Depletion-Safe Tuna: Has the UNCLOS Tribunal Usurped its Members’ Democracy?

Etan M Basseri, University of California, Davis
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ABSTRACT

In 1999 the International Tribunal for the Law of the Sea heard a complaint of fishing violations, with Australia and New Zealand alleging that Japan had exploited the delicate southern bluefin tuna fisheries in violation of the United Nations Convention on the Law of the Sea. Japan responded, and eventually prevailed, with the argument that the dispute was governed by a separate multilateral treaty concerning the tuna species. The issue of jurisdiction was a major issue in the case.

This paper argues that the Tribunal’s formation and operation was and is consistent with democracy. It applies four different critiques of international organizations to the Tribunal, with the tenets of democracy used as benchmarks along the way. Part I provides definitions of international fisheries, the Tribunal and the role of a court in a democratic system. Part II lays out the four critiques from four different perspectives. Part III analyzes the Southern Bluefin Tuna case itself, and in applying the critiques finds that the Tribunal’s formation and operation did not usurp democracy from its members.

* J.D., University of California, Davis School of Law, 2007; B.A. Political Science, University of Washington, 2004. A tremendous thanks to my wife, Sonya for her support during the research and writing of this paper.
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INTRODUCTION

Not so long ago, commercial fishing was a highly unregulated industry. One of the few geographical limits was the “three-mile” rule, the original standard for delineating a state’s territorial fishing waters dating from the eighteenth century. At that time, three miles was the approximate cannon-shot mark: “the distance from which a state could protect its seas from shore.” Today while the geographical limits have changed, the current international fisheries scheme focuses on protecting the marine environment as a whole. Regulating international fishing resources is a daunting task, and the some of the challenges to sustainable fishing happen to be the most common. This paper focuses on the central problem of combating the effects of the classic “tragedy of the commons” in the context of commercial fishing. That is, every actor in a finite area has the opportunity to exploit a shared but finite resource, and has no incentive to temper his own harvesting practice. Here the catches of commercial fishing vessels from a range of nations have caused an ecological and economic crisis. States have formed multilateral agreements in the interest of combating such a crisis and fostering equity in commercial fishing. As it happens, one of the world’s most powerful trade organizations does not address this issue: The World Trade Organization Agreement on Agriculture does not include fishery products. As controversial as the World Trade Organization may be, this paper will show that there is no shortage of opposition to delegating of authority to international bodies, even to those created by United Nations agreements. Recently, House Representative Ron Paul of Texas derided the United Nations Convention on the Law of the Sea and its tribunals:

“[The Convention] will create a Law of the Sea Tribunal, which will claim - and already has claimed - jurisdiction over the onshore as well as within the territorial sea or economic zones of coastal nations. This U.N. Tribunal could very well rule in a manner contrary to U.S. military, counterterrorism, and commercial interests…Mr. Speaker, [the Convention] is a perfect example of “taxation without representation” that our Founding Fathers rebelled against. We should under no circumstances surrender one

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1 The term “state” in this paper refers to a sovereign country (i.e., Japan, not California).
3 Id.
4 See, Garrett Hardin, The Tragedy of the Commons, SCIENCE, 1968.
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In determining whether the International Tribunal for the Law of the Sea (the “Tribunal”) is consistent with democracy, this paper will utilize four principal critiques of international organizations and the Tribunal itself. After articulating some core principles and definitions, the paper will lay out four tenets of democracy according to Robert A. Dahl. Next, the paper will present a case study of the Southern Bluefin Tuna case, testing four different critiques of international organizations against the Tribunal. First, Professor Louis Botsford of University of California, Davis maintains that international fisheries governance is one of the tragedy of the commons, too susceptible to free-riding and abuse. Next, Robert A. Dahl argues that given the difficulty faced by domestic states in building and maintaining a functional democracy, the barriers to democracy in an international organization are all the greater. Third, Jack Goldsmith claims that an international organization faces so many intrinsic institutional flaws that it cannot effectively operate as a democratic system, and that the formalization of common international law (“CIL”) by international organizations causes an invasion of CIL into American federal common law. Finally, (breaking with the pattern of scholarly insight) William Safire contends that international organizations are undemocratic because they are too susceptible to abuse by smaller, weaker states. Before proceeding into an analysis of the international fisheries regime and the Tribunal itself, it is necessary to define some of the particularized entities implicated in this area.

