

From Southern Bluefin Tuna Case to Biodiversity Beyond National Jurisdiction (BBNJ)

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ABSTRACT

This paper aims to study the prescription of provisional measure of International Tribunal for the Law of the Sea (hereinafter ITLOS) on Southern Bluefin Tuna case between New Zealand and Japan; Australia and Japan. Moreover, this case concerns the Southern Bluefin Tuna (hereinafter Bluefin Tuna) fishing, Japan's experimental fishing program exceed the set level by parties and the approach of ITLOS can clarify the example of the circumstance in order to take a provisional measure to prevent serious harm to the marine environment. The results show that this case can illustrate the approach of ITLOS to take a provisional measure as follow: tribunal shall take into account the circumstances to lead a serious harm to the marine environment. Additionally, this dispute, the circumstance of Japan exceeded Bluefin Tuna fishing, it brings about to be the serious harm to the marine environment. Thus, ITLOS notes that Japan, New Zealand and Australia should take the effective conservation measure in order to prevent serious harm to the stock of Bluefin Tuna because the conservation of the Bluefin Tuna is an element of protection and preservation of the marine environment. Nowadays, Biodiversity Beyond National Jurisdiction (hereinafter BBNJ) helps to preserve and protect the Bluefin Tuna as marine environment for the next generation also.

Keywords: *Biodiversity Beyond National Jurisdiction (BBNJ); Southern Bluefin Tuna; Marine Environment.*

Introduction

The earth has created valuable resources, both living resources and non-living resources for the mankind. The aforementioned resources are part of terrestrial, aquatic and marine environment. When the nature makes terrestrial aquatic and marine environment for human, everyone has an important obligation to preserve these resources for the next generations. For this reason, the authors are interested in studying of Southern Bluefin Tuna case as one example that shows the significance as the mankind try to preserve natural resources, especially Southern Bluefin Tuna (hereinafter Bluefin Tuna) as part of the living resource needs to be conserved. Additionally, the conservation of Bluefin Tuna is an element of the protection and preservation of the marine environment. However, this case, the authors focus on the provisional measure ordered by ITLOS to protect the marine environment. The important issues that aim to be taken into consideration as follows: the approach's ITLOS to

protect marine environment. Furthermore, the authors will explain from the facts of the case, requested the provisional measures by plaintiff and defendant, approach's prescription provisional measures and order of provisional measures, respectively.¹ Moreover, this case connects to the united nations convention on the law of the sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction as Biodiversity Beyond National Jurisdiction (hereinafter BBNJ), which it is adopted and opened to sign by all states on 4 March 2023 and convened a further resumed fifth session of the conference on 19 and 20 June 2023.²

Results and Analysis

1. Fact of Case Concerning Southern Bluefin Tuna

Southern bluefin tuna case, it is this dispute between Australia, New Zealand and Japan. This case concerns conservation as Southern Bluefin Tuna as *thunnus maccoyii* is a highly migratory species and it is a high valued fish in Japanese restaurant. Australia, New Zealand and Japan are state parties of UNCLOS and the convention for the conservation of Southern Bluefin Tuna of 1993. Before 1999, Australia, New Zealand and Japan conclude an agreement for conservation of Southern Bluefin Tuna. However, Japan does not make a convention for conservation of southern tuna bluefin after 1999. Australia and New Zealand observe that the circumstances of Japan have failed to comply with conservation of tuna bluefin. On the other hand, Japan contends that Japan have not breach the aforementioned convention. Australia and New Zealand as plaintiffs filed the dispute to the arbitral tribunal under Annex VII. Pending constitution arbitral tribunal, the plaintiffs request the provisional measures to ITLOS in order to prescribe the provisional measure for conservation southern bluefin tuna for mankind.

2. Requested Provisional Measure by Disputed States

Pending the constitution of the arbitral tribunal, Australia and New Zealand as plaintiff requested the provisional measures to ITLOS as follows: (1) Japan shall terminate the unilateral experimental fishing for Bluefin Tuna; (2) Japan shall put a limit on Bluefin Tuna fishing subject to last agree in commission for the conservation of Bluefin Tuna; (3) Japan shall take action and comply with precautionary principle in Bluefin Tuna, during a

¹ Cesare Romano, The Southern Bluefin Tuna Dispute Hints of a World to Come . . . Like It or Not, Ocean Development & International Law, p. 315.

