INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 1999

27 August 1999

List of cases:
Nos. 3 and 4

SOUTHERN BLUEFIN TUNA CASES

(NEW ZEALAND *v.* JAPAN;
AUSTRALIA *v.* JAPAN)

Requests for provisional measures

ORDER

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER; *Registrar* CHITTY.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 287, paragraph 5, and article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or “the Convention on the Law of the Sea”) and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the facts that Australia became a State Party to the Convention on 16 November 1994, that Japan became a State Party to the Convention on 20 July 1996 and that New Zealand became a State Party to the Convention on 18 August 1996,

Having regard to the fact that Australia, Japan and New Zealand have not chosen a means for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification submitted by New Zealand to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Notification submitted by Australia to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Request submitted by New Zealand to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the Request submitted by Australia to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the fact that the Request of New Zealand was entered in the List of cases under No. 3 and named Southern Bluefin Tuna Case (New Zealand *v.* Japan), Request for provisional measures,

Having regard to the fact that the Request of Australia was entered in the List of cases under No. 4 and named Southern Bluefin Tuna Case (Australia *v.* Japan), Request for provisional measures,

Having regard to the Order of 16 August 1999 by which the Tribunal joined the proceedings in the cases concerning the Requests for the prescription of provisional measures,

Makes the following Order:

1. *Whereas* Australia, Japan and New Zealand are States Parties to the Convention;

2. *Whereas*, on 30 July 1999 at 8:38 a.m., New Zealand filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph

5, of the Convention in the dispute between New Zealand and Japan concerning southern bluefin tuna;

3. *Whereas* a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

4. *Whereas* the original of the Request and documents in support were filed on 4 August 1999;

5. *Whereas*, on 30 July 1999 at 2:30 p.m., Australia filed with the Registry by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between Australia and Japan concerning southern bluefin tuna;

6. *Whereas* a certified copy of the Request was sent the same day by the Registrar to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

7. *Whereas* the original of the Request and documents in support were filed on 5 August 1999;

8. *Whereas*, on 30 July 1999, the Registrar was informed of the appointment of Mr. Timothy Bruce Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, as Agent for New Zealand, and Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia; and of the appointment of Mr. Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan, as Agent for Japan on 2 August 1999;

9. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Australia or of New Zealand;

10. *Whereas*, pursuant to article 17 of the Statute, Australia and New Zealand are each entitled to choose a judge *ad hoc* to participate as a member of the Tribunal in the proceedings in the respective cases;

11. *Whereas* Australia and New Zealand in their Requests informed the Tribunal that, as parties in the same interest, they had jointly nominated Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, as judge *ad hoc*;

12. *Whereas*, by a letter dated 6 August 1999, the Agent for Japan was informed, in accordance with article 19 of the Rules, of the intention of Australia and New Zealand to choose Mr. Shearer as judge *ad hoc* and was invited to furnish any observations by 10 August 1999;

13. *Whereas*, since no objection to the choice of Mr. Shearer as judge *ad hoc* was raised by Japan and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the

proceedings after having made the solemn declaration required under article 9 of the Rules in relation to each of the two cases at a public sitting of the Tribunal held on 16 August 1999;

14. *Whereas*, after having ascertained the views of the parties, the President of the Tribunal, by separate Orders of 3 August 1999 with respect to each Request, fixed 18 August 1999 as the date for the opening of the hearing, notice of which was communicated forthwith to the parties;

15. *Whereas* the Secretary-General of the United Nations was notified of the Requests by a letter dated 30 July 1999, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 4 August 1999;

16. *Whereas* additional documents were submitted on 5, 12 and 17 August 1999 by Australia, copies of which were transmitted in each case to the other parties;

17. *Whereas*, by a letter dated 6 August 1999, the parties were informed that the President, acting in accordance with article 47 of the Rules and with the consent of Australia and New Zealand, had directed that Japan might file a single Statement in Response by 9 August 1999;

18. *Whereas*, on 9 August 1999, Japan filed with the Registry its Statement in Response, which was transmitted via electronic mail to the Agent for Australia on the same date and on 10 August 1999 to the Agent for New Zealand; certified copies of the Statement in Response were transmitted by courier to the Agents for Australia and New Zealand on 10 August 1999;

19. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 16 and 17 August 1999 and noted the points and issues it wished the parties specially to address;

20. *Whereas*, at a meeting with the representatives of the parties on 17 August 1999, the President ascertained the views of the parties regarding the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;

21. *Whereas*, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal; and information regarding an expert to be called by Australia before the Tribunal pursuant to article 72 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Requests and the Statement in Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas* oral statements were presented at five public sittings held on 18, 19 and 20 August 1999 by the following:

On behalf of Australia and New Zealand: Mr. Timothy Caughley, Agent and
Counsel for New Zealand,

Mr. William Campbell, Agent and Counsel for Australia,
Mr. Daryl Williams AM QC MP, Attorney-General of the Commonwealth of Australia, Counsel for Australia,
Mr. Bill Mansfield, Counsel and Advocate for New Zealand,
Mr. James Crawford SC, Counsel for Australia,
Mr. Henry Burmester QC, Counsel for Australia;