PART I: DEFINITIONS

A. International Fisheries

A fishery in this context refers to “a place where fish or other aquatic animals are caught.” A fishery is “exploited” when its resources are utilized in any way, including fishing. In the context of fishing, the word “exploit” does not imply abusive or opportunistic behavior, although “over-exploit” does connote such behavior. As most laypersons would presume, an “international fishery” (or fisheries, as they more commonly occur) would exist in areas that no single state can claim as sovereign territory. That concept was altered with the widespread adoption of the United Nations Convention on the Law of the Sea (“UNCLOS”), which by 1994 included the U.S. as a signatory. The U.S. Senate subsequently
refused to ratify the treaty (even in revised form as submitted by then-
President Clinton) and U.S. provisional membership expired in 1998.\textsuperscript{10}

UNCLOS created, among other things, a shoreline scheme called the
Exclusive Economic Zone (the “EEZ”). That scheme was developed as
early as 1971 by leaders of African states who had a strong interest in
expanding their territorial rights beyond their shores.\textsuperscript{11} Today the EEZ is
meant to give sovereign states more control over offshore fisheries, and to
put those African states (and others) on a more equal footing with further
developed states in the commercial fishing industry. The EEZ itself is an
area extending, at a ninety degree angle, approximately two hundred miles
from a signatory states’ coast.\textsuperscript{12} In this system, the principal stakeholders
are determined solely on the basis of existing political reality. That is,
whoever governs the most shoreline has certain rights to the EEZ off that
shoreline. The scheme can lead to some surprising results, however. For
example, France surpasses Australia’s EEZ by millions of square miles
thanks to the number of French island-territories throughout the world.\textsuperscript{13} Of
the thirteen cases the Tribunal has adjudicated to date, three have included
France as a party, all with France as the responding party.\textsuperscript{14} Two cases
have included Australia; one as respondent and one as petitioner. While
this paper will not focus on the apparent geopolitical disparity, those
statistics illustrate the playing field upon which this regime operates.

B. The International Tribunal on the Law of the Sea

UNCLOS mandates a number of steps for dispute resolution
between member states\textsuperscript{15}. First, the parties are required to settle the matter
by peaceful means.\textsuperscript{16} Second, the parties are required to “proceed
expeditiously to an exchange of views regarding [the dispute’s] settlement
by negotiation or other peaceful means.”\textsuperscript{17} Finally, if the parties cannot
settle the matter on their own, they are required to employ one of a number
dispute resolution options. The Tribunal is one path that state-parties to
UNCLOS may utilize to resolve their disputes.\textsuperscript{18} Other options include

\begin{thebibliography}{18}
\bibitem{Donovan} Carrie E. Donovan, The Law of the Sea Treaty, WebMemo No. 470 of the Heritage
\bibitem{LOSCEEZ} See, LOSC, supra note 9, art. 57.
\bibitem{SeaAustria} Sea Around Us, 2007. A global database on marine fisheries and ecosystems. World
Wide Web site www.seaaroundus.org. Fisheries Centre, University British Columbia,
Vancouver (British Columbia, Canada). [Visited 19 Feb 2007].
\bibitem{ITLOS} International Tribunal on the Law of the Sea, List of Cases
\bibitem{UNCLOS} “Member states” are those countries whose governments have ratified UNCLOS.
\bibitem{LOSCEEZ} See, LOSC, supra note 9, art. 279.
\bibitem{LOSCEEZ} Id., art. 283.
\bibitem{LOSCEEZ} Part XV of the Convention lays down a comprehensive system for the settlement of
disputes that might arise with respect to the interpretation and application of the
Convention. It requires States Parties to settle their disputes concerning the interpretation

adjudication before the International Court of Justice, and arbitration before a five-member panel (the “Arbitral Tribunal”). As mentioned earlier the Tribunal has heard only thirteen cases since its inception, and in some of those cases the parties settled before the judgment stage. There are twenty-one member-judges of the Tribunal who are “elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.” Indeed the selection of judges itself is a relevant consideration in determine the democratic nature of the Tribunal. The Tribunal itself is located in Hamburg, Germany which is a historic port city and center for shipping and maritime trade.

It should be noted that the dispute resolution process is not designed to compel any member state to resolve a dispute; rather it is a system designed to facilitate voluntary dispute resolution. As this paper will demonstrate, the Tribunal made this understanding explicit in the 1999 Southern Bluefin Tuna case.

C. The Role of a Court in a Democratic System

Can a court actually be democratic? This paper will examine two aspects to the democratic nature of courts: first the process of appointment to the bench, and second, the process of judges’ decision-making once on the bench. The first task then is to establish the working central principles of a democratic institution.

or application of the Convention by peaceful means indicated in the Charter of the United Nations. However, if parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to the compulsory dispute settlement procedures entailing binding decisions, subject to limitations and exceptions contained in the Convention.

The mechanism established by the Convention provides for four alternative means for the settlement of disputes: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention.

A State Party is free to choose one or more of these means by a written declaration to be made under article 287 of the Convention and deposited with the Secretary-General of the United Nations.