²UNGAA/77/L.62, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/089/82/PDF/N2308982.pdf?OpenElement>

final settlement under arbitral tribunal; (4) Japan, Australia and New Zealand shall provide that no action which might provoke, develop or deliver more difficult of solution the dispute filed to arbitral tribunal under Annex VII; and (5) Japan, Australia and New Zealand shall maintain that no action is taken which might prejudice and carry out the decision on the merit of the case that arbitral tribunal may deliver.³

On the other hand, Japan requested to the ITLOS as follows: (1) to reject the request for provisional measure filed by Australia and New Zealand; and (2) ITLOS should consider that this dispute is properly and arbitral jurisdiction including prescribe provisional measures in good faith and urgent negotiation within six months.⁴

After the aforementioned provisional measures requested by plaintiff and defendant of this dispute, the next step, ITLOS has an approach to make an order of provisional measure as illustrated next topic.

3. Approach's ITLOS of Prescription the Provisional Measures

ITLOS initiates to consider that Australia, New Zealand and Japan are state parties of UNCLOS, pursuant to article 287 of aforementioned legal basis, they have not chosen a mean for the dispute settlement. However, disputed states deemed to have chosen an arbitral tribunal constituted in accordance with Annex VII under UNCLOS. Pending the constitution arbitral tribunal, Australia and New Zealand as plaintiffs filed the request of provisional measure to the tribunal on case concerning Southern Bluefin Tuna. Before ITLOS take the orders, the first step, authors observe that ITLOS will find the *prima facie jurisdiction* of the arbitral tribunal. Moreover, ITLOS shall prescribe the provisional measures under article 290 of UNCLOS, this article as provisional measure reflects that ITLOS can make the provisional measure which it considers appropriate under the circumstance to preserve the respective rights of parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

Furthermore, this dispute links to the legal basis as a convention for the conservation of Southern Bluefin Tuna of 1933, Japan, Australia and New Zealand are state parties of this convention and they have the obligation to take measure for the conservation and management of bluefin tuna. This case, before 1999, Japan, New Zealand and Australia have a commitment within framework of the experimental bluefin tuna fishing program.

³ Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), provisional measure, order of 27 August 1999, page 291, para 34.

⁴ Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), provisional measure, order of 27 August 1999, page 291, para 35.

However, Japan has not made the commitment of aforementioned program after 1999. This circumstance of Japan may initiate to catch bluefin tuna or take an experimental fishing program which exceed the level last set by the parties⁵ because bluefin tuna is the high price of fish in sashimi restaurants and it is the one of top class's fish market in Japan. The circumstances are considered by the tribunal and ITLOS can prescribe the provisional measure. According to under article 290 paragraph 1 of UNCLOS sets forth that "... the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstance to preserve the respective rights of parties to the dispute or to prevent serious harm to the marine environment." It can clarify the example of circumstance that tribunal can initiate and order the provisional measure, pending the final decision. Additionally, the authors observe that this case, ITLOS takes the precautionary principle as customary international law and it is the approach of ITLOS as mankind to protect the marine environment for the next generation.

The provisional measures were prescribed by ITLOS as follows: (a) Australia, New Zealand and Japan shall not take action which might provoke or reach the dispute; (b) Australia, New Zealand and Japan shall not take action which might be unfairness the carrying out of the merit of this case; (c.) Australia, New Zealand and Japan shall guarantee that their annual catches do not exceed the levels last agreed by parties; (d) Australia, New Zealand and Japan shall cease from the circumstance as an experimental fishing program and a catch of southern bluefin tuna; (e) Australia, New Zealand and Japan should negotiate and conclude an agreement on measures for the conservation and management of southern bluefin tuna; (f) Australia, New Zealand and Japan should make agreement with other state and fishing exitance under conservation and promoting of southern bluefin tuna stock.⁶

Japan of marine scientific research which took place on the high seas, it resulted on serious harm to the marine environment as determined by ITLOS and UNCLOS does not set forth in detail as a gap. BBNJ, it is the legal basis and aims to fill the gap by giving the legal power to create and manage marine protected areas on international waters. This is important to commit on biodiversity by International Conference or Conference of the Parties 15 (hereinafter COP15). Therefore, the authors focus on the relevance of Japan's

⁵ Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), provisional measure, order of 27 August 1999, page 296-297, para 81-84.

⁶ Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), provisional measure, order of 27 August 1999, page 297-301, para 90.

experimental activities, provisional measure of this case and the state's obligation to manage activities that do not cause serious harm to the marine environment as defined by BBNJ.

According to the United Nation Convention on the Law of the Sea, it lays down that the general obligation on state parties to protect and cooperate the conservation and management of marine environment. The significant gap of UNCLOS is the conservation and protection of our marine biological diversity in areas beyond national jurisdiction known as high sea, it is the result of human activities. Human activities which are not governed by any states and the activities are under the freedom of the sea on high seas. The aforementioned areas are still important for global biodiversity.

