

SEPARATE OPINION OF JUDGE *AD HOC* SHEARER

I have been able to vote in favour of the provisional measures prescribed by the Tribunal. However, since I have some reasons that are unstated by the Tribunal, or that differ somewhat from those stated, I wish to make some additional remarks. These will necessarily have to be stated summarily and briefly in view of the extreme time pressure under which the Tribunal has worked in these proceedings.

Jurisdiction

As preconditions for the exercise of its power to prescribe provisional measures under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 1982, the International Tribunal for the Law of the Sea must consider that “*prima facie* the [arbitral] tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires”. Such an arbitral tribunal is presently in the process of being constituted by the parties to the dispute under Annex VII to the Convention.

It is necessary for the Tribunal to find only that the Annex VII tribunal would have jurisdiction *prima facie*; and it has so found in the Order it has made. However, in my view, the demonstration of the jurisdiction of the Annex VII arbitral tribunal in the present case goes beyond the level of being merely *prima facie*; that jurisdiction is to be regarded as clearly established. Since Japan has indicated that, notwithstanding the constitution of the arbitral tribunal (and, by implication, notwithstanding any finding by this Tribunal that the arbitral tribunal, *prima facie*, has jurisdiction), it will challenge the jurisdiction of that tribunal at the commencement of its proceedings, I think it right to set out reasons for my view.

Japan's principal argument was that the dispute between itself and Australia and New Zealand did not concern the United Nations Convention on the Law of the Sea but concerned only the tripartite Convention for the Conservation of Southern Bluefin Tuna, 1993 (“the CCSBT”). This is essentially an issue of justiciability. In the present circumstances, where none of the parties have made coincident declarations of acceptance of jurisdiction under article 287 of the Convention, the questions of justiciability and jurisdiction are inextricably linked. If Japan's argument were to be upheld, then the provisions of Part XV of the United Nations Convention on the Law of the Sea would not apply, and neither an arbitral tribunal under Annex VII of that Convention nor this Tribunal would have jurisdiction. The parties would then be confined to the dispute resolution provision contained in the CCSBT, article 16, which is worded as follows:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, with the consent in each case of all the parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the

responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

As can be seen, this dispute resolution procedure is essentially circular, since if the parties are not agreed on reference to arbitration or judicial settlement the process of negotiation goes around and around, potentially without end. It was because of their frustration with the failure of Japan to agree to a binding dispute settlement procedure under this provision that Australia and New Zealand instituted proceedings under Part XV of the United Nations Convention on the Law of the Sea.

The effect of article 287, paragraphs 3 and 5, of the United Nations Convention on the Law of the Sea is to make arbitration under Annex VII the “default” procedure; that is, if the parties have not made any declaration at all under article 287, paragraph 1, choosing one or more of the four means for the settlement of disputes set out in that paragraph, or if the parties have made choices but not one that is co-incidental, then the parties are obliged to resort to an arbitral tribunal constituted in accordance with Annex VII. In the present case none of the parties have made declarations under article 287, paragraph 1; thus resort to arbitration is binding upon them.

The argument that the present dispute does not relate to the interpretation or application of the United Nations Convention on the Law of the Sea is, to my mind, highly artificial and without substance. The purpose of the CCSBT, which was signed by the three parties on 10 May 1993 and entered into force on 20 May 1994, is set in context by the preambular recitals, which include “[p]aying due regard to the rights and obligations of the Parties under relevant principles of international law”, and “[n]oting the adoption of the United Nations Convention on the Law of the Sea in 1982”. The objective of the parties is more particularly declared to be “to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna” (article 1). That the intention of the CCSBT was to give effect to the prospective obligations of the parties under the United Nations Convention on the Law of the Sea with respect to tuna as a highly migratory species is clear when the wording of article 1 is compared with that of article 64 of the United Nations Convention on the Law of the Sea. That article provides:

1. 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.

