

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