On behalf of Japan:
Mr. Kazuhiko Togo, Agent,
Mr. Robert T. Greig, Counsel,
Mr. Nisuke Ando, Counsel;

24. *Whereas* in the course of the oral statements a number of maps, charts, tables, graphs and extracts from documents were presented, including displays on computer monitors;

25. *Whereas*, on 18 August 1999, Mr. John Beddington BSc (Econ) MSc PhD, Director, T.H. Huxley School of Environment, Earth Sciences and Engineering, Imperial College of Science, Technology and Medicine, London, United Kingdom, was called as expert by New Zealand and Australia (examined on the *voir dire* by Mr. Matthew Slater, Advocate for Japan), examined by Mr. Crawford and cross-examined by Mr. Slater;

26. *Whereas*, on 19 and 20 August 1999, the parties submitted written responses to certain points and issues which the Tribunal wished them specially to address;

27. *Whereas*, during the hearing on 20 August 1999, the Tribunal addressed questions to the parties, responses to which were provided in writing on the same date;

28. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, New Zealand alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the arbitral tribunal") to adjudge and declare:

> 1. That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS [*United Nations Convention on the Law of the Sea*] in relation to the conservation and management of the SBT [*southern bluefin tuna*] stock, including by:
>
> (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 and

contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;

(b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission [*Commission for the Conservation of Southern Bluefin Tuna*] national allocations;

(c) taking unilateral action contrary to the rights and interests of New Zealand as a coastal State as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against New Zealand fishermen contrary to Article 119 (3);

(d) failing in good faith to co-operate with New Zealand with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS;

(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

2. That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:

(a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of New Zealand and Australia;

(b) negotiate and co-operate in good faith with New Zealand, including through the Commission, with a view to agreeing future conservation measures and TAC [*total allowable catch*] for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with New Zealand and Australia until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission 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.

3. That Japan pay New Zealand's costs of the proceedings;

29. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to adjudge and declare:

(1) That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock, including by:

(a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 of UNCLOS and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;

(b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission national allocations;

(c) taking unilateral action contrary to the rights and interests of Australia as a coastal state as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian fishermen contrary to Article 119 (3);

(d) failing in good faith to co-operate with Australia with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS; and

(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

(2) That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:

(a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of Australia and New Zealand;

(b) negotiate and co-operate in good faith with Australia, including through the Commission, with a view to agreeing future conservation measures and TAC for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT by Japan above the amount of the previous national allocation for Japan agreed with Australia and New Zealand until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch for the current year by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.

(3) That Japan pay Australia's costs of the proceedings;

30. *Whereas*, in their Notifications of 15 July 1999, Australia and New Zealand requested that Japan agree to certain provisional measures with respect to the disputes pending the constitution of the arbitral tribunal or agree that the question of provisional measures be forthwith submitted to the Tribunal and furthermore reserved the right, if Japan did not so agree within two weeks, immediately on the expiry of the two-week period and without further notice to request the Tribunal to prescribe the provisional measures;

31. *Whereas* the provisional measures requested by New Zealand in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) 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 ("the Commission"), 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;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

32. *Whereas* the provisional measures requested by Australia in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) 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 ("the Commission"), 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;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

33. *Whereas* submissions and arguments presented by Japan in its Statement in Response include the following:

> Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290(5) of UNCLOS pending constitution of such an Annex VII tribunal. First, the Annex VII tribunal must have *prima facie* jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1. Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have *prima facie* jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures.
>
> . . .
>
> In the event that the Tribunal determines that this matter is properly before it and an Annex VII tribunal would have *prima facie* jurisdiction, then, pursuant to ITLOS [*International Tribunal for the Law of the Sea*] Rules Article 89(5), Japan respectfully requests that the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP [*experimental fishing programme*] and the determination of a TAC and national allocations for the year 2000. Should the parties not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be, consistent with Parties' December 1998 agreement and subsequent Terms of Reference to the EFPWG [*experimental fishing programme working group*] …, referred to the panel of independent scientists for their resolution.
>
> The ... Statement of Facts and the history of negotiations between Australia, New Zealand and Japan concerning conservation of SBT, chronicles the bad faith exhibited by Australia and New Zealand in terminating consultations and negotiations over the terms of a joint experimental fishing program and their rash resort to proceedings under UNCLOS despite the absence of any controversy thereunder and the failure to exhaust the amicable provisions for dispute resolution that Part XV mandates be fully utilized. Accordingly, this Tribunal should require Australia and New Zealand to fulfil their obligations to continue negotiations over this scientific dispute.
>
> **... Submissions**
>
> Upon the foregoing Response and the Annexes hereto, the Government of Japan submits that the Request for provisional measures by Australia and New Zealand should be denied and Japan's counter-request for provisional measures should be granted;

34. *Whereas* Australia and New Zealand, in their final submissions at the public sitting held on 20 August 1999, requested the prescription by the Tribunal of the following provisional measures:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) 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 ("the Commission"), 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;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

35. *Whereas*, at the public sitting held on 20 August 1999, Japan presented its final submissions as follows:

First, the request of Australia and New Zealand for the prescription of provisional measures should be denied.

