand were informed that a second edition of the Program would be resumed in June of that same year.

In response, the two countries stated this move would bring the negotiations under CCSBT to an end. Japan, in its turn, affirmed that it had no intention of terminating the negotiations, but it was also prepared to submit the dispute to the mediation procedure established in the provisions of the CCSBT. Both other countries agreed, if Japan immediately ceased the EFP and if the mediation was carried out until 31 August 1999.

However, Japan reiterated its understanding that the EFP guidelines were perfectly aligned with the CCSBT's provisions, therefore, it could not accept its interruption as a condition for mediation to take place. In this wake, Australia and New Zealand declared the end to the diplomatic negotiations and stated the conflict did not only concern to the CCSBT, but also the United Nations Convention on the Law of the Sea (UNCLOS), a treaty of which the three countries were signatories, and general provisions of international law as well.

Thus, in the light of the foregoing, applications from New Zealand and Australia requesting the prescription of provisional measures were then inserted in the International Tribunal for the Law of the Sea (ITLOS) Case List under Nos. 3 and 4, respectively. Following the procedure, the applications were merged through the ITLOS Order of August 16, 1999, remaining being called as *Southern Bluefin Tuna Cases* (*New Zealand v.*

Japan, Australia v. Japan), *Request for provisional measures* [2].

2. ITLOS' Provisional Measures on the Bluefin Tuna Overfishing

Through the Statements of Claim submitted separately to ITLOS, Australia and New Zealand asserted that Japan, in carrying out unilaterally an EFP regarding the species *Thunnus maccoii* in 1998 and 1999, had failed to comply with its obligations under Articles 64 and 116 to 119 of UNCLOS, the CCSBT provisions and general rules of international law, as the precautionary principle. In this wake, Japan's unilateral actions and its lack of cooperation for the conservation and management of the SBT could cause serious damage to the applicants' rights to maintain sustainable fishing levels.

The situation was further aggravated by other factors, such as the considerable increase in fishing for the species by States that were not parties to the CCSBT. According to the applicants, by conducting an EFP unilaterally instead of the regime established by the Commission of the CCSBT, Japan's actions were making even more difficult to encourage such States to cooperate in the conservation and management of SBT stock.

Thus, in light of Japan's commitments to ratify UNCLOS, the requests submitted to ITLOS by Australia and New Zealand were as follows: (i) that Japan immediately cease the EFP for SBT; (ii) that Japan restricts fishing for SBT to the last quota established by the Commission, discounting the catches taken during the 1998 and 1999 Program; (iii) that the parties actions regarding fishing SBT are carried out in accordance with the precautionary principle until the final settlement of the conflict; (iv) that the parties do not to take actions capable of hindering or prolonging the settlement of the dispute submitted to the Arbitral Tribunal; (vi) that the parties do not adopt measures capable of preventing the

execution of any decisions on the merits that the Arbitral Tribunal may issue [3].

In this sense, according to Article 290(5) UNCLOS, there are two requirements for ITLOS observe to prescribe the provisional measures: (i) if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction, and (ii) that the urgency of the situation so requires [4].

The first requirement was sustained by the applicants based on Article 288(1), which establishes that "a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." Since both countries claimed that Japan had failed to comply with its obligations under Articles 64, and 116 to 119 of UNCLOS, they reputed the jurisdiction requirement properly satisfied [5].

Regarding the second condition, they affirmed the urgency of the situation referred to the fact that the Arbitral Tribunal to be established would not be able to decide on the provisional measures during that current year. In this sense, if the arbitral decision ordered that all parties should maintain the catches according to the last TAC to prevent the SBT stock from collapse, then it was necessary to ensure that Japan catches do not exceed their national allocation immediately.

In response, Japan initially argued that the dispute was eminently about a scientific controversy, rather than a legal conflict, which is why there would be no need for compulsory judicial procedures. On the other hand, the country alleged that ITLOS would not even have jurisdiction to prescribe provisional measures to such a dispute, adding that the requirements established by article 290(5) UNCLOS were not met [6].

Regarding the first requirement, Japan stated that the dispute did not refer to the provisions of UNCLOS, but solely to the CCSBT, which establishes its own procedures for the settlement of conflicts. Moreover, while the applicants have deemed the peaceful negotiations to be extinct, Japan affirmed that it has

never refused to continue the dialogue, and that it could not therefore be considered exhausted, in flagrant disregard of the first requirement of UNCLOS Article 288(1) [7].

Likewise, Japan considered the requirement about the urgency provided of Article 290(5) of UNCLOS insufficient. In that sense, even if ITLOS considered that the legal basis evoked by the applicants could validate the jurisdiction of an Arbitral Tribunal formed under Annex VII of UNCLOS, they would have failed to demonstrate the urgency of the requested measures [8]. As Japan argued, there would not be enough scientific evidence to confirm the possibility of serious harm to the SBT stock until the Arbitral Tribunal was formed.