Southern bluefin tuna is listed as a highly migratory species in Annex I to the Convention. The Commission for the Conservation of Southern Bluefin Tuna is an “appropriate organization” for the purposes of article 64, and also for the purposes of articles 118 and 119, which relate to high seas fisheries in general. Although only Australia, Japan, and New Zealand

are presently parties to the CCSBT, that convention is open to accession by other States. It has been remarked by at least two jurists of note that the CCSBT was “the first agreement signed since the adoption of the Law of the Sea Convention to give effect to the principles of article 64” (R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd ed., 1999), pp. 313-314). It is to be noted that Australia, Japan, and New Zealand ratified the United Nations Convention on the Law of the Sea shortly after the conclusion of the CCSBT (on 4 October 1994, 20 June 1996, and 19 July 1996, respectively).

It thus seems clear that a dispute between the parties regarding their duty to co-operate (other than, perhaps, a technical dispute regarding the powers and procedures of the Commission established under the CCSBT) is a dispute arising under the United Nations Convention on the Law of the Sea.

Once this conclusion has been reached, the separate dispute resolution procedures provided for by article 16 of the CCSBT can be regarded as establishing a parallel but not exclusive dispute resolution procedure. The provisions of Section 1 of Part XV of the United Nations Convention on the Law of the Sea (articles 279-285) do not give primacy to provisions such as article 16 of the CCSBT. Even if they could be so regarded, as a dispute resolution procedure chosen by the parties under article 280, there is no exclusion of any further procedure under Part XV of the Convention (article 281). Nor does article 282 constitute a bar. Under that article dispute resolution procedures adopted by parties to a general, regional, or bilateral agreement shall be applied in lieu of procedures under Part XV, but only if such a procedure “entails a binding decision”. As has already been noted, the provisions of article 16 of the CCSBT are circular and do not entail a binding decision¹.

It remains to consider article 283. Japan argued that it was only late in the course of negotiations between the three parties that Australia and New Zealand began to characterise their dispute as one arising, not within the framework of the CCSBT, but under the United Nations Convention on the Law of the Sea. As a consequence, Japan argued that the obligation to exchange views, contained in article 283, had not been discharged by Australia and New Zealand since there had been insufficient time for such an exchange to run its full course. Even though it is true that the prospect of reference to Part XV of the United Nations Convention on the Law of the Sea was referred to only shortly before the proceedings were instituted, it is, for the reasons stated earlier in this Opinion, highly artificial to separate into two different baskets a dispute under the Convention and a dispute under the CCSBT. The two instruments are inherently interlinked. There had been lengthy negotiations between the parties within the framework of the latter instrument. These negotiations had not resulted in a conclusion, nor in a choice of appropriate third party dispute resolution procedures. It was no more likely that these negotiations would have been successful had they been conducted expressly with reference to the United Nations Convention on the Law of the Sea. It is, however, to be regarded as implicit that the negotiations were conducted within the framework of both instruments.

Provisional measures

¹ The word “entail” means “necessitate”, or “involve unavoidably”. The word used in the French text of article 282 is “aboutissant”. The verb “aboutir” means “avoir pour résultat” or “arriver finalement”.

On the issue of provisional measures I wish to make three further remarks.

In the first place, I would have supported the prescription of provisional measures in stronger terms than those adopted. In particular I would have supported an order finding that Japan was *prima facie* in breach of its international obligations, under the CCSBT, the United Nations Convention on the Law of the Sea, and under customary international law, in conducting unilaterally experimental fishing programs in 1998 and 1999 outside the catch limitations previously agreed between the parties. A direct order to Japan alone to suspend this program would have been justified.

It seems to me, with respect, that the Tribunal, in its prescription of measures in this case, has behaved less as a court of law and more as an agency of diplomacy. While diplomacy, and a disposition to assist the parties in resolving their dispute amicably, have their proper place in the judicial settlement of international disputes, the Tribunal should not shrink from the consequences of proven facts.

The ineluctable fact proved before the Tribunal is that Japan, for the past two years, has been conducting an experimental fishing program without the consent of the other two parties to the CCSBT in excess of its annual quota as last agreed by the Commission. “Experimental fishing” is not a concept recognised, as such, either by the CCSBT or by the United Nations Convention on the Law of the Sea. The expression is not a term of art. It can be characterised, in theory, as one of a number of means of testing the recovery of fish stocks in various places and at various stages of their growth. To that extent it was within the powers of the Commission established under the CCSBT to approve an experimental fishing program as part of its scientific studies aimed at obtaining more accurate data concerning southern bluefin tuna stocks. But agreement on experimental fishing in 1998 and 1999 was not forthcoming in view of the failure of the parties to agree upon a change to the previously agreed total annual catch (TAC) and the catches for experimental fishing that would be allowed in addition to the annual national allocations of the TAC.