Second, despite all the submissions made by Japan, in the event that the Tribunal were to determine that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction and that the Tribunal were to determine that it could and should prescribe provisional measures, then, pursuant to ITLOS Rules Article 89(5), the International Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements would be, consistent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their resolution, should the parties not reach consensus within six months following the resumption of these negotiations;

36. *Considering* that, pursuant to articles 286 and 287 of the Convention, Australia and New Zealand have both instituted proceedings before the arbitral tribunal against Japan in their disputes concerning southern bluefin tuna;

37. *Considering* that Australia and New Zealand on 15 July 1999 notified Japan of the submission of the disputes to the arbitral tribunal and of the Requests for provisional measures;

38. *Considering* that on 30 July 1999, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, Australia and New Zealand submitted to the Tribunal Requests for provisional measures;

39. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article 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;

40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;

41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*;

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 19 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

88. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

89. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* ZHAO, YAMAMOTO, VUKAS, WARIOBA.

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna,

except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV,KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* YAMAMOTO, VUKAS.

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* VUKAS, WARIOBA.

By 21 votes to 1,

2. *Decides* that each party shall submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 6 October 1999, and *authorizes* the President of the Tribunal to request such further reports and information as he may consider appropriate after that date;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

By 21 votes to 1,

3. *Decides,* in accordance with article 290, paragraph 4, of the Convention and article 94 of the Rules, that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for southern bluefin tuna;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judge* VUKAS.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of August, one thousand nine hundred and ninety-nine, in four copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(Signed) Thomas A. MENSAH,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Vice-President WOLFRUM, Judges CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON and EIRIKSSON append a joint declaration to the Order of the Tribunal.

Judge WARIOBA appends a declaration to the Order of the Tribunal.

Judges YAMAMOTO and PARK append a joint separate opinion to the Order of the Tribunal.

Judges LAING and TREVES append separate opinions to the Order of the Tribunal.

Judge *ad hoc* SHEARER appends a separate opinion to the Order of the Tribunal.

Judges VUKAS and EIRIKSSON append dissenting opinions to the Order of the Tribunal.

(Initialled) T.A.M.
(Initialled) G.E.C.

JOINT DECLARATION OF VICE-PRESIDENT WOLFRUM AND JUDGES CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON AND EIRIKSSON

As regards the state of the stock of southern bluefin tuna, we fully share the views of the Tribunal set out in paragraphs 71, 77 and 80 of the Order. The scientific evidence presented to the Tribunal indicates that the stock has been severely depleted and is presently in a poor state. There remain uncertainties over the life cycle of the stock, as well as differences of opinion among scientists concerning the prospects for its future recovery. Cooperation among the members of the Commission for the Conservation of Southern Bluefin Tuna, at both the scientific and governmental levels, has not been effective in recent years; and during this same period catches by non-members of the Commission and new entrants to the fishery have risen significantly.

In the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the Convention lays down, as stated in the Order, a duty to cooperate to that end.

(Signed) Rüdiger Wolfrum
(Signed) Hugo Caminos
(Signed) Vicente Marotta Rangel
(Signed) Alexander Yankov
(Signed) David H. Anderson
(Signed) Gudmundur Eiriksson

DECLARATION BY JUDGE WARIOBA

I have voted against the operative paragraphs 1(c) and (f) not because I disagree with the substance but because I believe they are issues which belong properly to the merits.

Australia, Japan and New Zealand agreed on a total allowable catch (TAC) of 11,750 tonnes in 1989 and subsequently decided each year to maintain the same, up to 1997. The disagreement arose because Japan wanted the TAC to be increased while Australia and New Zealand held a contrary view. The respective positions were based on the appreciation of scientific evidence. Since the Tribunal has admitted in paragraph 80 that it cannot conclusively assess the scientific evidence presented by the parties, it has no basis of prescribing an order that sets a TAC. That issue should be left to the arbitral tribunal to determine.

Australia, Japan and New Zealand should of course continue negotiations with other fishing States and entities with a view to ensuring the conservation and promoting the objective of optimum utilisation. I am sure they will continue to do so in addition to continuing cooperation in matters on which they do not have a dispute. The Order of the Tribunal should be confined to issues that are the subject matter of dispute placed before it. The relationship of the parties to this dispute does not include non-parties to the 1993 Agreement.

I further disagree with references to the protection of the marine environment in paragraphs 67 and 68 of the Order. What is stated in those paragraphs is true but has no relevance here. Every activity in the oceans will of necessity affect the environment. It is not necessary for the Tribunal to include consideration of marine environment in every case. The Tribunal can do so only when it has been requested by a party or parties or when it considers it absolutely necessary and urgent. It was not so in this case.

(Signed) Joseph Sinde Warioba

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

SEPARATE OPINION OF JUDGE LAING

INTRODUCTION

1. I agree with the Agent for Japan that this is an "historic proceeding". Three outstanding global citizens are before this Tribunal in a case involving regional cooperation in which significant natural and economic resources are involved. The case presents the issue of how scientific uncertainty[1] can be handled in a judicial context. It involves questions relating to the interpretation of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its interaction with cognate conventions. Above all, in this case the Tribunal makes decisions of fundamental importance to the institution of provisional measures and potentially of critical relevance to an aspect of international environmental law.

2. This Separate Opinion is offered in an effort to elucidate my views on these last two aspects of the Tribunal's Order.