Alternatively, if the jurisdiction of the Arbitral Tribunal was held, Japan issued a counterclaim for the prescription of provisional measures for Australia and New Zealand to initiate immediately negotiations under the CCSBT, willing to establish a new TAC and to draw up guidelines for the continuity of the EFP jointly. Lastly, Japan requested ITLOS to issue a warrant stating that if the parties failed to reach an agreement within six months, the applicants should initiate the procedures for the settlement of scientific disputes under the CCSBT provisions [9].

On August 27th, 1999, ITLOS issued a decision asserting that, contrary to Japan's contention, the conflict referred to the application of legal norms and could not, therefore, be reduced to a scientific dissent. In this regard, ITLOS concluded that, as set in UNCLOS, Article 64, State-parties have the duty to cooperate directly or through international organizations to ensure the conservation, and to promote the optimum utilization of highly migratory species, including *Thunnus maccoyii*.

Concerning the CCSBT, ITLOS stated that the conduct of the parties within the Commission for the Conservation of SBT was relevant in assessing the extent to which countries were fulfilling their obligations under UNCLOS. However, ITLOS held

that the conclusion of that regional agreement did not preclude the parties from having access to the procedures prescribed by Part XV of UNCLOS, since it did not provide a dispute settlement regime capable of producing binding decisions, as required by Article 282 of UNCLOS.

In addition, in respect of Japan's argument about the non-exhaustion of attempts to resolve the conflict peacefully, ITLOS held that the parties are not required to continue negotiations indefinitely, especially when they deem such possibilities exhausted. In this wake, once the jurisdiction of an Arbitral Tribunal formed under Annex VII of UNCLOS was confirmed, ITLOS then proceeded to evaluate the second requirement of the provisional measures: the urgency of the situation.

By not accepting Japan's allegations that there was no scientific evidence capable of indicating that the EFP posed a serious threat to the *Thunnus maccoyii* species and that, therefore, that stocks could collapse before the formation of the Arbitral Tribunal, Judge Laing stressed that urgency referred to the interruption of the tendency to such harm, not necessarily the harm itself. Judge Treves made the same observation:

The urgency needed in the present case does not, in my opinion, concern the danger of a collapse of the stock in the months which will elapse between the reading of the Order and the time when the arbitral tribunal will be in a position to prescribe provisional measures. This event, in light of scientific evidence, is uncertain and unlikely. The urgency concerns the stopping of a trend towards such collapse [10].

While acknowledging the available scientific evidence would not allow a conclusive assessment of what measures were need for the conservation of the species, ITLOS emphasized the existence of consensus among the parties regarding the fragility of the stocks as a cause of great biological concern. Besides that, ITLOS also considered the applicant's claim about the increasing number of States non-parties in the CCSBT engaged in the SBT fishing, which, in its view, certainly contributes to the species' risk.

Lastly, considering the adequate management of the living resources of the sea as an indispensable element of the protection of the marine environment, in line with the provisions of UNCLOS Part VII, ITLOS concluded by prescribing the requested measures, highlighting that the parties should act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the specie *Thunnus maccoyii*.

For these reasons, based on Articles 287(5) and 290(5) of UNCLOS, as well as Articles 21 and 25 of its Statute, ITLOS, by majority, has ordered the prescription of the following provisional measures [11]: that the parties should ensure (i) the non-adoption of measures capable of aggravating or prolonging the conflict to be submitted to the Arbitral Tribunal; (ii) to not take measures capable of hindering the execution of any decisions on merit that the Arbitral Tribunal may issue; (iii) that their annual catch would not exceed the limit of the last TAC established, unless otherwise agreed; and (iv) that they would refrain from conducting experimental fisheries programs involving the SBT other than by consensus, and that catches should be computed in the last established TAC [12].

3. ITLOS SBT Cases' Decision in the Spotlight

The prescription of provisional measures in the SBT Cases represented an extremely innovative jurisprudence, not only for the protection of this species, but also to the marine environment in its totality. Environmentalists from all over the world announced the Order of August 27th, 1999 issued by ITLOS as the pillar that would eventually mend numerous regional fisheries agreements. This decision clearly raised the hope among those who understand precaution as a fundamental principle of international environmental law, introducing ITLOS as a powerful tool for environmental justice.

After it was issued, Australia's Minister of Agriculture, Fisheries and Forestry at that time, Warren

Truss, emphasized the importance of such an outcome to constrain UNCLOS member States to comply with other regional fisheries agreements, as follows:

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 [13].

