

SEPARATE OPINION OF JUDGES YAMAMOTO AND PARK

Operative paragraph 1(d) of the judgment orders New Zealand, Australia and Japan to “refrain from conducting an experimental fishing programme ... except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation ...”.

When the three parties to the dispute failed to reach agreement on a joint experimental fishing programme, Japan unilaterally launched one and Australia took regulatory measures against Japanese fishing vessels, according to the Response submitted by Japan which reads in part:

At the start of 1998, in the absence of an agreed TAC [total allowable catch] and quotas, Australia refused to sign a bilateral fishing agreement with Japan to permit Japanese vessels to fish for other species in the Australian EEZ or to visit Australian ports.
(Response, paragraph 17)

In this regard, the relevant part of article 64 of the United Nations Convention on the Law of the Sea may be noted with interest that:

[t]he 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 (emphasis added).

If, in compliance with the operative paragraph, the experimental fishing by any of the parties, Japan in the instant case, is to be suspended pending a decision by an arbitral tribunal to be constituted, it may be pointed out, in fairness, that the retaliatory measures taken by Australia against Japanese fishing vessels could have been dealt with likewise in the above paragraph of the judgment at least for the period pending the decision of the arbitral tribunal, because, in the absence of the cause that gave rise to the need for the measures, the measures themselves would have no *raison d'être*.

(Signed)

Soji Yamamoto

(Signed)

Choon-Ho Park