PROVISIONAL MEASURES

Irreparability

3. In its Order in the *M/V "Saiga" (No. 2)* case (provisional measures) the Tribunal prescribed provisional measures without specifying any particular standard or criterion for its orders. In this Order the Tribunal has gone a step further by reciting, without more, language of article 290, paragraph 1, that is emphasized in the following quotation:

> [T]he court or 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* … . (emphasis added)

It is thereby clear to me that the Tribunal has not chosen to base its decision on the criterion of "irreparability", which is an established aspect of the jurisprudence of some other institutions. I believe that that "grave standard" is inapt for application in the wide and varied range of cases that, pursuant to UNCLOS, are likely to come before this Tribunal. In my view, this confirms what I regard as the Tribunal's position that irreparablity is not the sole required criterion. This is

[1] In this case, eminent scientists have expressed diametrically opposed opinions on several critical issues relating to the Applicants' assertion on and scientific reports that the stock of Southern Bluefin Tuna is under serious threat. *Inter alia,* these have been on: predictions of the future level of parental biomass; changes in size composition; projections on the level of recovery; the appropriate approaches to necessary scientific investigation; the rate of recruitment of young fish to the stock; the increase in mortality rates of juvenile fish; whether an Experimental Fishing Programme (EFP) can or should be conducted unilaterally; the nature and scope of an appropriate EFP; the impact of fishing by non-parties to a fisheries management Convention; the actual structure and impact of EFPs designed by Japan (critiques about hypotheses; testing modalities; number of on-board monitors; whether additional catch of 2,000 fish per annum would be very significant if combined with the Total Allowable Catch; if the stock effectively decreases after the survey and general quota reductions occur, whether it may be impossible to prove that these were not provoked by the survey; method of data review and analysis; access to data by non-survey States; independence of reviewers; constraints on vessel location). Miscellaneous documents annexed to Response.

consistent with the practice on similar forms of remedy in a substantial number of national legal systems.

4. This view on irreparability might be inferred from the plain meaning of the text of paragraph 1 of article 290. Instead of irreparability, the key to UNCLOS provisional measures is the discretionary element of appropriateness, the concept used in the key paragraph of the recitals in the Order following the analysis of the issues and the law. Along with appropriateness, the formula of preservation of the respective rights of the parties underscores the discretionary nature of provisional measures. In this Tribunal, discretion will undoubtedly be prudently exercised in the light of the purpose of provisional measures: the preservation of the *status quo pendente lite* and the maintenance of peace and good order.

5. Prudence can be guided by reasonable *a priori* criteria, based on common experience. One set which has been suggested is:

> (1) the wrong has already occurred or cannot be compensated or monetarily repaired ... (2) the certainty that the feared consequence will occur unless the Tribunal intervenes, (3) the seriousness of the threat, (4) the right being preserved has unique or particularly special value or (5) the magnitude of the underlying global public order value, e.g. such possibly *jus cogens* values as global peace and security or environmental protection.[2]

In fact, the other formula in article 290, paragaph 1, "prevent serious harm to the marine environment", which partially coincides with items (3) and (5) of the foregoing list, seems to confirm the stated view on the absence of inevitability of an irreparability test. Further confirmation is afforded by the fact that, in several contexts, the Convention gives cognition to harm or damage only when it is, e.g., "serious", "significant", "substantial" or "major", not "irreparable".

Urgency

6. The Tribunal has reaffirmed that in cases where an autonomous arbitral tribunal is being constituted, provisional measures under article 290, paragraph 5, may be prescribed only when the "urgency of the situation so requires". The Tribunal is then authorized to prescribe such measures as evidently cannot await the *establishment* of the arbitral tribunal to handle the merits of the dispute. However, in this Order, the measures have been prescribed pending a *decision* of the arbitral tribunal. In my view, this really means that the measures are valid up to the moment prior to that tribunal's first relevant decision after establishment.

7. This requirement of "procedural urgency" is designed to restrict this Tribunal from unnecessarily assuming superior authority in matters relating to provisional measures over the tribunal dealing with the merits (*United Nations Convention on the Law of the Sea 1982: A Commentary* (hereafter "Virginia Commentary"), Vol. V (Shabtai Rosenne and Louis B. Sohn, eds., 1989), p. 56). I believe that one or two of the measures that the Tribunal has prescribed in this case come rather close to the province of the arbitral tribunal. This is a matter about which this Tribunal will have to continue to use the utmost circumspection.

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[2] See *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998,* Separate Opinion of Judge Laing, paragraph 25.

8. I agree with counsel for Australia that urgency or imminence is of the activity causing the harm, not necessarily the harm itself. Hence the present availability of stock is not determinative if, as a result of utilization, it is likely to disappear in the future. However, I disagree that there is a formal criterion of substantive urgency either under paragraph 5 or paragraph 1 (which omits any reference to urgency). Of course, in my view, urgency is a factor that the Tribunal will very often take into consideration in weighing the question of appropriateness. However, equally or alternatively, the Tribunal will often weigh such circumstances as the five suggested criteria for ordering provisional measures that I listed earlier.[3]

Rights of the Parties

9. In my view, the rights of the parties need not be of a particular hierarchical order or restricted class. The Applicants have identified a series of rights for protection. They may be all said to relate to the obligations contained in articles 64 and 116 to 119 of the Convention. These articles are cited in the Order but only in relation to the Respondent's unilateral implementation of an experimental fishing programme. I am convinced that the Order also covers additional rights. At the same time, the texts of these various provisions of the Order underscore that it adopts an approach to provisional measures unadorned by the trappings of irreparability.