The provisional measures had such an impact on the South Pacific fishing industry that the mere possibility of being prosecuted for similar actions led New Zealand to accept the imposition of a fine for the abusive fishing of *Hoplostethus atlanticus* and to cooperate with Australia to keep vessels from other States away from the breeding area of the species.

The success of the decision could be addressed to the broad view adopted by ITLOS on the concept of *marine environment*. The conflict referred to a fishing controversy, therefore, related to Part VII of UNCLOS, which provides for the high seas and its living resources. However, ITLOS expressly mentioned the protection of the living resources of the sea as an inseparable element of the proper management and conservation of the marine environment in its entirety, a subject that is disciplined by UNCLOS Part XII. Thus, its references to the need for prudence and cautious in fisheries are relevant to the interpretation and application of both Parts [14].

It should be noted that the precautionary principle has been pleaded several times before international courts, but the decision handed down in the SBT Cases was the one that came the closest to applying its concept. Despite the limited context of the prescription of the provisional measures, ITLOS decision seemed to support the conclusion that UNCLOS must be interpreted in accordance Principle 15 of the Rio Declaration of 14 June 1992 [15].

This principle is a key element of environmental legal protection. Those who defend its application do so because they regard the proper conservation of natural resources as threatened by the unsustainable patterns of production and consumption maintained today. For them, the principle is an extremely useful tool to stem the exacerbated rate of exploitation of resources from the seas, forests and subsoil, which, despite having scientifically uncertain consequences, is reckless and potentially destructive.

In a different way, its opponents claim that its application is easily manipulated by NGOs and radical green movements. The truth is that the lack of scientific certainty will always exist, to a greater or lesser extent, and it cannot therefore be used as a basis for rejecting the prudent, yet sometimes costly, risk management [16].

In this wake, it is reassuring that an international court such as ITLOS has shed light on the legal application of a principle so relevant to environmental conflicts. However, while the Order of 27 August 1999 mentioned several times the importance of prudence and cautious in the management of living resources of the sea, it did not expressly adopt or expressly reject the precautionary principle as a norm of international law. The closest reference to it is in Paragraph 77, which states "in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."

The doctrine points out several reasons why ITLOS avoided expressly referring to the principle in question. First, the absence of a consensus on its concept in the practice of States, which would make its express application as a guiding principle of international law overly controversial. Secondly, there may have been disagreement as to the most appropriate way of characterizing it, whether as a principle, an emerging norm, an approach or just a kind of preventive measure. On the other hand, it is also possible that the majority

have understood that pronouncing on that question in a declaratory award procedure would lead ITLOS to come close to the merits, which it was not authorized to do [17].

In any event, under international law, in particular under fisheries law, the term *precautionary approach* is generally more accepted than the term *precautionary principle* once it seems to imply more flexibility. However, few scholars consider the difference in terminology to be significant. Indeed, in view of its close connection with scientific uncertainty, great concern surrounds the legal application of the precautionary principle, especially considering an extractive industry such as fishing.

As it is clear from its reasoning, the Order of August 27th, 1999 illuminates this debate, but it falls far from defining the issue. While encouraging prudence and action in fisheries, ITLOS's hesitation to recognize the precautionary principle as a rule of international law has revealed the fears still lingering in the international community regarding decision-making in situations where scientific evidence is limited [18].

Of all the Separate Opinions presented, Judge Laing's offered the most comprehensive understanding on precaution as a guiding concept of international law. Having devoted no less than ten paragraphs to the topic, his reasoning is central to illustrate the contours and boundaries in which the precaution was applied in the SBT Cases.

Its main thesis is that, in the face of serious risk to or grounds (as appropriately qualified) for concern about the environment, scientific uncertainty or the absence of complete proof should not stand in the way of positive action to minimize risks or take actions of a conservatory, preventative or curative nature [19].

On the other hand, Laing emphasizes the difficulty in applying a principle that causes the reversal of the burden of proof so that the one doing the activity proves that there is no threat of harm. For the opponents of the precautionary principle, the inversion of the burden simply invokes the maximum logic that a

nonexistent damage cannot be proven, critical that its defenders claim to be little more than cynicism.

Moreover, even if precaution were accepted as a guiding principle of international law, important questions about its application would exist, such as the vast potential of its scope, the need to elaborate operational standards for its application, the obligations and monetary costs involved, the possible risks to public health associated with the solutions adopted to avoid the risk to the environment, the imprecision and uncertainties of the concept's unfolding, as well as the subjectivity of a notion so imbued with values.

Although Judge Laing had shown support for the need to act with caution in the management of marine resources, he pointed out that it was extremely difficult to conclude that precaution could be accepted as a legal principle or as customary international law, as the applicants claimed. In this regard, he has been quick to assert that UNCLOS adopts the *precautionary approach*. Corroborating this assertion, he mentioned the inclusion of the term in Agenda 21 and the UN Fish Stocks Agreement, to the detriment of the term *precautionary principle* [20].