Australia and New Zealand argued before the Tribunal that, in conducting a unilateral experimental fishing program in 1998 and 1999 without the consent of Australia and New Zealand, Japan was in breach of its obligations, not only under the CCSBT, but also under articles 64 and 117-119 of the United Nations Convention on the Law of the Sea. These articles, which relate to highly migratory species both within and beyond exclusive economic zones, and to fishing generally on the high seas, impose a duty to co-operate with a view to conservation and optimum utilisation. In addition, Australia and New Zealand invoked the precautionary principle, arguing that that principle, in the face of scientific uncertainty regarding the southern bluefin tuna stocks, should be applied in limiting the catches of the parties to those last agreed when the Commission established under the CCSBT was still functioning effectively. Japan rejected the status of the precautionary principle as one of general international law, although it stated that it was as fully committed, in its own long-term interest, as Australia and New Zealand to the sustainable exploitation of the southern bluefin tuna fishery.

Japan described the present dispute as one of science, not of law. All three parties were agreed that the southern bluefin tuna stocks were at historically low levels. However, they

differed markedly on whether the scientific data available showed an upward trend from that level. In Japan's view the scientific evidence showed a recovery of stocks and thus supported a higher TAC. In the view of Australia and New Zealand the scientific evidence did not show any such recovery and thus would not support any increase in the TAC for the present. It followed from that position that any experimental fishing program that took significant quantities of fish above the agreed TAC constituted a threat to the stocks requiring urgent removal.

It is to be noted that the parties agreed on a TAC of 11,750 tonnes, with annual national catch allocations of 6,065, 5,265, and 420 tonnes to Japan, Australia, and New Zealand respectively, in 1989. This was at a time when the parties were co-operating without the benefit of a formal written agreement. After the three parties entered into the CCSBT in 1993 the annual TAC, and national allocations thereunder, set in 1989, were reaffirmed. No other TAC or national allocations have since been agreed. References in the Tribunal's Order to these allocations "as last agreed" by the parties are to be understood as references to the figures first set in 1989. Since the Commission under the CCSBT was established in 1994, Australia and New Zealand have taken a precautionary approach and have been unwilling to increase the TAC, despite Japan's arguments that the scientific evidence supported the sustainability of an increase. Because the Commission operates on the unanimity principle, no change in the TAC or national allocations could be effected. There is thus stalemate in the Commission on this issue.

The precautionary principle/approach

The difficulties of applying the precautionary principle to fisheries management have been well explained in a recent work of persuasive authority (Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (1999)). There is a considerable literature devoted to the emergence of the precautionary principle in international law generally (see, for example, David Freestone and Ellen Hay (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (1996)), but whether that principle can of itself be a mandate for action, or provide definitive answers to all questions of environmental policy, must be doubted (see Philippe Sands, *Principles of Environmental Law* (1995), Vol. I, pp. 211-213). As Professor Orrego Vicuña has remarked, "[s]cientific uncertainty is normally the rule in fisheries management and a straightforward application of the precautionary principle would have resulted in the impossibility of proceeding with any activity relating to marine fisheries" (at p. 157). Hence, there is a preference by some to use the word "approach" rather than "principle". That this is so, particularly in the case of fisheries management, is confirmed by the wording of article 6 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 December 1995, which obliges States Parties to apply "the precautionary approach". Annex II to the Agreement lays down "guidelines" for the application of the precautionary approach. This Agreement, which has not yet entered into force, was signed by all three parties to the present dispute. It is thus an instrument of important reference to the parties in view of its probable future application to them, and in the meantime, at least, as a set of standards and approaches commanding broad international acceptance.

The Tribunal has not found it necessary to enter into a discussion of the precautionary principle/approach. However, I believe that the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach.

