RESPONSE AND COUNTER-REQUEST FOR PROVISIONAL MEASURES SUBMITTED BY JAPAN

In The Dispute Concerning
Southern Bluefin Tuna

Australia and New Zealand
v.
Japan

Response of the Government of Japan to Request For Provisional Measures & Counter-Request For Provisional Measures

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Part I

I. Introduction

1. With self-contradictory claims of urgency, Australia and New Zealand[1] have come to the wrong forum to resolve baseless claims relying on bald statements of opinion dressed as fact. In doing so, they seek to avoid their responsibility for failing to cooperate in the operation of the Commission of the Convention for the Conservation of the Southern Bluefin Tuna ("Commission" and "CCSBT") and in the scientific research necessary to make the Commission effective.

2. One would never know from the papers submitted by Australia and New Zealand that the Commission in recent years has invited expert scientists, independent of member nations, to assess essential and pressing scientific issues relating to the Commission's work. Nor could one know from Applicants' papers that those scientists have advised the Commission on the issues presented to this Tribunal as grounds for urgent action – let alone that their advice is in conflict with what Australia and New Zealand advance here.

3. The experts who have been consulted by the Commission in the past 18 months, including in connection with the establishment of a joint experimental fishing program, are Mr. J.J. Maguire and Drs. Patrick Sullivan, Robert Mohn, and Syoiti Tanaka. We requested that they provide their views, pursuant to which they have submitted a joint statement concerning major scientific issues presented by Australia and New Zealand in their request for provisional measures. Of most immediate significance, they make clear that there will not be irreparable damage to the southern bluefin tuna ("SBT") from Japan's experimental fishing program ("EFP"):

> "[G]iven that the expected catches from the EFP are smaller than recent quotas for the country undertaking the EFP, it would be possible to decrease that country's quota in future years to compensate for any detectable negative effects on the stock."[2]

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[1] Australia and New Zealand will sometimes hereafter be referred to collectively as "Applicants".

[2] Southern Bluefin Tuna: Panel Statement on Experimental Fishery Program by J.J. Maguire, Patrick Sullivan, Robert Mohn and Syoiti Tanaka (4 August 1999), p. 4, submitted herewith as **Annex 1**.

4. Thus even assuming that there is jurisdiction over this case, and assuming that other legal hurdles for the prescription of provisional measures could be overcome, the simple fact is that there is no risk of damage to the SBT that could not be remedied later. This fact alone precludes the imposition of the provisional relief Australia and New Zealand request, and their application should be dismissed. We turn now to a brief statement of the relevant facts and summarize Japan's legal arguments in response to this request.

II. STATEMENT OF FACTS

5. This matter arises from disagreement and dysfunction under the CCSBT. The CCSBT was signed and ratified by Japan, Australia, and New Zealand, and it entered into force on May 20, 1994. They are the only three member nations, but the CCSBT is open for accession by other nations. There are other countries and an area with significant catches of SBT, in particular Indonesia and the Republic of Korea, along with Taiwan, and the annual catch of the latter three combined is believed to be nearly as large as that of either Japan or Australia.

6. Japan is dependent on the resources of the sea and has, therefore, an overriding concern with conservation as well as optimum utilization of the fruits of the sea. The Japanese diet includes, on average, 70 kilograms of marine products per person per year, far exceeding that of most other industrialized nations. To meet these needs, Japan has a well-developed fishing industry but also is an importer of substantial amounts of ocean products from other countries and an area. Japan thus has important national interests in the conservation and optimum utilization of these resources, and international cooperation in matters relating to the sea is of great importance to Japan. Japan also is the principal consuming nation of SBT; approximately 90% of the global catch is sold on the Japanese market. Thus, for Japan the conservation and use of SBT is a matter of sustaining an important resource for its people now and in the years to come; for other nations, this is mostly a matter of the allocation of market shares in sales to Japan.

A. EARLY COOPERATION TO CONSERVE SBT

7. Japan first developed the SBT fishery in the 1950s.[3] Australia joined soon after. Whereas Japan engaged in high seas fishing by longlines, Australia

[3] This Statement of Facts is derived from the Declaration of Dr. Sachiko Tsuji (6 August 1999), submitted herewith as **Annex 3**, as well as the Statement of Douglas S. Butterworth, Ph.D. submitted as **Annex 2,** and the Declaration of Masayuki Komatsu (6 August 1999), submitted herewith as **Annex 4**.

primarily fished by net in its coastal waters and in what is now its exclusive economic zone ("EEZ") and targeted juvenile fish (0–1 years) for canning. By 1971, Japan realized that its fishing for SBT over the spawning grounds south of Java was adversely affecting the stock, and the Japanese industry refocused its efforts on other locations by establishing time and area closure on a voluntary basis.

The Japanese catch hit its peak in 1961 and has declined since. The Australian industry developed rapidly in the latter 1970's and early 1980s. Because of its focus on juvenile fish, the Australian catch was recognized as having a significant adverse effect on SBT stock.

8. Japan, Australia, and New Zealand began informal efforts to cooperate in the conservation and utilization of SBT in 1982. In that year, the first limits on SBT catch were established, applicable primarily to the Australian surface fishery because of the toll that exploiting large numbers of juvenile fish was having on the stock and applicable to a lesser extent to New Zealand, which was then developing its industry. In 1985, the nations agreed on an annual total allowable catch ("TAC") applicable to all their fisheries, and quotas for each nation were agreed upon. In negotiations each year thereafter through 1989, the TAC, as well as each nation's allocation, was reduced. As a result of these conservation efforts, Japan bore the largest share of quota reductions of the three nations when in 1989 its quota was reduced to 6,065 tons from its high in 1985 of 23,150, a 74% reduction.