As far as the present case is concerned, it was stressed that the requirement of urgency had been met not by scientific evidence of the imminent collapse of the SBT stocks, which was in fact uncertain and unlikely to happen, but by the need of the immediate suspension of the tendency for such a collapse. In this regard, Judge Treves noted that the ITLOS decision had made a veiled reference to the precautionary approach in paragraph 77, which he regretted not being expressed.

The most significant contribution of his Separate Opinion is that the notion of precaution seems to naturally be the basis of a request for provisional measures even if the rule to be applied does not requires a finding of urgency. Even more surprisingly, by stating that the concept of precaution is inherent in the imposition of provisional measures, Judge Treves

has boldly and forcefully inserted a relatively new and controversial concept into a well-established dispute settlement mechanism. Its opinion advances considerably towards establishing precaution as an important element available to assist legal institutions to address international environmental issues [21].

Lastly, the Separate Opinion of Judge Ivan Shearer, who addressed the status of precaution in much less detail than did Judges Laing and Treves, recognized the difficulty in applying the precautionary principle to environmental conflicts. In this context, following the understanding of Judges Laing and Treves, Shearer recognized the preference for the expression *precautionary approach* in contrast to the notion of principle.

In this sense, he stressed that scientific uncertainty is the predominant rule in fisheries management, which is why the direct application of this principle could paralyze the activities of the sector. Although less developed than the Separate Opinions granted by the other two Judges, Shearer's reinforces the thesis that, although the status of precaution as a rule of international law may be questionable, the notion of a precautionary approach to fisheries legislation rests on a solid academic foundation [22].

4. The Setbacks of the Arbitral Decision

When the Arbitral Tribunal was established, Japan maintained its preliminary objections to jurisdiction and admissibility by making the following requests: (i) that the Tribunal declare and find, first, that the dispute was legally irrelevant and should therefore be discontinued; (ii) alternatively, that the Tribunal declare that it has no jurisdiction over the claims made by the applicants; (iii) alternatively, that the Tribunal declare that the claims made by the applicants were not admissible [23].

Australia and New Zealand, in its turn, rejected the preliminary objections raised, alleging that: (i) the parties differed as to whether or not the EFP conducted by Japan was ruled by UNCLOS provisions; (ii) the

conflict related to the interpretation and application of UNCLOS, especially on the provision of Part XV; (iii) all jurisdiction requirements had been adequately met; and (iv) Japan's objections to the admissibility of the conflict were unfounded [24].

Having regard to the final Submissions of the Parties, the Arbitral Tribunal held in its view the case was not moot. Clearly there was a consensus between the parties as to the existence of a conflict regarding the EFP conducted unilaterally by Japan, especially concerning the TAC established by the CCSBT Commission. Similarly, it concluded that the diplomatic negotiations carried out after the adoption of the EFP were also focus on the CCSBT provisions, which was why, in its view, the conflict was eminently centered on that regional agreement. In truth, what divided the parties was whether the dispute referred only to the CCSBT, as Japan maintained; or refer to both the provisions of the CCSBT and those of UNCLOS, in accordance with the applicants' assertions.

As stated before, the applicants claimed that Japan had failed to comply with its obligations to cooperate for the conservation of SBT stocks, obligations assumed not only under the CCSBT, but also under UNCLOS and general rules of international law. Japan, for its part, argued that references to UNCLOS provisions were merely a strategy for ordering a request for provisional measures from ITLOS, since the articles referred to were too generic and therefore would not have the power to regulate the conflict between the parties [25].

In addition, Japan has stated that UNCLOS is a Framework Convention, which depends on implementing conventions or specific regional agreements to be in effect, with the most relevant UNCLOS principles and provisions having been satisfactorily covered by the CCSBT. Besides that, Japan emphasized the content of Article 64 of UNCLOS, which requires States whose citizens fish in regions of high migratory species listed in its Annex I

to cooperate to ensure the conservation and the optimal utilization of these species either directly or through appropriate international organizations, of which the Commission established by the CCSBT would be a striking example.

Lastly, Japan stated that the CCSBT constituted *lex specialis* regarding the conservation and optimum utilization of the species *Thunnus maccoyii* and that its institutional expression therefore eclipsed the provisions of UNCLOS. For these reasons, Japan continued to assert that the dispute fell exclusively on the provisions of the CCSBT and had no connection with the provisions of UNCLOS.

The Arbitral Tribunal, however, did not accept Japan's central argument. Although it recognized that there was support in international law for the application of a *lex specialis* governing the predictions of a previous treaty, it found was perfectly possible that a single act could simultaneously breach obligations established in more than one treaty. It also emphasized the frequent parallelism between these instruments, both about the norms of a material nature and to procedures for the resolution of conflicts.