If the parties to a dispute have not accepted the same settlement procedure, the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. International Tribunal for the Law of the Sea, Overview http://www.itlos.org/start2_en.html (last visited Feb. 19, 2007).


See, LOSC, supra note 9, Annex VI, art. 1.


For the purposes of this paper, the term “court” refers to an adjudicative body composed of judges and/or justices, and excludes a court with a jury. This distinction is necessary because the International Tribunal for the Law of the Sea is composed of judges and conducts the equivalent of bench trials, not conduct jury trials.
Robert A. Dahl lays out five central tenets of a democracy in his book, *On Democracy*. His list emphasizes the opportunities that a democracy provides, and does not predicate that system’s designation on what is manifest in reality. The tenets relevant to international organizations include:

1. Effective Participation
2. Equality in voting
3. Gaining enlightened understanding
4. Exercising final control over the agenda

He argues that effective participation is a critical aspect of pre-decision policy-making by the populace. This step helps to guide the system’s leader and other members. Voting equality requires the “one person, one vote” standard, which equalizes the rights of all members regardless of socio-economic status. Enlightened understanding aims to provide members education and exchange of ideas to make the populace a more informed decision-making body. Control of the agenda gives the members the power to determine what issues will be considered as the three tenets above are put into action. Dahl’s fifth tenet, the “inclusion of adults” requires that all permanent adult residents should have the right to participate in the democratic process, but does not quite apply in the international arena where citizens’ interests are represented (at least in principle) by their respective states. While those tenets are universally relevant to the process of forming an adjudicative body, only some of the tenets are relevant in that body’s decision-making processes.

American judges are not always elected by popular vote and unseating those who are elected can be precarious. In a jurisdiction where judges are elected by popular vote, surely all of the above tenets apply: Voters will learn about judicial candidates (Tenet 3), debate their strengths and weaknesses (Tenet 1), and might at times even seek to increase the number of judges or recall a sitting judge (Tenet 4). Their decisions will be final after an election (Tenet 2). In the case of judges appointed to the bench without popular vote, voters still exercise influence over the criteria that the President uses in choosing a judicial nominee though the common forms of political expression. The terms of non-elected federal judges is an issue ripe for debate that is beyond the scope of this paper.

What about the decision-making process once the judge is on the bench? At first glance, according to Dahl’s tenets a court’s decision-making process appears to be highly undemocratic for a number of reasons. Judges do not poll the population in their jurisdiction during a bench trial. Federal judges are not subject to term limits, forming a tradeoff of greater impartiality for greater isolation from public sentiment. Courts also run the

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risk of becoming abusive checks on the democratically-elected legislature.\textsuperscript{24} This “counter-majoritarian difficulty” can pose a serious threat to democracy without adequate procedural safeguards.

Perhaps courts may be democratic, albeit indirectly. Effective participation is manifest with amicus briefs, which are common tools used when interested entities are not a party to a case. Judges do gain enlightened understanding of a given case by hearing evidence and researching legal perspectives on the issue at bar. In determining an issue of law, a judge will consider studies, reports, law review articles and other sources of expert opinion. As for the inclusion of adults, the rules of evidence for most American jurisdictions allow a larger cross-section of citizens to participate, with children and non-citizens permitted to testify as witnesses in proceedings.\textsuperscript{25} It seems that a critical aspect of a democratic body is both its receptiveness to public input and its responsiveness to that constituency.

American courts have a history of responsiveness, as Robert A. Dahl’s remarked on the conduct of the Supreme Court in 1957: “[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the U.S..”\textsuperscript{26} But an American court must also remain subordinate to its Constitutional mandate: Alexander Hamilton wrote in \textit{The Federalist Papers} that American judges should not be superior to legislators. “It only supposes that the power of the people is superior to both [the Supreme Court and Congress] and that where the will of the people declared in the [C]onstitution, the judges ought to be governed by the latter, rather than the former.”\textsuperscript{27} But that subordinate status shifts when the power of the people is most threatened. “In the words of the Kerner Commission, when it considered the challenge that civil disorder posed for the criminal justice system in the 1960s, ‘[t]he quality of justice which the courts dispense in time of civil crisis is one of the indices of the capacity of a democratic society to survive. To see that this quality does not become constrained is therefore a task of critical importance.’”\textsuperscript{28} Therefore, the American understanding of a high court has many democratic attributes: It is a protector of its jurisdiction’s citizens, often subordinate to the elected


\textsuperscript{25} See, e.g., Fed. R. Evid. 601: “General Rule of Competency: Every person is competent to be a witness except as otherwise provided in these rules.”