Convenience of all Parties

10. A factor generally understood to militate against the prescription of provisional measures is the convenience of all parties. That factor will at times induce the Tribunal not to order any or to reformulate the measures requested. This is what the Tribunal has done in this case. Thus, it has not ordered the premature termination of the Respondent's current EFP, as requested. The Respondent had argued that interruption would impair the Programme's scientific validity and diminish the value of data collected to date.

11. On the other hand, the Tribunal has not declined to order provisional measures because of the possibly negative impact on the stock of increased fishing by non-parties to the 1993 Convention for the Conservation of Southern Bluefin Tuna (hereafter "the 1993 Convention"). Nevertheless, the Order does recite the problem with increasing fishing by non-parties and prescribes that the three litigants "should" make further efforts to reach agreement with non-parties. The aim is salutary, but it is unclear what benefit will accrue from prescribing such dialogue, especially where the obligation is not couched in patently mandatory terms. Possibly the motivation and justification are based on policies which transcend provisional measures *per se*.

[3] It will be noted that there is no requirement of urgency under article 31 of the Agreement for the Implementation of the Provisions of the 1995 United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereafter "Straddling Fish Stocks Agreement"). Article 31, paragraph 2, provides for provisional measures in terms identical to the first formula of UNCLOS article 290, paragraph 1, and also "to prevent damage to the stocks in question".

PRECAUTIONARY APPROACH

12. One such possible set of policies relates to special devices designed for the protection of the environment. The Applicants based their Requests for provisional measures on articles 64, 116–119 and 300 of UNCLOS; the 1993 Convention, the parties' practice thereunder, "as well as their obligations under general international law, in particular the precautionary principle" which, according to the Statement of Claim in the arbitral proceedings, annexed to the Request for provisional measures, "must direct any party in the application of those articles". They argued that the principle

> must be applied by States in taking decisions about actions which entail threats of serious or irreversible damage to the environment, where there is scientific uncertainty about the effect of such actions. The principle requires caution and vigilance in decision-making in the face of such uncertainty.

13. The Tribunal's Order does not refer to the "precautionary principle". Instead, in the recitals it chronicles the opposing views of the Applicants and Respondent about the condition of the stock in view of the allegations about the impact thereon of utilization. It also recites that "the parties should in the circumstances act with 'prudence and caution' to ensure that effective conservation measures are taken to prevent serious harm to the stock". It further notes the scientific disagreement about appropriate measures to conserve the stock and the non-agreement of the parties about whether the measures actually taken have led to improvement. This aspect of the recitals states the Tribunal's conclusion about the need for article 290-type of measures despite the Tribunal's inability conclusively to assess the scientific evidence. In my view, these statements are pregnant with meaning. In order to clarify and critique what I understand that the Tribunal has stated, I must first explore the background of the so-called precautionary principle of international environmental relations and law.

Background on Environmental Precaution

14. The notion of environmental precaution largely stems from diplomatic practice and treaty-making in the spheres, originally, of international marine pollution and, now, of biodiversity, climate change, pollution generally and, broadly, the environment. Its main thesis is that, in the face of serious risk to or grounds (as appropriately qualified) for concern about the environment, scientific uncertainty or the absence of complete proof should not stand in the way of positive action to minimize risks or take actions of a conservatory, preventative or curative nature. In addition to scientific uncertainty, the most frequently articulated conditions or circumstances are concerns of an intergenerational nature and forensic or proof difficulties, generally in the context of rapid change and perceived high risks. The thrust of the notion is vesting a broad dispensation to policy makers, seeking to provide guidance to administrative and other decision-makers and shifting the burden of proof to the State in control of the territory from which the harm might emanate or to the responsible actor. The notion has been rapidly adopted in most recent instruments and policy documents on the protection and preservation of the environment.[4]

[4] Of note is para. 17.21 of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development. Paragraph 17.1 also calls for "new approaches to the marine and coastal area management and development, at the national, regional and global levels, approaches that are integrated in context and are precautionary and anticipatory

15. Even as questioning of the acceptability of the precautionary notion diminishes, challenges increase regarding such specifics as: the wide potential ambit of its coverage; the clarity of operational criteria; the monetary costs of environmental regulation; possible public health risks associated with the very remedies improvised to avoid risk; diversity and vagueness of articulations of the notion; uncertainties about attendant obligations, and the imprecision and subjectivity of such a value-laden notion.[5] Nevertheless, the notion has been "broadly accepted for international action, even if the consequence of its application in a given situation remains open to interpretation" (A. D'Amato and K. Engel, *International Environmental Law Anthology* (1996), p. 22).