9. The three nations continued to cooperate on conservation measures informally, and each year from 1989 through adoption of the CCSBT they agreed upon a TAC and national quotas. Australia also insisted that the annual TAC and quotas be agreed upon before it would engage in discussions of its annual bilateral fishing agreement with Japan, which discussions were necessary to permit Japanese vessels to fish in Australia's EEZ or enter its ports.

B. COOPERATION UNDER THE CCSBT

10. The CCSBT formalized the three nations' cooperative relationship and has as its goal the conservation and optimum utilization of the SBT. The Convention established a Commission, which is to facilitate the Convention's goals through consensus. All three nations must agree before the Commission may take action. Advised by a Scientific Committee, the Commission has authority to set an annual TAC and national quotas. As with all other actions, the TAC and quotas can be set only by consensus; no nation can be required to comply with a quota to which it did not agree.

The Commission also is empowered to conduct scientific studies and to facilitate in the sharing of scientific information among the three parties, each of which is encouraged to conduct its own scientific investigations.

11. When the Commission was convened, it established as a long-term management goal the recovery of the SBT spawning stock biomass ("SSB") to the levels of 1980 and subsequently set a target to do so by the year 2020. This level was targeted because earlier research had shown that although the SSB had declined substantially before 1980, there had not been a corresponding decline in the number of fish joining the catchable stock (referred to as "recruitment"), which suggested that the stock was or would be completely self-sustaining at the 1980 SSB levels. Thus, no one in the scientific community believes that return to the 1960 SSB level is necessary or even desirable.

12. To accomplish these management goals, the Commission in 1994 established a TAC for that year of 11,750 tons, and national quotas of 6,065 tons, 5,265 tons, and 420 tons for Japan, Australia, and New Zealand, respectively. The same TAC and quotas were adopted for each year through 1997. There has been no agreement to an annual TAC or national quotas since then. Although they have previously called for mutual reductions of the quotas, Australia and New Zealand have advised that they intend to maintain their national catches at the limits of the 1997 allocation, and Australia has stated to this Tribunal that it is required as a matter of its own domestic law not to exceed the catch last agreed upon by the Commission. There is no such requirement in the CCSBT itself.

13. Based on its analysis of all available data respecting SBT abundance over the last decade, Japan has been persuaded that the stock is recovering from historic lows and that it would be possible for the Commission to increase the TAC and quotas and still meet the management objectives established by the Commission. This is consistent with the twin objectives of the CCSBT: to conserve and to provide for the optimum utilization of SBT. Australia and New Zealand have not agreed. Indeed, New Zealand has sought to decrease the TAC.

14. In order to minimize the scientific uncertainty giving rise to these diverging assessments, Japan proposed that there be an experimental fishing program to improve the data concerning abundance in those areas and times not fished commercially in recent times and to clarify whether it would be possible to increase the catch without affecting the ability to meet the management objective for recovery.

15. Australia's scientists acknowledge the usefulness of an experimental fishing program in reducing scientific uncertainty:

> "Experimental fishing programs (EFP) can be an effective tool for improving the management of a fishery resource in terms of conservation and optimal utilisation. In the context of the CCSBT discussions . . . an experimental fishing program allows for short-term additional catches, taken in a controlled manner, to provide specific information to improve management of the stock. The reason for considering an EFP is that fishery stock assessments can contain many uncertainties and different interpretations of available data can lead to divergent estimates of appropriate catch levels."
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> T. Polacheck & A. Preece, "A Scientific Overview of the Status of the Southern Bluefin Tuna Stock" at para. 30 (Annex 4 to Australia's Request for Provisional Measures) (referred to below as "Polacheck/Preece Report").

16. In 1996, after Japan made such proposals, the Commission's Scientific Committee invited independent scientific experts Dr. D. Butterworth and Dr. R. Hilborn to join with the parties in assessing the likelihood of recovery of the SBT parental spawning stock to its 1980 level by 2020, the management objective of the Commission. In fact, the parties and the independent scientists assessed the likelihood of reaching that goal if the TAC were increased by 3000 tons for three years to permit an experimental fishing program, followed by a decrease of the same amount for three years. Japan assessed the prospects of recovery as 75%. The independent scientists assessed the likelihood as 67%. Australia and New Zealand considered the likelihood to be much lower. *See* **Annex 2**, paras. 43–44; **Annex 19**, pp. 104497–99. Moreover, although Australia and New Zealand's predictions for recovery in these circumstances was only slightly different than their predictions assuming no increase in the catch, they refused to agree to an experimental fishing program, alleging that any impact – even a slight impact – on the chances for recovery was not acceptable.

17. Japan continued over the next two years to try to develop a joint experimental fishing program with Australia and New Zealand, but neither was willing to give the matter fair consideration. At the start of 1998, in the absence of an agreed TAC 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. And in July and August 1998, Japan conducted a pilot experimental fishing program.

C. EXPERIMENTAL FISHING PROGRAM

18. The experimental fishing program has as its principal purpose testing two competing hypotheses concerning the distribution of the SBT population. Japanese scientists had concluded that the parties' differing adherence to the two hypotheses in calculations to determine the fish stock accounted for approximately 2/3 of the difference in their assessments.

19. The two hypotheses are referred to as the constant squares hypothesis and the variable squares hypothesis. These two hypotheses reflect diametrically opposite explanations for the fact that spatially and temporally grounds fished by Japanese longline vessels have contracted since the early 1990s. One view attributes this contraction to economic considerations largely independent of fish distribution, whereas the other attributes it to an assumed contraction in the times and locations where fish are present. The constant squares hypothesis holds that areas formerly but no longer fished have roughly the same density of fish as those that currently are fished; the variable squares hypothesis holds that the areas that are no longer fished have no SBT at all. The two hypotheses are recognized as extremes; it is accepted that reality is somewhere in between. In stock assessments, the parties give different weights to the different hypotheses, which results in wide disparities in stock assessment.