\textsuperscript{27} \textit{THE FEDERALIST} NO. 78 (Alexander Hamilton).

legislature, rarely deviating from prevailing public sentiment on a given subject.

**PART II: THE CRITIQUES**

While there are a number of critics of international governing bodies, some of the most outspoken include Louis Botsford, Robert A. Dahl, Jack Goldsmith and William Safire. The critiques range from a fear of retaliatory action (against the U.S. and her allies) to arguments about the intrinsic institutional flaws of a global governing body.

Ecology professor Louis Botsford at University of California, Davis argues that greater holism is required to assure long-term fishery stability, and that international regimes are a barrier to such holism. He is critical of international fisheries regimes “where existing institutional structures are inadequate to overcome short-term economic interests, and where socially and culturally diverse participants have little tradition of cooperation.”29 In Botsford’s view, fishing policies must be principally driven by science, not short-term economic benefit. An international regulatory system is insensitive to the needs of states with vested interests in long-term sustainability. Botsford’s fear of international fisheries governance is one of the tragedy of the commons, with the small actors colluding to exploit the resource before the regulatory agency can act against such exploitation. He would view the organization as undemocratic in its limited capacity to react to misconduct, especially where one state accuses another of free-riding.

Another critique of international organizations focuses on their intrinsically non-democratic operations. Robert A. Dahl argues that international organizations are incapable of being democratic because citizens in democracies cannot exercise political control over foreign affairs.30 Because citizens can never exert greater control over foreign affairs as they do in domestic affairs, foreign affairs will always remain non-democratic and thus international organizations will be non-democratic as well.

Dahl cites the U.S. decision to adopt NAFTA in late 1993: “A week before the vote on NAFTA in the House of Representatives, 79 percent of those surveyed in a CBS/New York Times poll were unsure or did not know whether their Congressional representative favored or opposed NAFTA.”31 This is not to suggest that American citizens were wholly ambivalent about free trade in North America; it demonstrates that citizens did not care enough to become well-informed. Dahl argues that as a result public opinion played little to no role in Congress’ ultimate decision on NAFTA.

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31 Id. at 24.
He concludes that popular control in a domestic system is manifestly difficult.

Dahl carries this observation to the international arena on the premise that the difficulty present with domestic popular control is only exacerbated in a system that involves multiple states. To remedy this, he argues that leaders would need to create institutions that would provide citizens with opportunities for participation, influence, and control roughly equivalent to those already present at the domestic level. One example of such an institution would be a system of electoral government; international leaders would need to run for office and face the same challenges by the electorate that domestic politicians face. Those international leaders would need to wield control over international bureaucracies in a similar way that legislatures and executives do at the domestic level.4

Dahl’s conclusion is that given the difficulty faced by domestic states in building and maintaining a functional democracy, the barriers to democracy in an international organization are all the greater. He notes that since democratic states delegate power to political elites, there is a reasonable basis for delegating such power to international political elites. Dahl effectively suggests that while international organizations are not likely to be democratic per se, their leaders’ power originates from a source that is familiar and accepted in many democratic states.

Jack Goldsmith is skeptical of international organizations that govern international public goods, such as fisheries. He begins with the premise that multilateral treaties can identify shared interests and increase transparency among states. Such transparency makes it more difficult for states to cheat the system and punishes those who are caught. The creation of international organizations can also facilitate communication through lowered transaction costs. That premise however is predicated on the idea that a state’s citizens want a particular product or service, and that cooperation is the most efficient way for a state to provide it. In the case of international fisheries, the case is weaker because the finite supply of fish results in more of a prisoner’s dilemma than cooperation. In the context of fisheries, the case is better identified as one of “collective action.” Every state must agree to punish treaty violators but such punishment is still subject to state action. As in any collection action problem, free-riding is an inherent risk. Goldsmith is skeptical that multinational collective action problems can be solved by treaty. In sum, like Botsford he argues that an international organization faces so many intrinsic institutional flaws that it cannot effectively operate as a democratic system; indeed it cannot operate as it is designed at all.

32 Id at 30.
33 Id at 31.
34 Id.
35 Id. at 32.
36 See, GOLDSMITH, supra note 2, at 86.
37 Id at 87.
Goldsmith also argues that international courts tend to formalize customary international law ("CIL"), which results in American courts eventually adopting such law.\textsuperscript{38} He considers such a process as undemocratic with regard to American citizens because American lawmakers cannot directly influence the adoption and application of customary international law.\textsuperscript{39} This critique is valid insofar as it is a commentary on the democratic nature of the federal judiciary in the U.S., but the critique does not substantively analyze the democratic nature of the international court itself. Goldsmith takes issue with the fact that CIL might have the same force of law as the U.S. Constitution or treaties to which the U.S. is a signatory.\textsuperscript{40} Because Goldsmith’s critique blames the international courts for inducing American judges to adopt CIL, his own critics might characterize his logic as “the tail wagging the dog.”

