

DISSENTING OPINION OF JUDGE VUKAS

1. Although I appreciate and share the concern for the survival of the southern bluefin tuna stock, expressed in the Tribunal's Order, my interpretation of the relevant provisions of the United Nations Convention on the Law of the Sea (hereinafter: "the Convention" or "the Law of the Sea Convention") obliges me to formulate the present Dissenting Opinion. Namely, I am not convinced that the requirements for the prescription of provisional measures by the Tribunal, set out in article 290, paragraph 5, of the Convention, are satisfied in the present case. Specifically, contrary to the Tribunal (paragraph 80 of the Order), I do not consider that there is an "urgency of the situation" in the present case, which would require the prescription of the provisional measures requested by New Zealand and Australia.

2. When the Tribunal is asked to prescribe, modify or revoke provisional measures under article 290, paragraph 5, it may do so only "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". I do agree with the Tribunal (paragraph 52 of the Order) that the first requirement from article 290, paragraph 5, is satisfied. The arbitral tribunal to be established in accordance with Annex VII to the Convention has *prima facie* jurisdiction in this case, as it concerns not only the implementation of the 1993 Convention for the Conservation of Southern Bluefin Tuna, but also the interpretation and application of the provisions of the Law of the Sea Convention, dealing with conservation and management of the living resources of the exclusive economic zone and of the high seas (paragraphs 48 to 50 of the Order). The Applicants are entitled to submit their request to the arbitral tribunal, as no settlement has been reached by recourse to Part XV, section 1, of the Law of the Sea Convention. This condition for the submission of a dispute to the arbitral tribunal, provided for in article 286 of the Convention, has been fulfilled by the Applicants by way of several exchanges of views they had with Japan in 1998 and 1999, concerning the fishing for southern bluefin tuna, particularly Japan's experimental fishing programme. These consultations and negotiations concerned the interpretation and application of both the 1993 Convention for the Conservation of Southern Bluefin Tuna and the Law of the Sea Convention, but they proved to be unsuccessful. I do agree with the Tribunal that, once New Zealand and Australia considered that the possibility of settlement under section 1 of Part XV of the Convention had been exhausted, they were entitled to invoke the procedures under section 2 of Part XV (paragraphs 56 to 62 of the Order).

Yet, as already mentioned, the second requirement for the prescription of provisional measures by the Tribunal under article 290, paragraph 5, is missing. Namely, the circumstances of the case bring me to the conclusion that there is no "urgency of the situation", which would require action of the Tribunal.

3. Urgency is not explicitly indicated in article 290, paragraph 1, of the Convention as a general condition for the prescription of provisional measures by a court or tribunal to which a dispute has been submitted. The situation is the same in respect of the International Court of Justice (I.C.J.). Neither the Statute, nor the Rules of the I.C.J. mention urgency. Yet, it is

considered to be a prerequisite for indicating a provisional measure by the Court.¹ Therefore, Shabtai Rosenne concludes in respect of the attitude of the I.C.J.:

The Court will normally only indicate such measures if it is satisfied of their urgency and that there is the possibility that the object of the litigation will be prejudiced if appropriate measures are not indicated ...²

4. It comes as no surprise that the drafters of the Law of the Sea Convention explicitly mentioned urgency in article 290, paragraph 5. A court or tribunal, including the International Tribunal for the Law of the Sea, is entitled to prescribe provisional measures under this paragraph only “[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted ...”. Its competence, as well as the provisional measures it may prescribe, are temporary:

Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, ... (article 290, paragraph 5).

In the present case, the process of the constitution of the arbitral tribunal has already commenced. On 30 July 1999, New Zealand and Australia requested the submission of their dispute with Japan to an arbitral tribunal constituted in accordance with Annex VII. The two States notified this action to Japan and, being parties in the same interest in the dispute, they have agreed to appoint one member of the arbitral tribunal, pursuant to Annex VII, article 3 (g). On 13 August 1999, Japan also appointed a member of the arbitral tribunal, in accordance with article 3 (c) of Annex VII.

The nomination of the two members enables the constitution of the arbitral tribunal. The remaining three members of the arbitral tribunal, including its President, will be appointed in accordance with article 3 (d) and (e) of Annex VII. According to these provisions, the arbitral tribunal will be constituted in the course of 1999. There is no reason to doubt that the arbitral tribunal will expeditiously determine its procedure in accordance with article 5 of Annex VII. The statements and commitments of the parties during the present proceedings reinforce such expectations (paragraph 101 of the Response of the Government of Japan to Request for provisional measures and Counter-Request for provisional measures).

