

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, *misura 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

