SEPARATE OPINION OF VICE-PRESIDENT NELSON

These observations will deal briefly with the role of section 1, in particular article 282, in the scheme of the dispute settlement system contained in Part XV of the Convention.

1. At the outset it is necessary to note that States Parties are free to settle disputes concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 280 makes this quite clear. It reads as follows:

> Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by *any peaceful means of their own choice*. (Emphasis added)

2. The whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention. That was the intent of the drafters of the Convention. In a memorandum with respect to the negotiating text on this matter President Amerasinghe stated that: "[w]hile imposing the general obligation to exchange views and to settle disputes by peaceful means, these articles give complete freedom to the parties to utilize the method of their choosing, including direct negotiation, good offices, mediation, conciliation, arbitration or judicial settlement" (UN Doc. A/CONF.62/WP.9/Add.1, *Off. Rec.* V., p. 122). The view was also put forward that "when an agreement existed between parties to a dispute whereby they had assumed an obligation to settle any given dispute by recourse to a particular method, that agreement should have precedence over the procedures agreed upon in the new Convention" (Statement by the Japanese delegation at the 60th plenary, paragraph 55, *ibid.*, p. 27. See too the observations of Argentina at the 59th plenary, paragraph 46, *ibid.*, p. 18, and the *Virginia Commentary* V, p. 26).

3. It is in this context that article 282, which has been the subject-matter of much debate in this case, should be read. It states that:

> If the States Parties which are parties to a dispute *concerning the interpretation or application of this Convention* have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree. (Emphasis added)

4. This provision, in my view, constitutes a hurdle which ought to be crossed before the procedures in section 2 of Part XV can be invoked. It contains certain requirements which must be met before the mandatory procedures in section 2 can be utilised.

5. The requirements are as follows. First, the dispute between the parties must concern the interpretation and application of the Convention on the Law of the Sea. Secondly, the parties must have entered into an agreement – general, regional, bilateral or otherwise – to submit such dispute to a procedure that entails a binding decision. It will be remembered that in the *Southern Bluefin Tuna Award* (39 ILM 1359 (2000)) where the companion article 281 was at issue, the Arbitral Tribunal found it necessary to deal with the expression "and the agreement between the parties does not exclude any further procedure" (see article 281, paragraph 1). That Tribunal came to the conclusion "that Article 16 of the 1993 Convention 'exclude[s] any further procedure' within the contemplation of Article 281(1)" – though not expressly (paragraph 59, p. 1390, *ibid.*). Justice Sir Kenneth Keith in his Separate Opinion, relying on the same requirement in article 281, came to a very different conclusion, holding that Article 16 of the Convention for the Conservation of Southern Bluefin Tuna did "not 'exclude' the jurisdiction of this tribunal in respect of disputes arising under UNCLOS" (paragraph 30, p. 1401, *ibid.*).

6. The point being made here is that it is in the requirements contained in articles 281 and 282 that can be found the crucial test whereby there can be any resort to the compulsory procedures embodied in section 2 of Part XV. In other words the bar created by these articles can only be circumvented when the requirements are met.

7. For the reasons given in the Order, I am in agreement with the Tribunal that "for the purpose of determining whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction, article 282 of the Convention is not applicable to the dispute submitted to the Annex VII arbitral tribunal"

(paragraph 53). However, I have doubts concerning the reach of paragraph 51, which may well render article 282 or article 281 ineffective.

8. These observations should not be construed as denying the centrality of the dispute settlement procedure in the scheme of the Convention, so eloquently described by President Amerasinghe as being "the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently ... Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably" (A/CONF.62/WP.9/ADD.1, *Off. Rec.* V, p. 122, also cited by Sir Kenneth Keith in his Separate Opinion).

(*Signed*) Dolliver Nelson