20. As alluded to earlier, in 1998, the CCSBT Commission convened a "peer review" panel to evaluate the quality of the scientific analyses being used by the Commission's Scientific Committee and to facilitate achieving greater levels of the consensus on which the Commission was dependent, but then lacked. The members of the Peer Review Panel were Dr. S. Tanaka, Dr. P. Sullivan, and Mr. J.J. Maguire. The Peer Review Panel recently commented on the competing hypotheses as follows:

> "Clearly the variable squares approach, which assumes that there are zero fish in all of the squares that were once fished, but that are not fished in a given year, is not a realistic assumption. It must be considered as an extreme case and there is a high probability that the true CPUE [catch per unit effort] is somewhat higher. The same cannot be said of the constant square assumption, and although it is unlikely that the abundance in unfished squares will be exactly the same or higher than in fished squares, this approach could be realistic in some years, and not in others."

Annex 13, p. 106642. Notwithstanding this assessment, Australia and New Zealand continue to give primary emphasis to the variable squares hypothesis found by the Panel to be "not a realistic assumption."

21. The Panel further observed that "[w]ith regard to the specific issue of how stock abundance is distributed (i.e., constant squares vs. variable squares assumptions), it is only by gathering data from those areas where no commercial fishing takes place that this problem is likely to be resolved in the short term." *Id.* at p. 106639. The Panel also recognized that experimental fishing – fishing where commercial operations ha[ve] not occurred recently – is a reasonable means to do so. *Id.* at p. 106642. This is exactly what Japan did on a pilot project basis in 1998.

22. The data obtained from the 1998 pilot EFP demonstrated that such a program could be designed properly to obtain useful data; it also showed that the fish densities in unfished areas refuted the variable squares hypothesis; the data showed variations in densities over time and space that warranted full-scale investigation; and, by validating the attribution of greater weight to the constant squares hypothesis, this research suggested that fish abundance was substantially greater than previously assessed and was increasing and that any effects of the study on the SBT population was completely subsumed by the increased population indicated by it to exist.

23. Far from taking comfort in these results or trying to advance the research effort, Australia and New Zealand lodged Notes Verbale with Japan complaining that the EFP program violated obligations under the CCSBT and seeking dispute resolution under that treaty. Although reference was made generally to the United Nations Convention on the Law of the Sea ("UNCLOS"), no specific provision of UNCLOS was mentioned as the basis for the dispute, and dispute resolution under UNCLOS was not initiated.

24. The parties then embarked on an effort to resolve the dispute through negotiations of a rather concrete sort. In December 1998, they agreed to establish a triparty Experimental Fishing Program Working Group ("EFPWG") and directed it to report to the CCSBT Commission with a proposed experimental fishing program ideally by April 1999. **Annex 7**, pp. 107274–107275. In addition, building on the benefits perceived from involvement of independent experts in the Peer Review Panel, the parties were directed that a group of independent scientists be convened to assist the EFPWG in developing a joint experimental fishing program. They were further directed that if consensus could not be achieved, "the Parties may invite the independent scientists to play an adjudicating role in completing the Working Group's advice to the Commission." *Id.* at p. 107274.[4]

[4] *See* Declaration of Masayuki Komatsu, para. 11 (**Annex 4**). Formal Terms of Reference providing for this adjudicating role were later developed and agreed to. See **Annex 8**, pp. 106682–106684.

The scientists selected for this purpose were Drs. Tanaka, Sullivan, and Mohn.

25. The EFPWG met over the first several months of 1999. Initially, it appeared that considerable progress was being made toward agreement on a joint EFP. The parties seemed to have agreed that the EFP should, as Japan had proposed, continue to test the constant squares vs. variable squares hypothesis, that it would be important to do so in a multi-year program at appropriate times and locations to evaluate whether there was significant annual variation, as well as other variation among other time/space strata. Australia proposed to include a tag-and-release component, which was agreed to on a pilot basis. Australia also proposed to have the test locations be picked randomly, which Japan offered to do on a pilot basis. Many other terms and conditions were tentatively agreed. During the 1999 EFP negotiations, Australia and New Zealand advocated a trilateral EFP in the range of 1,200 to 1,500 tons and considered even larger amounts.

26. By mid-April 1999, only a few subjects remained for resolution. One was whether, and if so how, so-called decision rules had to be agreed upon before the EFP could begin. In the absence of agreement, the independent scientists offered a resolution.[5] Japan agreed to their proposal; Australia and New Zealand did not. Then, in late April, Australia proposed a completely new conceptual plan. In addition, Australia proposed and insisted upon developing entirely new indices effectively to alter significantly the existing assessment system by replacing the current indices derived from the catch rate of the commercial fishery. Japan resisted, because the plan that had been worked out by the parties previously needed to get started in June or could not be conducted in 1999, and thus there was not enough time to develop the Australian concept. There were also considerable problems with pragmatic and theoretical underpinnings of this new approach. Japan sought concurrence from Australia and New Zealand to begin the EFP in June. They did not agree, and Japan began the EFP it had proposed, with modifications agreed upon through the EFPWG process, on June 1, 1999. The EFP will continue through the end of August, during which time the experimental vessels are anticipated to catch approximately 2000 tons of SBT.

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[5] *See* Fourth Joint Experimental Fishing Program Working Group Meeting (EFPWG(4)) – Record of Discussions and Work Program; Tokyo, 12–15 April 1999 (**Annex 11**); Southern Bluefin Tuna: Panel Statement on Experimental Fishery Program (**Annex 1**); Declaration of Dr. Sachiko Tsuji at para. 53 (**Annex 3**).