The power to prescribe provisional measures *ultra petita*

The last matter on which I wish to comment concerns the power of the Tribunal to prescribe provisional measures not requested by the parties. The Tribunal in the present case, and in the *M/V "Saiga" (No. 2)* case (Request for provisional measures, Order of 11 March 1998, paragraph 47), invokes as one of the bases of its Order the provisions of article 89, paragraph 5, of the Rules of the Tribunal, which provides as follows:

When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure.

The theoretical question arises whether this power might be exercised in a manner wholly at variance with the request of any of the parties. Suppose, for example, the Tribunal in the present case had been so alarmed by the evidence presented by the Applicants that it considered that, as a provisional measure, the entire southern bluefin tuna fishery should be closed down; or, less drastically, that the parties should be required to implement a *pro rata* reduction of 50% in the TAC as last agreed. In fact neither the Applicants nor the Respondent in the present proceedings have asked for a reduction in the TAC, or for an alteration in annual national allocations of the TAC, as last agreed between them. Australia and New Zealand, in effect, regard that TAC as both the present precautionary catch limitation and the status quo, so far as preserving the rights of the parties are concerned, pending a decision by the arbitral tribunal. Japan has argued that the TAC is set unreasonably low, in the light of the scientific evidence. A decision by the Tribunal, on its own initiative, to prescribe a reduction in the TAC, pending the decision of the arbitral tribunal, would thus have come as an unwelcome surprise to all parties.

Welcome or unwelcome, does the Tribunal have that power? Article 89, paragraph 5, of the Rules of the Tribunal was modelled on article 75 of the Rules of Court, adopted by the International Court of Justice (1978). This Rule allows the I.C.J. to indicate provisional measures *proprio motu*, or to indicate measures other than those requested by the parties. The "head power" to grant provisional measures is contained in article 41 of the Statute of the International Court of Justice, which is not in terms dependent upon any request by the parties.

The situation of the Tribunal is, in my opinion, significantly different from that of the I.C.J. Its power to grant provisional measures is in one respect greater, and in another respect weaker, than that of the I.C.J. The power of the Tribunal is greater in that its constituent instrument, the United Nations Convention on the Law of the Sea, in article 290 and in Annex VI, article 25, confers on it the power to prescribe provisional measures, and provides that parties to the dispute shall comply promptly with those measures. The power of the I.C.J., by contrast, is merely to indicate, not prescribe, provisional measures.

The Tribunal's powers are weaker, in my view, than those of the I.C.J. in so far as they are conditioned by the provisions of article 290 of the United Nations Convention on the Law of the Sea. Article 290 begins, in paragraph 1, by providing that the Tribunal "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment". This would appear, if it stood alone, to give the Tribunal a free hand. In the present case, considerations of the environment alone, and separately from the rights of the parties, might be held to justify provisional measures of the Tribunal's own design. However, paragraph 3 of the article provides that "[p]rovisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard". The power of the Tribunal to prescribe provisional measures in the present case more particularly derives from paragraph 5 of article 290, but this too is made subject to the rest of the article, with the addition of the requirement of urgency.

I conclude therefore that the Tribunal has no power to order provisional measures without a request for such measures by a party, and without giving the parties an opportunity to be heard on those proposed measures. If article 89, paragraph 5, of the Rules of the Tribunal truly purports to give a power to the Tribunal to act beyond the bounds of what has been requested (*ultra petita*), then in my opinion that rule is not authorised by the Convention (*ultra vires*) and is thus invalid. If, on the other hand, it is properly to be interpreted as meaning only that the Tribunal may, in addition to the alternatives of acceding completely to, or rejecting completely, the requested measures, prescribe measures that represent a partial grant or a modified version of the requested measures, then the rule would be within power. I would include among such permitted measures, even if not formally requested by the parties, such "traditional" provisional measures as non-aggravation of the dispute, and - in the special circumstances of the present case - the measure directing the parties to seek agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, since this measure is closely related to other measures sought by the parties.

In the present case I am satisfied that, in the orders that it has made, the Tribunal has not exceeded the powers given to it under article 290 of the Law of the Sea Convention.

(Signed)

Ivan Shearer