In this sense, the Arbitral Tribunal did not appear to have difficulty recognizing that the conclusion of an implementing agreement does not automatically remove the obligations imposed by the framework convention under which it was drawn up. In addition, it held that a dispute concerning the interpretation and application of the CCSBT will never be completely unrelated to the interpretation and application of UNCLOS, simply because the former was drawn up precisely to implement the general principles of that Convention [26].

Thus, the Arbitral Tribunal asserted that the conflict between the parties, even though it was centered on the CCSBT, also related to the provisions of UNCLOS, since they were not two separate conflicts, but one conflict which arose simultaneously within the two Conventions. In the Tribunal's view, concluding that they were two different conflicts would be artificial.

However, surprisingly the Arbitral Tribunal stated that, while relevant to the applicants' argument, such a conclusion did not define the conflict under analysis. Other articles should also be examined.

Article 279 of UNCLOS establishes that States parties are required to settle disputes concerning the interpretation or application of UNCLOS by peaceful means in accordance with Articles 2(3) and 33(1) of the United Nations Charter [27]. Article 280 of UNCLOS provides, in its turn, that none of the provisions of that section prevent the right of signatories to agree, at any time, on the settlement of a dispute by any peaceful means of its own choice [28].

Alternatively, Article 281(1) prescribes that if States which are parties to a dispute concerning the interpretation or application of UNCLOS, which the Arbitral Tribunal has confirmed in the SBT Cases, agree to seek resolution of the dispute by a peaceful means of its own choice, the procedures set out in Part XV of UNCLOS shall only be applied: (i) if a solution has not been reached by that means; (ii) if agreement between the parties does not exclude the possibility of another procedure [29].

Finally, the Arbitral Tribunal examined Article 286 of UNCLOS, which provides that, subject to the rules of section 3, which refer to the limitations and exceptions to the application of section 2, any dispute concerning the interpretation or application of UNCLOS shall be submitted, at the request of either party, to the court or tribunal having jurisdiction over that section [30].

Thus, considering the extensive negotiations between the parties, the Arbitral Tribunal held that the first condition set out in Article 281(1) of UNCLOS was properly satisfied [31]. Moreover, it also emphasized the wording of Article 16(2) of CCSBT, which provides that a lack of consensus on the submission of a dispute to the International Court of Justice or to arbitration does not exempt parties from continuing to seek composition of the dispute by any of the various peaceful means listed in Article 16(1).

However, in the Tribunals view, such a provision cannot constrain the parties to negotiate indefinitely, making it impossible to conclude, for the purposes of Article 281(1) and 283 of UNCLOS, that no solution has been reached [32].

The Tribunal then proceeded to examine the second requirement for the application of the procedures set out in Article 281(1) of UNCLOS, which, as already mentioned, requires that the agreement between the parties does not exclude any other procedure [33]. In this wake, apparently the terms of Article 16 of CCSBT do not expressly exclude the application of any procedure, including the procedures of UNCLOS. However, in the opinion of the Arbitral Tribunal, the absence of such an express provision is not decisive.

In this sense, Article 16(2) of CCSBT, in its first clause, states that any dispute not so resolved by the peaceful means listed in Article 16(1) shall be referred for settlement to the International Court of Justice or to arbitration, but only with the consent of all parts to the conflict. Therefore, the Tribunal concluded that it was not a conflict subject to either an arbitration or ITLOS at the request of only one of the parties, as provided for in Article 286 UNCLOS, since in both cases the CCSBT requires the consent of all parties.

At the same time, the second clause of Article 16(2) of CCSBT states that "failure to reach agreement on the International Court of Justice or arbitration shall not absolve the parties to the conflict from continuing to seek to resolve it by any of the various peaceful means referred to paragraph 1 above". Thus, the effect of this express obligation is not only to highlight the requirement of consensus for the submission of a conflict to the proceedings of the International Court of Justice, ITLOS or arbitration, but also removes the procedures therein from the scope of compulsory procedures of Part XV of UNCLOS when it has not been accepted by all parties involved.

In addition, Article 16(3) of CCSBT reinforces this intention by specifying that, in cases where the dispute is submitted to arbitration, an Arbitral Tribunal must be

constituted in accordance with its Annex, which seems to indicate that the arbitration contemplated in Article 16 is not the compulsory arbitration of Part XV of UNCLOS, but an autonomous and consensual arbitration conducted under the terms of CCSBT.