William Safire of the New York Times provides the final critique of international organizations. While he is an editorial writer and not an academic, his commentary is valuable in illustrating a pervasive American perspective. His opinions about international organizations are felt by many in the U.S., from members of Congress to the general public. Safire’s critique will operate in this paper as a sobering perspective on international organizations in contrast with the analytical methods of the other critics.

William Safire has spoken out on many occasions against the U.S. delegating any power to international organizations. With regard to fisheries, he once wrote that the United Nations Convention on the Law of the Sea “was a product of the Carter era, almost turning ownership of the ocean's resources over to a new U.N. bureaucracy supposedly representing ‘all mankind.’”\textsuperscript{41} Safire’s criticism of UNCLOS is similar to the reservations that President Ronald Reagan had during his term of office. Reagan took issue with UNCLOS in three main objections.\textsuperscript{42} First, he objected to the creation of the International Seabed Authority, which he though gave disproportionate representation to underdeveloped countries. Second, he feared that UNCLOS would restrict free enterprise in the supply of minerals. Third and most importantly for this paper, Reagan objected on the grounds that “mandatory dispute resolution restricts [state] autonomy.”\textsuperscript{43} This forms the foundation for Safire’s critique of many international bodies, including the International Tribunal for the Law of the Sea. He fears that international bodies will be used to selectively prosecute or punish states or state actors that have unpopular general foreign policies.\textsuperscript{44} In sum, Safire believes that international organizations are undemocratic because they are too susceptible to abuse.

\textsuperscript{39} Id. at 818.
\textsuperscript{40} Id. at 842.
\textsuperscript{42} See, Donavan, \textit{supra} note 10.
\textsuperscript{43} Id.
\textsuperscript{44} See, Safire, \textit{supra} note 41.
ANALYSIS: THE SOUTHERN BLUEFIN TUNA CASE

A. Factual Background

For an analysis of the democratic factors that are most relevant to the formation and operation of the Tribunal, we turn to the Southern Bluefin Tuna case that the Tribunal heard in 1999. This case stands out as a good test case for assessing the democratic nature of the Tribunal. First, while many of the cases initiated before the Tribunal were settled before an order was issued, this case did not settle. Second, the issue of jurisdiction was central to the case, and therefore applies well in the context of this paper’s analysis of democratic factors. Third, the parties in this case were Australia, New Zealand and Japan; all highly-developed countries, one of which is a member of the G8 summit. This illustrates the Tribunal’s capacity to affect large, powerful states’ interests. Fourth, the Tribunal issued provisional measures in a remarkably fast manner; a mere one month after Australia filed its complaint. Before beginning an analysis under the critiques, the paper now turns to the factual specifics of the case.

In the Southern Bluefin Tuna case, a central issue was whether the Tribunal had jurisdiction to hear the fishing dispute and take any remedial action. The case arose out of Japan’s alleged failure to cooperate with conservation efforts of southern bluefin tuna, in violation of a multilateral agreement with Australia and New Zealand (the “CCSBT”). That agreement created a total allowable catch (“TAC”) in the EEZ of Australia and New Zealand. Japan had requested an extension of settlement negotiations but Australia and New Zealand claimed that such negotiations were exhausted. Since all three parties had ratified UNCLOS, the Tribunal at least appeared to have prima facie jurisdiction over this case. Japan disagreed, arguing two principal points: First, prima facie jurisdiction required that the dispute implicate UNCLOS and not any other international agreement. In Japan’s view, since the CCSBT was implicated in this case the Tribunal did not have jurisdiction. Second, prima facie jurisdiction required that the parties attempt good faith attempts at settlement in accordance with UNCLOS Part XV, Section 1, which in Japan’s view had not been satisfied.

The Tribunal consisting of twenty-two judges (some of whom were hand-selected by the individual parties, including an ad-hoc judge) decided to issue a range of orders called “provisional measures,” the functional equivalent of a temporary injunction. When Australia and New Zealand then proceeded to the UNCLOS Arbitral Tribunal, the tribunal found it was

47 Id. art. 8(3).
without jurisdiction to hear the dispute because the CCSBT required that all parties consent to any arbitration. In other words, UNCLOS mandatory arbitration (applicable only in the case where the parties cannot otherwise agree on a form of dispute resolution) was superseded by the CCSBT mutual-consent-for-arbitration clause. While the international Tribunal granted a short-term remedy to the alleged fishing violations, it essentially had the rug pulled out from under it by one party to a smaller multilateral agreement.