D. THE CURRENT DISPUTE

27. Once again, Australia and New Zealand reacted inappropriately, serving Notes Verbale complaining of alleged breaches of obligations under the CCSBT. They contended that Japan's initiation of the EFP in 1999 terminated the dispute resolution process under the CCSBT, which they characterized only after the fact as being under UNCLOS as well. They insisted that Japan terminate the EFP or face unspecified legal action. Japan offered mediation under the CCSBT. Australia and New Zealand refused unless Japan would agree to terminate the EFP, the very matter in dispute. Japan declined, but offered binding arbitration under the CCSBT. Australia and New Zealand again refused unless Japan would agree to terminate the EFP; Japan declined. Australia and New Zealand then initiated these proceedings for arbitration under Annex VII of UNCLOS and also sought provisional measures pending constitution of the arbitral tribunal.

III. SUMMARY OF ARGUMENT

A. THERE IS NO JURISDICTION TO PRESCRIBE PROVISIONAL REMEDIES

28. It is clear that the gravamen of the claims being asserted concern the CCSBT. The contention that Japan has somehow violated provisions of UNCLOS calling for cooperation and conservation cannot be taken at face value in light of the undisputed facts: the history of Japan's cooperation with Australia and New Zealand in the conservation and management of SBT, first informally and more recently through the CCSBT; the fact that nearly the same amount of SBT as Japan catches is being caught by non-parties to the CCSBT and that do not have Japan's record of conservation or cooperation; and the fact that those non-parties have not been sued by Australia and New Zealand.

29. What Applicants really assert is some sort of lack of cooperation under, or other violation of, the CCSBT. The provisions of UNCLOS on which they rely do not have the specific compulsory meaning Applicants contend; it is only by reference to the CCSBT that those provisions are attributed specific content. Put differently, if this matter were resolved by any of the means available under the CCSBT, the Applicants would have no remaining independent claim under UNCLOS – if they were to prevail, their claims would be moot, and if they were to fail it would be because the acts of which they complain are permitted by the specific treaty to which they are parties, and they would have no standing to complain otherwise. Thus, much as they dress up their claims to try to avail themselves of

UNCLOS's provisional measures provisions, the claims are claims under the CCSBT.

30. That this is a dispute under the CCSBT has immediate consequences for this Tribunal's jurisdiction. UNCLOS Article 290(5) permits this Tribunal to contemplate imposition of provisional measures only if the Annex VII arbitral tribunal would have *prima facie* jurisdiction of the underlying dispute.[6] Article 288(1), which Applicants cite as the sole basis for jurisdiction, permits the invocation of UNCLOS dispute resolution jurisdiction only for disputes concerning the interpretation or application of UNCLOS.[7]

31. Moreover, recourse to UNCLOS Part XV Section 2's procedures may be had only after good faith attempts at settlement have failed. That cannot be said to have occurred here. The process initiated by the Applicants in August 1998 specifically invoked dispute resolution under the CCSBT, not UNCLOS. The procedures under the CCSBT provide for resolution by "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice," and permit resort to mediation, arbitration, or judicial settlement only by mutual consent. CCSBT Article 16. The CCSBT procedures have not been exhausted. Australia and New Zealand have claimed that Japan terminated all consultations and negotiations by beginning the EFP, but that is fiction; Japan has expressly agreed to continue consultations and negotiations, and in fact has offered mediation or arbitration. That Japan would not capitulate and moot the case by stopping the EFP as a condition precedent to mediation or arbitration under the CCSBT does not afford any basis to Australia or New Zealand to bypass those procedures now.

32. Applicants' efforts to force Japan to capitulate before they will agree to pursue the dispute resolution processes of the CCSBT bespeaks bad faith on their part. So, too, does the fact that fishing conducted by their own nationals causes the same – indeed even more – potential damage for the SBT than that which might be created by Japan. Equally telling is the failure of Australia or New Zealand even to initiate consultations, let alone binding

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[6] *See* Takane Sugihara, Moritaka Hayashi, Shigeki Sakamoto, Atsuko Kanehara, and Akira Takada, "Memorandum concerning jurisdiction in the dispute between Australia/ New Zealand and Japan" (6 August 1999), submitted herewith as **Annex 6**.

[7] Although not raised by Australia or New Zealand as a basis for jurisdiction, an analysis of Article 288(2) also clearly demonstrates no basis for jurisdiction. No court or tribunal has jurisdiction in the instant dispute, because it is a dispute concerning the interpretation or implementation of the CCSBT, and no party has "agreed otherwise" to jurisdiction.

dispute resolution under UNCLOS, with the non-parties to the CCSBT that are engaged in fishing for SBT.

33. As a final point regarding jurisdiction, even if the application is deemed to arise under UNCLOS, Applicants have not satisfied the conditions precedent to binding dispute resolution under Part XV. Article 283 requires a full and mature exchange of views before resort may be had to Part XV. The only exchanges to have occurred thus far were with respect to the CCSBT. Australia and New Zealand have not provided the opportunity for such exchanges under UNCLOS. Australia and New Zealand did not identify any provisions of UNCLOS they allege to have been violated (or how) until June 1999, shortly before initiating this action. Having refused to engage in any meaningful exchanges thereafter by imposing pre-conditions on their willingness to do so that could not be accepted, Australia and New Zealand should not be permitted to claim that they have fulfilled their obligations under UNCLOS to exhaust consensual dispute resolution. For all these reasons, this Tribunal should deny relief because it lacks *prima facie* jurisdiction.