Additionally, United Nations Members seek to fill these gaps and have agreed for an early conclusion of the International Legally Binding Instrument, it calls Biodiversity Beyond National Jurisdiction (BBNJ) for the protection of our oceans and the equitable sharing of their resources under UNCLOS at the end of 2023.⁷ The BBNJ Treaty, it has a framework for 4 areas as follows :

1) Conservation and sustainable use of marine genetic resources

BBNJ prescribes that the general objective of existing institutions and mechanisms for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles.⁸, definitions of biodiversity, marine genetic resources and bioprospecting which are as Common Heritage of Mankind. In order to achieve the abovementioned, BBNJ guides by the following principles and approaches such as the principle of the common heritage of humankind and the precautionary principle or precautionary approach.⁹

2) The area-based management tools like marine protected areas

BBNJ prescribes various types of protected areas, Environmental Impact Assessment (EIA) standards, marine spatial planning, monitoring of impacts, baseline

⁷ Neil Henderson, A brief introduction to the High Seas Treaty, <https://www.gard.no/web/articles?documentId=35175276>

⁸ Article 2, General Objective and article 4 Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies of BBNJ Treaty, Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UNGA Resumed fifth session, New York, 20 February–3 March 2023, https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf.

⁹ *Ibid.*, Article 5, General principles and approaches

constitution and need for a new coordinating institution or expansion of mandate of existing institution.

3) The environmental impact assessments

BBNJ prescribes that activities' processes, thresholds and other requirements for conducting and reporting assessments to protecting and preserving the marine environment.¹⁰

4) The capacity-building and technology transfer

BBNJ prescribes increase, disseminate and share knowledge on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and transfer of marine technology to all developing States Parties such as landlocked developing countries, geographically disadvantaged States.¹¹

To include, discussions on UNCLOS Part XIII on Marine Scientific Research and Part XIV on Development and Transfer of Marine Technology; UNCLOS III Final Act Annex VI Resolution and generally provisions in Part XI and the 1994 Agreement; lessons learned from the ISA experience in building capacity and transferring marine technology.

4. The Impact of BBNJ and the serious harm to the marine environment

BBNJ prescribes the meaning of "Marine genetic resources" that any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value. Moreover, Southern Bluefin Tuna corresponds to the meaning of marine genetic resources because they are marine animal containing functional units of heredity of actual or potential value, due to the high price of fish in sashimi restaurants and the one of top class's fish market in Japan. Although the Tribunal did not raise such matter as a reason and at the time of the case there was no definition of marine genetic resources (hereinafter MGRs) but tuna as a type of aquatic animal. Therefore, it falls within the definition of MGRs and it was established later that is the abovementioned meaning of BBNJ.

BBNJ prescribes that the parties shall take decisions to adopt measures in areas beyond national jurisdiction when human-caused disaster has caused, or is likely to cause serious or irreversible harm to marine biological diversity and to ensure that the serious or irreversible harm is not exacerbated.¹²

¹⁰ *Ibid.*, Article 21 bis, Objectives

¹¹ *Ibid.*, Article 42, Objectives

¹² *Ibid.*, Article 20, ante Emergency measures

ITLOS takes into account the great service to mankind by clarifying as follows: tribunal prescribed the provisional measures in southern bluefin tuna case and to order the conservation of the living resources of the sea is an element of the protection and preservation of the marine environment.”¹³ Tribunal also reiterated and elaborated that living resources and marine life are part of the marine environment.¹⁴ The Southern Bluefin Tuna are the marine living resources and part of the marine environment which all states protect and preserve although they have had serious or irreversible harm in areas beyond national jurisdiction pursuant to BBNJ.

Conclusion

If state experiment activities impact the serious harm to the marine environment and it is a dispute between states, Article 290 of UNCLOS sets forth the Tribunal's discretion to make a reasonable judgment and in this case, the judgment has based on scientific evidence which may take into account case by case and uncertainty in each case. However, the great change begins when BBNJ was adopted and made available for signature by stipulating that it would still take a scientific approach but clarify its scope. It must be the best available science and scientific information at that time. In summary, taking into account of the protection and preservation of the marine environment which closing the gap of UNCLOS on what all of states has long been concerning.

Moreover, the challenge will come after the enforced treaty and exercised rights by states on the customary principle as “principle of freedom of the sea” based on self-interest and principle on marine environmental considerations. In addition, it extends the application of the common heritage of mankind principle to include Marine Genetic Resources (MGRs) in the high seas rather than applying this principle only to natural resources in the Area. Finally, every state shall apply strictly and concern to protect and preserve the marine environment on UNCLOS and BBNJ for the next generation.

¹³ Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 295, para. 70.

¹⁴ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at p. 61, para. 216.

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