B. Was the Tribunal’s Formation Democratic?

The facts of the Southern Bluefin Tuna case illustrate both the strengths and weaknesses of the Tribunal: the court can order significant action, but individual states can enter into agreements that effectively shut the court’s doors. The ultimate question in this section is whether the formation of the Tribunal usurped the democratic attributes of the member states. To answer that question, the paper now turns to the critics’ analyses of the case.

In Professor Botsford’s view, the Tribunal adjudicates cases long after damage to the environment has occurred. Even when the Tribunal acts, its jurists will include stakeholders with a short-term view of the resource. On that basis, an analysis under Botsford puts the Tribunal, like any other international regulatory regime, under great skepticism. Indeed, Botsford warns that “[g]reater management involvement of stakeholders who do not have an actual long-term interest in the fishery may even have negative effects on sustainability.”

This critique begins its analysis in the context of the Southern Bluefin Tuna case by claiming that the formation of the Tribunal itself did not proportionately represent the regional stakeholders. Indeed, the Tribunal consisted of judges from countries including Argentina, Brazil, Bulgaria, Cameroon, Grenada, India and Italy. None of those countries are situated where the fishery dispute arose, although some of the mentioned countries may have had commercial fishing vessels that exploited southern bluefin tuna. There, the Tribunal temporarily enjoined the parties from fishing southern bluefin tuna until the dispute was resolved.

Taken as a whole, the ultimate outcome is favorable under Botsford’s criteria: The fear of a collective action problem was precluded in the Southern Bluefin Tuna case because there was an existing framework for the regulation of a fishery (known to be acutely susceptible to over-exploitation). Japan, Australia and New Zealand had formed an agreement on tuna fishing on the basis of scientific evidence. Since the UNCLOS

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49 See, Botsford, supra note 29.
dispute resolution mechanisms ultimately deferred to that agreement, the
critique holds the Tribunal’s actions undemocratic (i.e., the non-
representative court did not defer to the CCSBT), but favors the overall
outcome of the case. However not all critics focus on scientific expertise;
some focus on varying degrees of popular influence from states’ citizens.

The democracy test for Robert Dahl requires some level of popular
support of a decision-maker. Although Dahl sets a high standard in the
context of representative government, he ultimately concedes that even in
the most democratic states, decision-makers are appointed through powers
delegated to already-elected officials.\(^{51}\) In the context of the Tribunal, the
qualifications for becoming a judge are somewhat vague: “persons enjoying
the highest reputation for fairness and integrity and of recognized
competence in the field of the law of the sea.”\(^{52}\) While there is no
distinction between persons with experience as a jurist, those with practical
experience in maritime and environmental law, or even persons holding a
law degree, there is a conflict-of-interest prohibition.\(^{53}\) There are a
number of safeguards against collusion and outside influence.

For example, UNCLOS requires that no fewer than three judges
from each major continent (as established by the General Assembly of the
United Nations) be represented on the Tribunal, and no two judges “of the
Tribunal may be nationals of the same State.”\(^{54}\) Those provisions remain in
effect regardless of how many states from a given continent actually join
UNCLOS. Each judge is selected by secret ballot, and on top of gaining the
highest number of votes must gain two-thirds majority support from the
voting state parties.\(^{55}\) The quorum to have such an election requires that
two-thirds of state parties be present.\(^{56}\) According to Dahl’s criteria, this is
an example of an indirect democratic process: while individual citizens do
don not nominate judges to the Tribunal, they do elect an executive who then
appoints nominators. This critique posits that the overall selection process
is democratic insofar as there is an equal distribution of power among all
member-state parties. This critique’s procedural concerns differ from
Goldsmith’s concerns about free-riding and anti-democratic lawmaking.

Under Jack Goldsmith’s criteria, Japan’s allegedly unauthorized
fishing in the *Southern Bluefin Tuna* case is a good example of free-riding
in the context of a collective action problem. According to the critique, the
Tribunal could not operate as an effective check on UNCLOS member
states; since both state-parties had to agree to submit the case to the
Tribunal, the system allowed one party to drag its feet and delay dispute
resolution indefinitely.\(^{57}\) Under Goldsmith’s critique, the Tribunal is
dismissed as undemocratic because it did not effectively serve the

\(^{51}\) See, Curtis, *supra* note 38, at 842.
\(^{52}\) See, LOSC, *supra* note 9, Annex VI, art. 2.
\(^{53}\) Id. art. 7-9.
\(^{54}\) Id. art. 3.
\(^{55}\) Id. art. 4.
\(^{56}\) Id.
\(^{57}\) See, Tyler, *supra* note 48, at 61.
regulatory function that its constituents expected of it. In the Southern Bluefin Tuna case this may indeed have been the case, since Japan had repeatedly insisted on resuming negotiations with Australia and New Zealand, seeking to avoid formal adjudication. Given that Australia and New Zealand felt that the attempts at a negotiated settlement were exhausted, there is room for suspicion that Japan was simply dragging its feet.