B. APPLICANTS HAVE NOT SHOWN IRREPARABLE DAMAGE OR ANY OTHER BASIS FOR RELIEF

34. Assuming that the Tribunal were to have an appropriate jurisdictional predicate for acting now, it nonetheless should decline to do so. First, there is no reason to believe that the Annex VII arbitral tribunal cannot be constituted in time to consider any request for provisional relief. There is no damage, let alone irreparable damage, that would occur between now and when the panel might act provisionally, and thus no basis for this Tribunal to act under Article 290(5).

35. More generally, there is no irreparable damage of any sort present here that would warrant intervention. As noted at the outset, Japan's experimental fishing will not cause irreparable damage. If Australia and New Zealand were to prevail on the merits and demonstrate that this fishing had caused adverse effects, which Japan denies, they could be fully compensated by future reductions in Japan's catch. Indeed, they are hardly in a position to deny that future reductions would provide relief – that is precisely the relief they request, by seeking reductions in this year's catch based on last year's pilot EFP. This is also the remedy they have followed in the past when they have exceeded agreed quotas.

36. Australia's and New Zealand's further efforts to allude to irreparable damage fall apart under scrutiny. The most they claim with respect to SBT is a threat to stock recovery "in both the medium and long term," *see*, e.g., Australia's and New Zealand's Requests for Provisional Measures, para. 21, but provisional remedies are permissible only to prevent irreparable damage that will occur before resolution of the merits – surely before the medium term, let alone the long term. Moreover, the evidence on which they rely, one-sided and extreme as it is, still acknowledges that any damage is speculative; their own scientific experts offer no suggestion that the damage could be predicted to occur with reasonable probability. Again, provisional remedies are intended to prevent irreparable damage that is reasonably probable of occurring. Mere speculation will not suffice.

37. Further, the relief they request is not capable of averting the damage they allege. As Australia and New Zealand make plain in their papers, several other countries and an area fish for SBT without being subject in any way to the CCSBT or any other voluntary limitations on their catches. Indeed, Australia and New Zealand acknowledge that the damage they seek to avert arises at least equally in part from such non-party catches. Yet those non-parties to the CCSBT are not before the Tribunal. There is no way that restraining Japan's catch can affect those non-parties' catches to avert the harm alleged. To the contrary, it is just as likely that these non-parties will pick up the slack and catch more.

38. The conduct of Australia and New Zealand also belies any urgency or irreparable damage. If the SBT stock were in fact on the verge of collapse due to current fishing levels, then Australia and New Zealand could not, consistent with that position, continue with their own fishing. Yet they are, and in fact the Australian domestic catch levels have actually *increased* over the last 6 years for which there are data – this at a time when New Zealand has been pressing for lower quotas in the Commission.

39. Provisional measures are also not needed to protect any rights of Australia or New Zealand under UNCLOS. Their request to order a halt to the EFP has no validity because they have no rights that could be affected by Japan's 1999 EFP. Even if there were, it is hard to imagine that interrupting the last few days of the 1999 program could have any material effect on the preservation of their rights. Conversely, imposition of the remedies requested would damage rights of Japan.

40. Before prescribing provisional measures, the Tribunal must consider the respective rights of the parties, not only those of the Applicants. In this

instance, Japan clearly has a right to pursue scientific investigations of the SBT stock. It has undertaken an experimental program, which is not itself commercially viable, at significant expense to itself and to its fishing industry, for the purpose of trying to reduce the principal cause of variability in current stock assessments, and thereby to provide a basis for bringing the parties to the CCSBT closer together and facilitate the consensus on which the CCSBT depends. The utility of the EFP depends on obtaining similar data over consecutive years; a three year program is generally considered the minimum in order to have full confidence in the results. Thus ordering cessation of the EFP, as Applicants request, would infringe the rights of Japan and would disserve the interests of science, on which conservation and optimum utilization of the SBT depend.

41. Finally, in considering whether or not to prescribe the provisional remedies requested, the Tribunal must consider that what Australia and New Zealand propose is final relief for damage that they claim already has occurred, not provisional relief to prevent injury pending resolution of the case. There is no other way to construe their contention that the amount of fish caught in the 1998 pilot EFP and in this year's EFP must be paid back out of current and future years' commercial catches. Any such relief is wholly inappropriate as a provisional measure.

C. CONDITIONAL COUNTER-REQUEST FOR PROVISIONAL REMEDIES

42. If the Tribunal were to find that there is jurisdiction to prescribe provisional measures and that some form of action is warranted, then it should take account of how Australia and New Zealand have frustrated the functioning of the CCSBT and are rendering it ineffective. It is acknowledged by all concerned that management of the SBT stock cannot take place among Japan, Australia, and New Zealand alone. The other SBT fishing countries and an area must be brought in as members or cooperating entities under the CCSBT regime. Australia and New Zealand have made that impossible. No other country or area, seeing how Australia and New Zealand use the consensus requirement under CCSBT as an invitation to veto, rather than as a mandate for compromise, have been willing to join such an organization. No other country or area, seeing how Australia and New Zealand are unwilling to consider legitimate scientific evidence and experimentation that might permit expansion of the catch, will join an organization in which they will be required to give up current catches. And no other country or area will want to risk being prematurely and unjustifiably hauled before an international tribunal as a result of joining an organization with

Australia and New Zealand. To the outside world, there is no room at the table for anyone other than Australia and New Zealand, which is a prescription for failure.