Fulcrum in the foregoing, the Arbitral Tribunal considered that Article 16 of CCSBT is an agreement between the parties to seek the settlement of the conflict by peaceful means of their own choice, which adequately fulfills the terms and intentions of both article 281(1) and the 280 of UNCLOS [34]. Such an understanding, as held by the Tribunal, is since the wording of Article 16 of CCSBT is very similar to the wording of Article XI of the Antarctic Treaty, since the circumstances are almost identical [35]. In its view, to the States which concluded that treaty, those provisions were intended to exclude any possibility of compulsory jurisdiction.

To illustrate this conclusion, the Tribunal emphasized the significant number of international agreements with maritime elements concluded after the adoption of UNCLOS that exclude with different degrees of clarity the possibility of unilateral submission of a conflict to compulsory procedures or to arbitration. Many of these agreements establish such an exclusion by expressly requiring that disputes should be resolved by procedures established by consensus of the parties. Other instruments, in turn, preclude the unilateral submission of a dispute to compulsory procedures or arbitration not only through the express requirement of consensus, but also as in Article 16 of CCSBT, by requiring that the parties continue to seek the resolution of the conflict by peaceful means of their own choice.

Furthermore, in the view of the Tribunal, affirming that disputes concerning obligations arising both from UNCLOS and from implementing agreements, such as the CCSBT, should be brought within the scope of Part XV of UNCLOS, would mean depriving the parties of the right to settle conflicts under the procedures of those agreements. Thus, by a majority vote, the

Tribunal declined to hear the merits and, therefore, concluded that it was not necessary to proceed to the examination of the questions pertaining to admissibility, although it pointed out that the provisions of UNCLOS involved suggest that the impasse was not of a purely scientific nature [36].

At last, fulcrum in Article 290(5) of UNCLOS, which provides that “once established, the court to which the dispute has been lodged may modify, revoke or confirm such provisional measures”, the Arbitral Tribunal, revoked the provisional measures prescribed by ITLOS, which ceased to have effect as from the date of signature of the arbitration award, on August 4, 2000 [37].

5. The Scholars’ Reflections on the Arbitral Decision

The SBT Cases were the first case submitted to an Arbitral Tribunal formed under the norms of Annex VII of UNCLOS. According to the critics, it would be reasonable to expect that the first Arbitral Tribunal constituted to hear a fisheries dispute under Part XV of UNCLOS would observe more carefully the key role played by its compulsory procedures. Alternatively, the decision reveals a very restrictive textual analysis of UNCLOS provisions, prioritizing the provisions established in a parallel regional agreement.

In adopting this view, the Arbitral Tribunal seems to have suggested that UNCLOS signatories can opt out of the Part XV compulsory procedures by erecting regional implementing agreements. This conclusion could have serious implications for the subsequent fisheries conflicts under UNCLOS, since, based on its rationale, many disputes may be removed from the scope of Part XV [38].

In this wake, two points of the SBT Cases arbitration deserve attention. First, despite the applicants’ argument that the dispute was related to obligations established by UNCLOS and by the CCSBT, the Arbitral Tribunal concluded that it was artificial to consider those obligations independently. Secondly, on

the premise that the conflict was mainly focused on the CCSBT, the Tribunal assessed whether the terms of its Article 16, which provides for conflict resolution procedures in that Convention, met the requirements set out in Article 281(1) of UNCLOS [39].

As discussed before, Article 16 of the CCSBT does not explicitly exclude the application of other procedures, but the Tribunal stated that its wording was based on Article XI of the Antarctic Treaty, which was intended to exclude the possibility of submission of a conflict relating to its provisions to procedures of compulsory jurisdiction. This conclusion was based mainly on other regional treaties enforced after UNCLOS that did not establish compulsory procedures for the settlement of disputes, as well as on the wording of Article 281 of UNCLOS, which allows its signatories to limit the application of Part XV through the conclusion of other agreements. In this sense, the fact that other agreements after UNCLOS did not establish compulsory procedures for resolving conflicts would not necessarily mean that the parties, in concluding the CCSBT, had the objective of excluding the application of compulsory UNCLOS procedures.

Besides that, from the interpretation attributed to Article 281 of UNCLOS by the Arbitral Tribunal, it could be stated that a regional agreement which does not provide for procedures leading to binding decisions can preclude the application of Part XV of UNCLOS merely by the presumption that the Parties so wanted. Similarly, under Article 282 of UNCLOS, a regional agreement establishing procedures leading to binding decisions also rules out the application of Part XV of UNCLOS. Under this approach, these two Articles could be reduced to a single proposition: regional agreements exclude compulsory UNCLOS procedures [40].

However, the most likely explanation is that Article 281 of UNCLOS was not drawn up for the purpose assigned to it by the Arbitral Tribunal [41]. The context to which its meaning seems most appropriate is one in which the parties, seeking a negotiated solution, agree

to resort, for example, to conciliation. Then, if the attempt to achieve a peaceful settlement prove to be inexhaustible, the parties would remain free to evoke UNCLOS Part XV compulsory procedures, unless they have specifically agreed in a different sense.