William Safire has criticized the formation of the Tribunal on the basis that such an international body is inherently susceptible to nepotism and other abuses. In particular, Safire has written of his fears that the Tribunal will become a platform for political attacks and counterattacks by smaller states in response to actions by larger states. The issues raised by this critique however are not strongly supported by the composition and operation of the Tribunal. First, judges who compose the Tribunal represent a highly diversified and decentralized cross-section of world states.\(^58\) Such a system of selection minimizes the risk of collusion and deceit. Second, the Tribunal does not wield a great deal of power in any matter because the parties can effectively opt out of the Tribunal at any time.\(^59\) That arrangement precludes the Tribunal from hearing a case against the will of a single party, as was the ultimate outcome in the Southern Bluefin Tuna case. There, Japan continuously objected to the Tribunal’s hearing the case, and the UNCLOS Arbitral Tribunal held that the Tribunal did not have jurisdiction (reversing the provisional measures that the Tribunal had ordered). It seems that while Safire’s fears might be manifest in international bodies wielding greater and centralized authority, there is little support for his critique in the context of the Tribunal.

C. Is the Tribunal’s Operation Democratic?

For the purposes of this paper, it is accepted that a court is a critical part of a democratic system when the policy of judicial review offsets the “tyranny of the majority” problem. Taken holistically, a court is democratic insofar as it operates as a check on political branches of government, notwithstanding some degree of partiality.\(^60\) The ultimate question in this section is whether the Tribunal in reaching its decision usurped the democratic attributes of the member states.

Professor Botsford’s concern with the “tragedy of the commons” would be manifest where the Tribunal was complicit in member states’ over-exploitation of a fishery. Remember, Dahl’s fourth tenet of democracy, “Exercising Final Control over the Agenda” requires that the international body be responsive to the member states. Botsford is concerned that the short-term benefits of over-exploitation incentivize

\(^{58}\)See, LOSC, supra note 9, Annex VI, art. 3.

\(^{59}\)See, “Part XV”, supra note 18.

\(^{60}\)That is, when a judge is appointed by an elected official.
unilateral action as opposed to cooperation under UNCLOS. Is that fear assuaged in the course of the Tribunal’s operations?

In the Southern Bluefin Tuna case, Australia and New Zealand filed a request for provisional measures on July 30, 1999, alleging that Japan had been unilaterally conducting an experimental southern bluefin tuna fishing program as early as June 1999.61 The Tribunal granted the request for provisional measures in an order dated August 27, 1999.62 The Tribunal made that order notwithstanding the fact that Japan claimed on August 9, 1999 that such an order would cause irreparable harm to the scientific research it was conducting by fishing southern bluefin tuna.63 There, the disputing parties made scientific claims that were at odds with one another. Under Botsford’s criteria, the Tribunal’s decision is favored because of the concerns over member states’ unilateralism and suspicion of scientific claims that are inconsistent with existing international agreements. This critique views the Tribunal’s actions as democratic because of its responsiveness to Australia’s and New Zealand’s claims in granting temporary relief in August 1999.

Robert Dahl’s critique of international bodies theorizes that because citizens will never exert greater control over foreign affairs as they do in domestic affairs, foreign affairs will always remain non-democratic and thus the international organizations governing foreign affairs will remain non-democratic as well. In the course of the Tribunal’s operation during the Southern Bluefin Tuna case, the critique anticipates that citizens of Australia, New Zealand and Japan had no substantial influence over the course of the proceedings. As the statute creating the Tribunal did not allocate for amicus briefs or their functional equivalent, there is no direct way for citizens to have a voice during Tribunal proceedings.64 That said, Article 26 requires that a hearing for the prescription of provisional measures be open to the public.65 It should also be noted that the transcript of the hearing is made available on the Internet.66 Requiring the hearing to be public creates transparency, educates the public on case specifics, and since member states’ attorneys general often appear as counsel at the Tribunal, is informative to voters for future domestic elections where the attorney general is selected by popular vote. Under Dahl’s tenets of democracy, those aspects of the public hearing foster effective participation (Tenet 1) and gaining enlightened understanding (Tenet 3).

On the other hand, it should be noted that fishermans’ interests were not formally represented before the Tribunal. The parties were member-

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61 Southern Bluefin Tuna, Order, par. 2, 5.
62 Id.
64 See, LOSC, supra note 9, Annex VI.
65 Id.
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states, and fishermen did not have a procedural mechanism to interplead as interested parties. That apparent deficiency is more one of due process than democracy; it is more a constitutional problem than a political one. Notwithstanding that consideration, this critique concludes that the Tribunal is somewhat democratic in the context of international courts.