43. The only remedy that makes any sense, if there is to be any, is for this Tribunal to prescribe that Australia and New Zealand urgently resume negotiations and consultations under the CCSBT with a view toward reaching agreement on the TAC, annual quotas, and the continuation of the EFP on a joint basis. Moreover, since these are at bottom matters highly dependent on scientific expertise, then, absent agreement on such matters within six months, Australia and New Zealand should be directed to agree to revert to the processes contemplated by the process agreed upon in December 1998 (and discussed in Paragraph 24 above), whereby the parties may refer unresolved issues to the independent scientists they have engaged to help bring about a resolution.

IV. STATEMENT OF LAW

A. INTRODUCTION

44. This case involves nothing more than a disagreement about a matter of science: the proper method for assessing the stock of SBT and the formulation of an EFP designed to contribute needed scientific data to improve the assessment of SBT stocks. The disagreement arose under the CCSBT and has been the subject of extended discussions among the parties in the context of the CCSBT's dispute resolution procedures, which have not run their course. The matter has nothing to do with the UNCLOS.[8]

45. Although various scientists have taken different views, substantial scientific evidence (including the views of a panel of independent scientists formed by the CCSBT to provide peer review of these issues) supports the positions that Japan has taken throughout these discussions. Thus it is a serious mischaracterization, whether directly or by implication, to portray Japan as having embarked on the EFP as a pretext for increasing its commercial SBT catch or as having acted without due regard for the proper conservation and management of the SBT stock. In short, nothing in the situation warrants action by the Tribunal to prescribe provisional measures.

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[8] *See* William T. Burke, "Memorandum concerning jurisdiction in the dispute between Australia/New Zealand and Japan" (2 August 1999), submitted herewith as **Annex 5**.

B. THIS MATTER DOES NOT ARISE UNDER UNCLOS AND IS NOT WITHIN THE JURISDICTION OF AN ANNEX VII TRIBUNAL

46. 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.[9] 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.

i. The Disagreement Among the Parties Arises Solely under the CCSBT and Involves Issues of Science over which Reasonable Scientists Can Differ, Not Principles of Law

47. The events that underlie Australia's and New Zealand's application to this Tribunal arose under CCSBT. They involve a long course of attempts by Japan under that Convention to work with Australia and New Zealand to establish TAC limits for 1998 and 1999 and to negotiate a mutually acceptable experimental fishing program. The difference of views between Australia and New Zealand, on the one hand, and Japan, on the other, is about factual issues: the need for better data on SBT stocks and the scientific validity of an experimental fishing program. It is not about abstract legal principles of cooperation or conservation.

48. Indeed, until they abruptly changed course in order to file this case as a dispute under UNCLOS, Australia and New Zealand treated the matter as one arising under the CCSBT, not UNCLOS. Up to May 31, 1999, Australia and New Zealand consistently described the consultations between Japan and Australia/New Zealand as consultations under CCSBT Article 16(1) concerning a dispute on the interpretation or implementation

[9] Australia and New Zealand purport to predicate jurisdiction solely on Article 288(1) of UNCLOS, which provides for jurisdiction "over any dispute concerning the interpretation or application of this Convention [UNCLOS]. . . ." *See* New Zealand Request for Provisional Measures, paras. 22, 25.

of the CCSBT. Such consultations on this difference of views began on August 31, 1998, with Australia's Note Verbale (NoLGB98/318)[10] as the opening salvo. The subject of the discussion from that point until May 1999, was always regarded as a question of the interpretation or implementation of the CCSBT.

49. For example, in Japan's Note Verbale (162) to New Zealand of September 9, 1998,[11] Japan stated its intention to begin consultations under Article 16(1). In response, New Zealand's Note Verbale (40/12/10/3) of September 10, 1998,[12] stated:

> "In connection with the Government of New Zealand's request for consultations to agree on a process for resolving the dispute between the two countries over the legality of the unilateral experimental fishing programme . . . New Zealand reiterates the grounds set out in its Note of 31 August [701/14/7/10/3] which disclose the existence of a dispute in respect of the interpretation or implementation of the Convention [for the Conservation of Southern Bluefin Tuna]."

50. In this document, New Zealand went on to remark: "References to acting 'inconsistently' with the Convention [for the Conservation of Southern Bluefin Tuna] including the 'decision-making process set out in the Convention' are clearly references to matters of interpretation of the Convention, in the same manner as references to the Law of the Sea Convention and to customary international law are references to matters of implementation of the Convention." That is, New Zealand itself treated the instant dispute as concerning the interpretation or implementation of the CCSBT and stated unmistakably that the UNCLOS only applied as it related to the interpretation or implementation of the CCSBT.

51. Even in the current year, in its Note Verbale (701/14/7/10/3) of June 24, 1999,[13] New Zealand stated: "There is no doubt that a dispute settlement process has been initiated and was continuing under the 1993 Convention [the CCSBT] up until 31 May, 1999."

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[10] *See* **Annex 17** at 1.
[11] *See id.* at 12.
[12] *See id.* at 17.
[13] *See id.* at 42.

52. Thus, the Applicants recognized, as they must, that the instant dispute arises under the CCSBT. Until May 1999 they, at most, referred to UNCLOS as a factor to be taken into consideration, but they did not assert that the subject of the dispute was a difference of views on the UNCLOS itself. In fact, the settlement dispute procedures under UNCLOS are irrelevant as a solution to the instant dispute. The Applicants belatedly attempt to distort the basic structure of UNCLOS in [a] manner not legally cognizable.[14]

53. That this dispute is not one involving the interpretation or application of UNCLOS is evident from a review of the UNCLOS provisions relied on by Australia and New Zealand, Articles 64 and 116 to 119.[15]