Nevertheless, even if Article 281 of UNCLOS was intended to cover conflict resolution clauses such as Article 16 of CCSBT, regional agreements do not have the potential to preclude resort to compulsory procedures of a Convention such as UNCLOS without clear provisions. Except for its vague claim under Article 281 of UNCLOS, as well as its reference to other regional agreements such as the Antarctic Treaty, the Arbitral Tribunal did not clarify that point.

Indeed, the core of the problem appears to have been the Tribunal's reluctance to treat the case as parallel to both the CCSBT and UNCLOS. There is no doubt that the controversy was about high seas fishing, thus leading to the application of important UNCLOS provisions, as ITLOS had noted in the early procedures. However, the Arbitral Tribunal seems to have concluded that it could not rule on UNCLOS issues without also deciding on the interpretation and application of CCSBT.

Thus, since it did not have jurisdiction to hear disputes under that Convention, it concluded that could not assess any other aspect of the dispute, including its relationship to the provisions of UNCLOS. But the Tribunal makes no reference to the principle of inseparability in substantiating its incompetence, unless for stating that it is artificial to consider the case as a conflict concerning UNCLOS in a way that is separate from the CCSBT. But if the inseparability of issues pertaining to UNCLOS is not the basis of the decision, then the outcome is even more questionable.

In that case, the Arbitral Tribunal would have interpreted Part XV as implicitly subject to provisions of future agreements, in addition to being subject to regional agreements under which conflicts, that fell under the scope of UNCLOS and these agreements, are eminently centered. Such a conclusion would mean

that when a State fishing on the high seas enters into a regional agreement which does not establish compulsory procedures for the settlement of disputes, it would also have precluded its protection against the creeping jurisdiction of coastal States, provided for in Part XV of UNCLOS [42].

Another irony, of which the Arbitral Tribunal seemed aware, is that Article 30(2) of the UN Fish Stocks Agreement imports the provisions of Part XV of UNCLOS to the CCSBT and other regional agreements. These provisions include Article 281 of UNCLOS, which, according to the its decision, excludes from Part XV those disputes which concern agreements that do not establish compulsory procedures for the settlement of disputes. Therefore, the Tribunal appeared to ignore the circularity of its arguments when it warns of the benefits brought by the UN Fish Stocks Agreement to a fisheries disputes such as the SBT Cases.

It should be noted that in The MOX Plant Case both ITLOS and the Arbitral Tribunal considered UNCLOS and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) to be separate but parallel regimes. Although OSPAR establishes compulsory procedures for the settlement of conflicts capable of leading to binding decisions, none of the courts accepted the argument that Article 282 of UNCLOS therefore excluded its jurisdiction over the dispute.

The only dissenting opinion presented in the decision is the one from Judge Keith, who did not appear to be convinced of the conclusion that, by enacting the CCSBT, the parties expressed their implicit intention to exclude the application of UNCLOS Part XV. In striking contrast to the majority view, whose approach circumvented the absence of a clear wording and found it possible to rule out the application of the UNCLOS provisions based on a seemingly implicit rule, Keith stressed the need for a clear and explicit wording to the exclusion of UNCLOS compulsory procedures.

According to his view, the wording of Article 16(1) of CCSBT referred only to disputes concerning the interpretation or application of that agreement and, therefore, should not be evoked as a result of non-compliance with obligations assumed under UNCLOS. In this wake, he emphasized that the regimes of both treaties, including their dispute settlement procedures, were distinct sets of rules, and it would be surprising whether the dispute settlement procedures under the CCSBT were applicable to conflicts beyond its provisions.

It seemed that Keith turned to section 1 of Part XV of UNCLOS and noted that the emphasis of this section rests on the parties' freedom of choice as to the means of resolving conflicts. In this sense, he concluded that the general structure of Part XV itself establishes the need for signatories to include clear provisions in the collateral treaties to UNCLOS if they wish to rule out the application of the compulsory procedures set out in section 2.

Finally, and this is what really distinguished his conclusions from the position of the majority, Keith mentioned his understanding of the central role played by UNCLOS settlement of disputes procedures, expressed in all stages of the negotiations leading up to its adoption. While the majority sought to trace vague analogies between the wording of Article 16 of CCSBT and Article XI of the Antarctic Treaty, he cast a sensitive glance at the origins of UNCLOS itself, recognizing that “[t]he States at that Conference moved decisively away from the freedom which they generally have in their international relations not to be subject in advance to dispute settlement processes, especially processes leading to binding outcomes” [43].