The second issue that Jack Goldsmith takes up with the operation of international bodies is the risk that they tend to formalize CIL, and such a tendency leads to CIL invading American common law. Since the US has not ratified UNCLOS at this writing, Goldsmith’s fear of UNCLOS becoming US law by way of a formal treaty would be somewhat moot. That leaves CIL, which is an amorphous area of law with which he is even more concerned.67 The focus then shifts to the Tribunal and the reach of its influence.

Examples of such an invasive trend would include citations in American court opinions to cases the Tribunal has heard, formal Acts of Congress, and perhaps references to the Tribunal in Congressional committee meetings. As it happens, no state or federal reported case has ever even mentioned the International Tribunal for the Law of the Sea.68 In the legislative history of the U.S. Code and the Congressional Record, few Congressmen have spoken favorably of the Tribunal or its decisions. In Congress, Senator Claiborne Pell of Rhode Island was the most vocal supporter of UNCLOS and the Tribunal.69 Additionally, UNCLOS and the Tribunal received strong support from the Clinton Administration into 1998 when U.S. provisional membership expired.70 While UNCLOS supporters were few and far between, the critics of the international scheme were strongly outspoken.71 As a whole, Congressional support for the Tribunal is meager at best. Although the Clinton administration endorsed UNCLOS, the Bush administration has not. Taken as a whole, the evidence suggests that CIL created by the Tribunal has not yet invaded American common law, and Goldsmith’s fear is not yet realized. As it happens, the UNCLOS opponents in Congress raised the same concerns as William Safire does in his opposition to the U.S. joining international regimes.

Safire argues that international organizations are undemocratic because they are too susceptible to misuse by underdeveloped countries and enemies of the U.S. In the context of the operations of the Tribunal, his critique would focus on evidence of the Tribunal’s misuse by smaller or weaker states as a weapon against larger or stronger states. In the Southern Bluefin Tuna case, Australia and New Zealand brought a complaint against Japan. First, there was no collusion among underdeveloped states there, as all three of those states are considered developed countries, indeed members

67 See, Curtis, supra note 38, at 818.
69 See, 142 Cong. Rec. S9473-02, supra note 5.
of the Organization for Economic Cooperation and Development (OECD).\footnote{Member Countries, Organization for Economic Cooperation and Development website, http://www.oecd.org/countrieslist/0,3025,en_33873108_33844430_1_1_1_1_1,00.html (last accessed March 7, 2007).} Second, none of those three states have substantial military capability compared to the United States, China and the Russian Federation. Therefore short-sighted economic unilateralism and/or classic brinkmanship do not stand as reasonable explanations for the states’ actions.

On the other hand, the defendant Japan is a member of the G8 Global Summit, while Australia and New Zealand are not.\footnote{Members of the G8, G8 Gleneagles 2005, http://www.g8.gov.uk (last accessed March 7, 2007).} This critique suspects that Japan was a convenient target for the two petitioner states, and that Japan’s unilateral experimental fishing program was an example of a G8 state “throwing its weight around.” The critique also highlights, as many of the critiques in this paper would, the fact that the Tribunal is a relatively new court and that the far-reaching effects of its jurisprudence have yet to be seen. Thus this critique has a basis, albeit weak, for identifying the Tribunal as undemocratic.

**Conclusion**

This paper has attempted to answer the question, “Does the International Tribunal for the Law of the Sea usurp democracy from state-parties in the course of its formation and operation?” After laying out Dahl’s four tenets of democracy, four critiques of international organizations were put forth. The case study was on the Southern Bluefin Tuna case, where the Tribunal was ultimately held to not have jurisdiction over the dispute. The critique of the formation of the Tribunal focused on the participation of member states and individual citizens. The prevailing view was that the formation of the Tribunal was not democratic as to individual citizens, but was somewhat democratic with regard to member states. As to the operation of the Tribunal, the prevailing view under the critiques was that the Tribunal was substantially democratic. While it seems desirable to have a democratic international institution instead of an autocratic one, the authority the institution wields is also relevant. Here it was shown that the Tribunal does not wield supreme authority over many matters, and for better or worse this limits its effectiveness in the regulation of commercial fishing. That limited effectiveness is manifest in a recent article in an Australian newspaper: It is alleged that “Japan has illegally taken $2 billion worth of southern bluefin tuna from waters surrounding Australia in the past 20 years, effectively killing the stock commercially…An independent international investigation into the high-end but at-risk fishery has found that Japanese fishers and their suppliers
have caught up to three times Japan's quota each year and hidden it."^{74}
Things might not be looking good for southern bluefin tuna after all.

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