54. UNCLOS Article 64, concerning the conservation and optimum utilization of highly migratory species on the high seas in general, prescribes no specific principles of conservation or concrete conservation measures, nor does it even list the principal factors to be considered in deciding on such measures. It merely creates an obligation of regional (or in some cases global) cooperation. Japan has cooperated in the drafting of the CCSBT and the establishment and management of an international organization under the CCSBT and, accordingly, Japan simply cannot be said to have violated its obligation to cooperate under UNCLOS Article 64. In fact, because of disagreements in the drafting process between coastal countries and fishing countries, UNCLOS left the principles, factors for consideration, priorities and practical measures of conservation for highly migratory fish species on the high seas to be regulated by international agreements on a region-by-region and species-by-species basis.[16]

55. Australia and New Zealand also assert that Japan should be ordered to act in compliance with the precautionary principle with respect to SBT fishing, pending resolution of this dispute. The precautionary principle has not been incorporated in UNCLOS,[17] and there is serious doubt that it has attained the status of a rule of customary international law. In any event, however,

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[14] Memorandum concerning jurisdiction in the dispute between Australia/ New Zealand and Japan (**Annex 6**).

[15] Articles 116 to 119 do not establish any specific cooperation requirements for conservation. The Applicants also cite Article 300, but only as applying the good faith principle to the other articles, not as an independent basis for decision.

[16] Memorandum concerning jurisdiction in the dispute between Australia/ New Zealand and Japan (**Annex 6**).

[17] 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, which is not yet in force, refers to the precautionary approach (not the precautionary principle).

the precautionary principle is a concept that so far is not sufficiently well-defined as to serve as a principle of decision in this case. For this Tribunal simply to order the parties to apply that principle under a treaty such as the CCSBT which simultaneously mandates conservation and optimum utilisation of the SBT stock would provide no practical guidance. To articulate rules to implement the precautionary principle would be a huge undertaking with wide-ranging ramifications for virtually every nation with respect to every conceivable species. It is hardly appropriate to try to develop such rules in these expedited proceedings associated with a single case among only three countries and involving only one species.

ii. Australia and New Zealand Have Not Met The Procedural Requirements For Establishing Jurisdiction Under Part XV, Section 2 of UNCLOS

56. As a condition to invoking the jurisdiction of Article 288(1), Australia and New Zealand must demonstrate that they have fully exhausted opportunities for amicable dispute-resolution procedures under Section 1 of Part XV. Article 286 of UNCLOS incorporates this requirement of exhausting amicable means of dispute resolution by requiring, as a precondition to recourse to procedures under Section 2 of Part XV, that the parties attempt and fail to reach a settlement under the procedures prescribed by Section 1. The intent of Section 1 is to discourage parties from precipitously invoking procedures under Section 2 and to require them first to make their best efforts to resolve the dispute through negotiation or other agreed peaceful means. Australia and New Zealand have failed, in several respects, to comply with this obligation to seek an amicable settlement in good faith.

a. Recourse to the Provisions of Part XV of UNCLOS Is Precluded by Article 281 Because the Parties Have Embarked on a Settlement Process that, by its Own Terms, Has Not Yet Run its Course

57. Article 281 of UNCLOS provides that where:

"States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure."

This provision applies to the recourse Australia and New Zealand are now seeking, since both the invocation of arbitration under Article 287 and the application for provisional measures under Article 290 are "procedures provided for in this Part," namely Part XV.

58. Whether or not the dispute described by Australia and New Zealand properly can be described as raising issues under UNCLOS (Japan submits that this contention is not correct), there can be no doubt that the underlying dispute, implicating the same issues of science, arises under the CCSBT. The latter Convention prescribes a dispute-resolution mechanism to which the parties have agreed. Article 16 of the CCSBT requires the parties to attempt to agree on resolution of any such dispute by "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice." If the dispute is not resolved otherwise it shall, with the consent of the parties, be referred to arbitration under the CCSBT or to the International Court of Justice ("ICJ"). While adoption of either of these latter means requires the consent of all the parties involved, declining to consent does not put an end to the matter. Article 16 of the CCSBT requires the parties to continue to seek resolution by one of the means enumerated above. In short, under Article 16 of the CCSBT, the parties have agreed to continue negotiating among themselves until they either resolve the substance of the dispute or agree on a mechanism for third-party intervention to help resolve it.

b. The Claim Asserted by Australia and New Zealand is Made in Bad Faith and Constitutes an Abuse of Right Under UNCLOS

59. The record leaves no doubt that procedures were commenced under Article 16 of the CCSBT, but then aborted by Australia and New Zealand in an attempt to aggravate the dispute, to avoid their obligations under Article 16 of the CCSBT and to create a spurious claim under UNCLOS. Both Australia and New Zealand called on Japan to engage in consultations under Article 16 for purposes of resolving the dispute[18] and Japan accepted this invitation.[19] Japan at all times thereafter has been willing to engage in such consultations, has so communicated repeatedly to the other States Parties and has proposed submission of the matter to both mediation and arbitration. Australia and New Zealand rebuffed Japan's efforts, by taking

[18] *See* Australia and New Zealand Notes Verbale of 31 August 1998, **Annex 17** at 1, 5.
[19] *See* Japan Notes Verbale of 9 September 1998, *id.* at 9, 12.

the unjustified position that Japan's decision to conduct the 1999 phase of its experimental fishing program constituted *ipso facto* a termination of negotiations.

60. The disingenuous claim that Japan terminated negotiations by failing to agree to abort the EFP (and thus render the underlying dispute moot) is unfounded. To the contrary, Japan unequivocally, unconditionally and repeatedly has manifested its intention not to terminate discussions and its willingness to continue negotiating with Australia and New Zealand. Indeed Japan proposed that the parties engage in mediation and also agreed to submit to binding arbitration under the CCSBT.[20] Moreover, in contrast to the demand of Australia and New Zealand that Japan terminate the EFP, and thus render it nugatory (see below), as the price of participating in negotiation or mediation, Japan took steps to promote settlement and protect the interests asserted by the other parties by agreeing to reduce its future catches to compensate for the amounts taken during the EFP, should the outcome of the EFP so dictate.