5. It remains to consider whether the Requests for provisional measures, submitted by New Zealand and Australia, are of such a nature as to require immediate action by the Tribunal, i.e. whether they contain urgent provisional measures, and therefore the decision should not wait until the constitution of the arbitral tribunal.

In paragraph 1 of their respective Requests for provisional measures, Australia and New Zealand request the Tribunal to prescribe provisional measures in their dispute with Japan over southern bluefin tuna (SBT), which they qualified as follows:

¹ The request by Switzerland in the *Interhandel* case was dismissed on account of a lack of urgency; *I.C.J. Reports 1957*, p. 112.

² Shabtai Rosenne, *The World Court; what it is and how it works*, 5th ed., Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995, p. 97.

The dispute relates to Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999.

Thus, according to the Requests of the Applicants, Japan's unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 is but one of the manifestations of "Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock ...". Yet, all the relevant data and argumentation in the Requests of the two States, and in the statements of their representatives in the hearings, dealt almost exclusively with Japan's experimental fishing in 1998 and 1999. No other acts of Japan which could be characterized as relevant independent manifestations of the non-willingness of that State to cooperate in the conservation of the southern bluefin tuna stock are advanced by the Applicants. The problems encountered in the work of the Commission for the Conservation of Southern Bluefin Tuna in respect of the determination of the total allowable catch remain within the scope of the relevant rules of the 1993 Convention. In this respect, even Australia and New Zealand did not have always the same views (paragraph 47 (e) of New Zealand's Statement of Claims and Grounds on Which it is Based). Regular commercial fishing for southern bluefin tuna by Japan is considered today by the Applicants as representing an act aimed against the conservation of this species merely because it is not reduced by the amount of the fish taken by Japan in the course of its experimental fishing.

After this general comment, let us now turn to the provisional measures required by New Zealand and Australia. The first measure requires "that Japan immediately cease unilateral experimental fishing for SBT". This request may seem urgent, but only if the schedule of Japan's experimental fishing programme in 1999 is not taken into account. Namely, as this programme will end no later than 31 August 1999, a provisional measure requiring immediate cessation of the experimental fishing, if adopted on 27 August 1999, would have only a symbolic value. In practice, it may concern only a hundred tonnes or so of tuna to be caught between 28 and 31 August 1999 (paragraph 83 of the Order). It is difficult to characterize such a provisional measure as urgent and, therefore, not being appropriate to await the establishment of the arbitral tribunal under Annex VII.

The second requested measure asked that "Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ..., subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999". Thus, this requirement is not an independent one; it is caused by Japan's catch in its experimental programme in 1998 and 1999. On the other hand, it is obvious that the Applicants do not consider this measure as an urgent one for the state of the tuna stock, as they do not propose any measure of self-restraint in respect of their own catch.

The remaining three requested provisional measures refer to some general principles on the protection of the environment and on the settlement of disputes; the precautionary principle, the duty of non-aggravation of an existing dispute, and non-prejudice to the merits of the case. All three measures are addressed to all parties. The general attitude of the parties after the

conclusion of the 1993 Convention, and their statements before this Tribunal, prove that it is not urgent, and even not necessary, to remind them of those principles.

6. In conclusion, I would like to restate my main reasons for not agreeing to the provisional measures requested by Australia and New Zealand as being urgent:

- (a) With or without a measure prescribed by the Tribunal, the experimental fishing programme of Japan in 1999 ends in a few days.
- (b) The evidence submitted by the Applicants has failed to convince me that the forthcoming months are decisive for the survival of the southern bluefin tuna. However, it is not only the evidence submitted by the parties that brought me to that conclusion. Even more convincing is the attitude of all those who fish for southern bluefin tuna. They do not convince me that they are concerned with the situation of the stock. Notwithstanding their pretended concern about the future of the stock, none of them intends to reduce the pace of its regular catch. Not only Japan, but Australia and New Zealand have also not expressed their intention to reduce their regular catch in the remaining months of 1999. The same is the situation with the States which are not parties to the 1993 Convention.
- (c) Japan's Request for the prescription of two provisional measures is only a counter-request in case *prima facie* jurisdiction is found to exist. Japan denies the existence of the Tribunal's jurisdiction, and it does not claim that the measures it proposes are urgent.

On the basis of the above-mentioned, I have to conclude that no "urgency of the situation" in respect of the southern bluefin tuna stock has been confirmed, and that, consequentially, there are no "rights of the parties to the dispute" (article 290, paragraph 1) which should be preserved by the provisional measures requested from the Tribunal by New Zealand and Australia. Any request for the prescription of provisional measures the parties may have at a later stage can be addressed to the arbitral tribunal to be constituted in the forthcoming months in accordance with Annex VII.

(Signed)

Budislav Vukas