16. However, it is not possible, on the basis of the materials available and arguments presented on this application for provisional measures, to determine whether, as the Applicants contend, customary international law recognizes a precautionary principle.[6]

Precaution in Marine Living Resource Management

17. However, it cannot be denied that UNCLOS adopts a precautionary *approach.* This may be gleaned, *inter alia*, from preambular paragraph 4, identifying as an aspect of the "legal order for the seas and oceans" "the conservation of their living resources ...". Several provisions in Part V of the Convention, e.g. articles 63-66, on conservation and utilization of a number of species in the exclusive economic zone, identify conservation as a crucial value. So do article 61, specifically dealing with conservation in general, and article 64, dealing with conservation and optimum utilization of highly migratory species (such as tuna). Article 116, on the right to fish on the high seas, *inter alia* reiterates the conservation obligation on nationals of non-coastal/distant fishing States while fishing in the exclusive economic zone of other States. Article 117 explicitly articulates the duty of all States "to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for" conservation of living resources in the high seas. Article 118 requires inter-State cooperation in the conservation and management of high seas living resources. Such cooperation is to extend to negotiations leading to the establishment of subregional or regional fisheries organizations. And article 119, entitled "conservation of the living

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in ambit ...". Paragraph 15 of the Rio Declaration, adopted at the same Conference, provides that "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." See generally *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, Separate Opinion by Judge Weeramantry, *I.C.J. Reports 1995*, pp. 288, 341-344; *The Precautionary Principle and International Law: The Challenge of Implementatrion* (D. Freestone and E. Hey, eds., 1996); D. Freestone and E. Hey in Freestone and Hey 1996, pp. 19-28, 258; A. Kiss in Freestone and Hey 1996, pp. 3-16, 258; *The Global Environment: Institutions, Law and Policy;* (K. Vig and R. Axlerod, eds., 1999)*;* A. D'Amato and K. Engel, *International Environmental Law Anthology* (1996); J. Cameron and J. Abouchar, in Freestone and Hey 1996, pp. 29-52; C. Burton, *22 Harv. Env. L.R,*. pp. 509-558 (1998); M. Kamminga in Freestone and Hey 1996, pp. 171-186; O. McIntyre and T. Mosedale, *9 Jo. Env. L,*. pp. 221-241 (1997); W. Gullett, *14 Env. & Pl. L.J.*, pp. 52-69 (1997).

[5] P. Sands in Freestone and Hey 1996, p. 134; F. Cross, *53 Wash. & Lee L.R.*, pp. 851-925 (1996); J. Hickey and V. Walker, *14 Va. Env. L. J.*, pp. 423-454 (1995); J. Macdonald, *26 O.D.I.L.*, pp. 255-286 (1995).

[6] It might be noted that treaties and formal instruments use different language of obligation; the notion is stated variously (as a principle, approach, concept, measures, action); no authoritative judicial decision unequivocally supports the notion; doctrine is indecisive, and domestic juridical materials are uncertain or evolving.

resources of the high seas", deals with the allocation of allowable catches and "establishing other conservation measures". Although paragraph 1(a) refers to measures, based on the best scientific evidence, for production of the maximum sustainable yield, the conservatory thrust of this article is vigorously reaffirmed by the treatment, in paragraph (b), of the effects of management measures on associated or dependent species the populations of which should be maintained or restored "above levels at which their reproduction may become seriously threatened". Article 116, in association with the Part V articles mentioned above, has been stated to point to the precautionary "principle" of fisheries management, while article 119 has been said to reflect a precautionary "approach" "when scientific data is not available or is inadequate to enable comprehensive decision-making" (Virginia Commentary, Vol. IV, pp. 288, 310). Most of these are the very provisions before this Tribunal today. Strikingly, also, article 290, paragraph 1's reference to serious harm to the marine environment as a basis for provisional measures also underscores the salience of the approach.

18. I have drawn the reader's attention to several recitals in the Order that are of particular interest in the connection. The Tribunal also recites the apparent key importance in this case of serious harm to the marine environment as a crucial, perhaps *the* crucial criterion or condition for provisional measures and it prescribes as provisional measures a prohibition of experimental programmes except by agreement of all three parties and annual catch limits (quotas), which include the concept of payback for catch taken over quota in 1999. The Tribunal's apparent willingness to base an edifice of provisional measures for possible harm to marine living resources on the language of article 290 dealing with serious harm to the environment must be approached with some prudence since scientific views might differ about the underlying question. Besides, article 194, paragraph 5, of the Convention,[7] which partly deals with the matter, is not unequivocal and the precautionary approach remains very general. I therefore hold that reliance on the preservation of rights formula of article 290, paragraph 1, must continue to be the main engine of this aspect of provisional measures.

19. In view of my earlier discussion, it becomes evident that the Tribunal has adopted the precautionary approach for the purposes of provisional measures in such a case as the present. In my view, adopting an *approach*, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures.

20. My conclusions so far are bolstered by such recent precedents as paragraph 17.21 of Agenda 21. It is also reinforced by various provisions in articles 6 and 7 of the Code of Conduct for Responsible Fisheries of the Food and Agriculture Organization and articles 5(c) and 6 of the Straddling Fish Stocks Agreement, with detailed requirements for the application of the precautionary approach. In the present context, it matters little that the former is a voluntary Code and the latter is not yet in force.[8] With some cogency, these developments were judicially presaged by the International Court of Justice in 1974:

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[7] Article 194, paragraph 5, of UNCLOS states that measures taken in accordance with Part XII, on protection and preservation of the marine environment, shall include those necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. Impliedly, the ingredients of the marine environment include living resources. However it is evident that this does not dispose of the question posed in the text.