Thus, rrecognizing the current overlapping of provisions on dispute settlement procedures in international legal practice, especially in treaty law, as well as the central role played by UNCLOS compulsory procedures, Keith asserted that the application of Article 16 of CCSBT in detriment of the

provisions of Part XV would require a clear and express provision. For these reasons, he considered that the Arbitral Tribunal was competent to hear the merits of the dispute [44].

Unfortunately, by renouncing its jurisdiction and revoking the provisional measures, the Arbitral Tribunal has cast doubt on the effectiveness and credibility of UNCLOS compulsory dispute settlement procedures, especially on ITLOS. If the arbitral decision in the SBT Cases is taken as a precedent, it may encourage the parties to circumvent UNCLOS compulsory jurisdiction through the adoption of regional collateral agreements.

The effects of this decision on the future of international environmental law could be dramatic. If UNCLOS bows to conflicts that are ruled simultaneously by its provisions and by the provisions of agreements of consensual jurisdiction, the compulsory procedures provided for in Part XV could become obsolete, leading its signatories to uncertainty, diplomatic strife and, consequently, tendency towards unilateralism [45]. Such inconsistency threatens to sabotage an extremely valuable court, since ITLOS has attributes that make it very effective for resolving environmental conflicts.

6. Conclusion

Essentially, apart from enlightening the debate on the precautionary principle as a rule of international law, the SBT cases revealed the difficulties arising from conflicts ruled by provision established in a framework convention such as UNCLOS and those provided for in its regional implementing agreements. Considering the frequent overlap between the UNCLOS' provisions and those of regional fishery agreements, it is likely that most fisheries disputes on the high seas may refer to more than just one of them, so the findings in the SBT cases are extremely relevant for the study of subsequent similar cases.

First, since the central issue regards the conservation of a fish stock, it is important to note that ITLOS did

not accept the applicants' claim concerning the precautionary principle as a rule of international law. Analyzing the Order of August 27th, 1999, the precautionary approach was established as a soft rule in the STB Cases, which shall not be mistaken to the precautionary principle. According to ITLOS understanding, while the former would allow countries to be flexible concerning the management of fisheries, the latter, if considered as an applicable principle under international law, would restrict excessively such an important economic sector.

Although the court has taken a more flexible approach to precaution, as far as the urgency requirement is concerned, its analysis has been more environmentally protective. The provisional measures were granted by ITLOS because, beyond falling the scope of UNCLOS, the situation concerning the species *Thunnus maccoyii* was already alarming even before the CCSBT was erected. In ITLOS's view, the capability of irreparable damage for the SBT stock was too critical to be ignored, thus, scientific evidence of permanent harm and even the harm itself were waived by the Order of August 27th, 1999.

Regarding UNCLOS compulsory procedures for the settlement of disputes, it is established that conciliation must be prior to any procedure under Part XV. Thus, if States try to settle the conflict as prescribed by any implementing agreement and did not resolve it by peaceful means, they are subject to UNCLOS compulsory procedures, since conciliation does not generate any binding decisions, nor the parts are constrained to try to conciliate indefinitely. That was precisely what happened in the SBT cases: the parties were unable to reconcile and the CCSBT, an UNCLOS implementing agreement, is unable to produce binding decisions.

In this sense, the Arbitral Tribunal should not have excluded the application of UNCLOS. First, because its provisions constitute *lex generalis* and are indirectly applicable to maritime matters; second, because the countries ascended to the Convention and did not make

any express reservations to the procedures prescribed in Part XV of UNCLOS therein being automatically subject to it. Instead, the Arbitral Tribunal used a very restrictive textual analysis of UNCLOS provisions, prioritizing the procedures for settling disputes established in that parallel regional agreement.

Lastly, the prescription of three different types of dispute settlement under UNCLOS seemed to be a great idea when drafting the Convention; however, the STB Cases are a perfect example that having multiple jurisdictions may weaken the adjudication system. Although designed to offer more means of protecting the marine environment and the living resources of the sea, UNCLOS compulsory procedures for the settlement of disputes may not have the outcome as environmentally protective as expected.

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- [4] UNITED NATIONS. United Nations Convention on the Law of the Seas. 1982, accessed on 11 Nov., 2017, available online at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, Art. 290(5): Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.
- [5] UNITED NATIONS. United Nations Convention on the Law of the Seas, 1982, accessed on 11 Nov., 2017, available online at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, Art. 64: The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work; Art. 116: All States have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section; Art. 117: All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.; Art. 118: States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end; Art. 119: In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global; (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

- [6] See footnote n. 4 above.
- [7] UNITED NATIONS. United Nations Convention on the Law of the Seas. 1982. Available at: <http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>. Access on: nov. 11, 2017. Art. 288(1): A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part
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has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

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