[8] These developments were foreshadowed by the 1982 resolution of the International Whaling Commission, imposing a ban on commercial whaling, and by the 1989 United Nations General Assembly resolution

> [E]ven if the Court holds that Iceland's extension of its fishery limits is not opposable to the Applicant, this does not mean that the Applicant is under no obligation to Iceland with respect to fishing in disputed waters in the 12-mile to 50-mile zone. On the contrary, both States have an obligation to take full account of each other's rights and of any fishery waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them ... (*Fisheries Jurisdiction* case, *I.C.J. Reports 1974*, pp. 3, 31, paragraph 72).

21. The Tribunal has not followed the suggestion that has been made in this case that potential damage to fish stocks should not be treated as, e.g., damage by a dam. However, in my view, while the Tribunal has drawn its conclusions and based its prescriptions in the face of scientific uncertainty, it has not, *per se*, engaged in an explicit reversal of the burden of proof. I believe that, where possible, such matters are best reserved for the stage of the merits, i.e. for the arbitral tribunal.[9] The cautiousness of the Tribunal's Order thus becomes apparent. This is commendable, since this entire area is fraught with difficulty.

CONCLUSION

22. It is ironic that these disagreements about science and natural resources should result in judicial proceedings when the Respondent consumes the overwhelming majority of the harvest of southern bluefin tuna and is therefore the ultimate financial resource. It might also appear to be regrettable that Japan has been made a party in its first international adjudication in over 90 years. However, this is not surprising, since the judicial resolution of disputes is now one of the most pervasive phenomena of contemporary international life. In fact, this is one of the most notable features of UNCLOS, which devotes three of its nine annexes to compulsory dispute resolution. It might be predicted that this trend will continue, and that devices like provisional measures and the precautionary notion will be frequently featured. It is nevertheless hoped that the parties will be able to craft an expeditious resolution of their problem.

(Signed) Edward A. Laing

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recommending modalities for introducing a ban on fishing with driftnets. However, I am not quite certain whether these two precedents are more consistent with the pretension of establishing a more comprehensive normative framework than I believe the approach connotes.

[9] In fact, in the area of fisheries management, such a decision should be made with great care, because of its possible impact on fishermen which, *prima facie*, could be unfair and unrealistic, unless the level of scientific certainty about probable damages increases.

SEPARATE OPINION OF JUDGE TREVES

1. I concur with the Order of the Tribunal. The reasons set out in it in support of the urgency of the measures prescribed require, however, a few developments and clarifications.

2. The requirement of urgency is part of the very nature of provisional measures, as these measures are meant to preserve the rights of the parties *pending the final decision* (article 290, paragraph 1, of the Convention).

3. In paragraph 5 of article 290 the requirement of urgency is set out explicitly. It would seem that there would have been no necessity to do so had this "urgency" been the same as that which is inherent in the very nature of provisional measures (which applies also, in any case, to requests under article 290, paragraph 5, as the measures so requested may be prescribed in accordance with the article as a whole). It is an urgency that has to be commensurate to the fact that the Tribunal has been requested to grant provisional measures "pending the constitution of an arbitral tribunal to which a dispute has been submitted", and which, once constituted, will be entitled to modify, revoke or affirm the measures granted under paragraph 5, and also to prescribe measures of its own.

4. The requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of article 290 as regards the moment in which the measures may be prescribed. In particular, there is no "urgency" under paragraph 5 if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted. As regards the moment up to which it is needed that the measures be complied with, the only urgency which is relevant is that of paragraph 1 of article 290. The measures are supposed to apply "pending the final decision" and this expression should be read as meaning up to the moment in which a judgment on the merits has been rendered. Of course, in the case of measures requested under paragraph 5, this applies to the judgment on the merits by the arbitral tribunal. In both cases the measures may be revoked or modified before the final decision on the merits respectively by the court or tribunal competent under paragraph 1, or by the arbitral tribunal competent under paragraph 5.

5. Closely linked to the temporal dimension of the requirement of urgency is what may be called its qualitative dimension. The Convention envisages it in paragraph 1 of article 290 by stating that the court or tribunal must consider the measures "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment". That the International Court of Justice sees in the need to preserve the respective rights of the parties a requirement of "irreparable damage" or "irreparable prejudice" is well known.

6. The fact that in article 290, paragraph 1, of the United Nations Convention on the Law of the Sea provisional measures may be prescribed "to prevent serious harm to the marine environment" and not only to preserve the respective rights of the parties, noted in paragraph 67 of the Order, is relevant for establishing the criterion for determining whether there is urgency in the qualitative sense whenever the measures, even though requested for the preservation of the rights of a party, concern rights whose preservation is necessary to prevent serious damage to the environment. The statement in paragraph 70 of the Order that "the conservation of the living resources of the sea is an element in the protection and

preservation of the marine environment" must be seen in this light. On the basis of that statement, it seems reasonable to hold that the prevention of serious harm to the southern bluefin tuna stock is the appropriate standard for prescribing measures in the present case. This standard can apply to measures for the preservation of the rights of the parties because these rights concern the conservation of that very stock. This point is not entirely clear in the Order. Prevention of serious harm to the stock of southern bluefin tuna is mentioned, in paragraph 77, as the purpose of action to be taken by the parties, and not as the standard for prescribing provisional measures.

7. But are the requirements for temporal and qualitative urgency satisfied in the case submitted to the Tribunal?

8. The urgency needed in the present case does not, in my opinion, concern the danger of a collapse of the stock in the months which will elapse between the reading of the Order and the time when the arbitral tribunal will be in a position to prescribe provisional measures. This event, in light of scientific evidence, is uncertain and unlikely. The urgency concerns the stopping of a trend towards such collapse. The measures prescribed by the Tribunal aim at stopping the deterioration in the southern bluefin tuna stock. Each step in such deterioration can be seen as "serious harm" because of its cumulative effect towards the collapse of the stock. There is no controversy that such deterioration has been going on for years. However, as there is scientific uncertainty as to whether the situation of the stock has recently improved, the Tribunal must assess the urgency of the prescription of its measures in the light of prudence and caution. This approach, which may be called precautionary, is hinted at in the Order, in particular in paragraph 77. However, that paragraph refers it to the future conduct of the parties. While, of course, a precautionary approach by the parties in their future conduct is necessary, such precautionary approach, in my opinion, is necessary also in the assessment by the Tribunal of the urgency of the measures it might take. In the present case, it would seem to me that the requirement of urgency is satisfied only in the light of such precautionary approach. I regret that this is not stated explicitly in the Order.

9. I fully understand the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law. Other courts and tribunals, recently confronted with this question, have avoided to give an answer. In my opinion, in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law. The precautionary approach can be seen as a logical consequence of the need to ensure that, when the arbitral tribunal decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to me inherent in the very notion of provisional measures. It is not by chance that in some languages the very concept of "caution" can be found in the terms used to designate provisional measures: for instance, in Italian, *misure cautelari,* in Portuguese, *medidas cautelares,* in Spanish, *medidas cautelares* or *medidas precautorias.*

10. It may be added that the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened to signature on 4 December 1995, which envisages the very situations considered in the present case, brings support to some of the points made above. The Agreement has not yet come into force and has been signed, but not ratified, by Australia, Japan and New

Zealand. It seems, nonetheless, significant for evaluating the trends followed by international law. Even though this Agreement is independent from the United Nations Law of the Sea Convention, it has remarkable links with it. Article 4 provides that the Agreement "shall be interpreted and applied in the context of and in a manner consistent with the [United Nations Law of the Sea] Convention", and article 30 adopts *mutatis mutandis*, for the settlement of disputes concerning the interpretation and application of the Agreement, the provisions set out in Part XV of the United Nations Convention on the Law of the Sea.

11. Article 31, paragraph 2, of the Agreement of 5 December 1995 (a provision meant to apply *mutatis mutandis* to the dispute settlement provisions of UNCLOS and applicable "[w]ithout prejudice to article 290") provides that the power of prescribing provisional measures shall include that of prescribing them "to prevent damage to the stocks in question". Thus the standard set by the Straddling Fish Stocks Agreement is even lower than that of "serious harm" set out in article 290, paragraph 1, of the Law of the Sea Convention. Moreover, the Agreement adopts and develops in detail the precautionary approach. In particular, article 6 states, *inter alia*, that: "The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures" (paragraph 2).

(Signed) Tullio Treves

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 decision[1].

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 ineluctible 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

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:

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[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

DISSENTING OPINION OF JUDGE EIRIKSSON

1. I was unable to concur in the Tribunal's decision in paragraph 90(1)(a) of its Order to prescribe, as a provisional measure, that the parties "shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal".

2. I did so not because I disagree with the general proposition that parties to a dispute should take measures to avoid aggravating the dispute pending its settlement by judicial means. Indeed, this should be recognized as a general policy guiding States in their international relations. Rather, I oppose laying down a measure, binding in international law, with the consequential remedies for its breach, which is of so general a nature that a party cannot be entirely clear when contemplating any given action whether or not it falls within its scope. I would have preferred that the Tribunal confine itself to prescribing measures which have clear and specific objectives, such as those prescribed in paragraph 90(1)(c) to (f), with which I agree.

3. Among the acts which would come to be considered in the context of the measure prescribed in paragraph 90(1)(a) are those designed by a party to deny fishing vessels of another party access to its ports. It may indeed be the case that once the relations of the parties with respect to fishing for southern bluefin tuna are "normalized", at least for the period pending the decision of the arbitral tribunal, as is the intent of the specific measures prescribed by the Tribunal, Australia would no longer see the need for such measures. Nonetheless, I would have preferred that any action in this regard had been the subject of specific measures and the matter should not have been left for interpretation of the general measure prescribed in paragraph 90(1)(a).

4. For similar reasons, I dissented from the Tribunal's decision in paragraph 90(1)(b) to prescribe, as a provisional measure, that the parties "shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render". The Tribunal should, in my view, have refrained from enacting, as a measure binding in international law, such a broadly worded measure.

(Signed) Gudmundur Eiriksson