61. Article 16 of the CCSBT makes no provision for a party simply to declare that procedures under it are terminated, as Australia and New Zealand have done, least of all on a basis that is so clearly a pretext as the one the two States have put forth here. Thus, a procedure exists for peaceful resolution of the present dispute, to which the parties have agreed, namely the procedure under Article 16 of the CCSBT, and that procedure has not run its course. To the contrary, that procedure so far has been frustrated by Australia's and New Zealand's unjustified refusal to participate in mediation and eventual arbitration under that Convention, except on conditions that would effectively moot the controversy.

62. Review of the parties' communications shows that all these States have agreed in principle on mediation, subject only to two conditions that Australia and New Zealand attempted to impose, namely that Japan cease the EFP by July 5, 1999, and that the mediation be completed by August 31, 1999.

63. The first of these conditions clearly is contrary to Article 16 of the CCSBT, since it would effectively moot the outcome of the mediation. The EFP – on which the three States had been engaged in discussion over a consid-

[20] *See* Notes Verbale to Australia of 1 June, 15 June and 23 June, *id.* at 26, 32, 35; Notes Verbale to New Zealand of 4 June, 16 June, 24 June and 2 July 1999, *id.* at 27, 33, 40, 51.

erable period of time and on which they had come close to agreement at an earlier point – is an integrated three-year program of experimental fishing, following a 1998 pilot program. It is designed to enhance understanding of the current status and future prospects of SBT stocks. An interruption of the EFP in mid-course would impair its scientific validity and cause the data collected up to the point of interruption to be of lesser value.[21] Thus, when Australia and New Zealand demanded that Japan discontinue the EFP as a condition of their willingness to mediate or arbitrate under the CCSBT, they were, in effect, insisting that Japan concede the outcome of the dispute-resolution procedure before it even had begun. This was not consistent with a willingness to negotiate, mediate or arbitrate in good faith. It was, instead, a demand that Japan render the underlying question moot by destroying the utility of all the EFP work done prior to that time, as well as rendering futile any future work under that program that could be conducted if the procedures under the CCSBT led to the decision that the EFP was proper.[22] Parties required to consult are not entitled to insist the other side unconditionally submit to their views. Indeed, as the ICJ has held, where as here, parties are under a duty to negotiate:

> "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[23]

64. The second condition – the setting of an arbitrary deadline on mediation – also is inconsistent with Article 16, which requires the parties to the CCSBT to continue seeking to resolve disputes until resolution is reached or a binding form of determination is agreed upon.

65. Thus, for the Article 16 mediation process, to which all three States have agreed in principle, to go forward as the CCSBT envisages, it would be

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[21] *See* Declaration of Dr. Sachiko Tsuji, para. 59 (**Annex 3**).

[22] It should be noted that Australia's and New Zealand's approach, rather than serving the ends it purports to advance, would have entirely the opposite effect. If mediation or arbitration under the CCSBT were to yield an outcome validating the EFP, Japan might have to start over again, not only postponing the time at which calculations of TAC under the CCSBT could be based on better scientific data than they have been heretofore, but also causing the additional catch that was involved in the EFP to be scientifically devalued.

[23] *North Sea Continental Shelf* (Germany and Denmark/Netherlands), 1969 I.C.J. at 47.

necessary only for Australia and New Zealand to abandon their unlawful demands.

66. Even if the parties had failed so far to agree on a dispute-resolution mechanism under Article 16, Australia and New Zealand still would be obligated by Article 16 to continue to participate in good faith in efforts to reach agreement with Japan on a mechanism for resolving the dispute. This they have failed to do, clearly in the hope that, by thwarting the implementation of Article 16, they will be able to have recourse to the provisions of Part XV of UNCLOS, which they evidently prefer. Article 281 of UNCLOS, however, stands in their way and provides a basis on which the Tribunal is required to abstain from any action in this case.

67. Australia's and New Zealand's behavior supports only one obvious inference: For their own reasons these two States have decided not to comply with their obligations under Article 16 of the CCSBT but chose instead to seek to achieve their ends either by coercing Japan or by misdirecting their differences with Japan to a forum in which these issues do not belong.

68. While Japan contends that the actions Australia and New Zealand have taken to thwart settlement under Article 16 of the CCSBT are not lawful, to the extent that they are considered lawful they are nonetheless abusive.

69. Article 300 of UNCLOS imposes on Parties a duty to fulfill their obligations in good faith and to exercise the "rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." The behavior of Australia and New Zealand in this matter falls squarely within the classic definition of an abuse of right:

> "The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognized in favor of that State."[24]

70. The position asserted by Australia and New Zealand also is redolent of bad faith, as evidenced by several factors in addition to those mentioned above:

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[24] *Dictionnaire de la terminologie du droit international* (1960, under *Abus de droit*), quoted and translated in Nordquist et al., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY, Vol. V (Martinus Nijhoff 1989) at 152.

(a) Australia's own fishing methods for SBT, in which surface fishing predominates, leads to a disproportionate catch of juvenile fish. This poses a proportionately greater threat to the conservation of the SBT stock than the modest incremental catch involved in Japan's EFP. It is inconsistent with good faith for Australia to assert that Japan is threatening the SBT stock or violating the precautionary principle when it is well aware that its own SBT fishing practices have a greater adverse impact on conservation of the SBT stock than do those of Japan.

(b) There are other countries, including notably Indonesia and the Republic of Korea, whose nationals fish for SBT, as do residents of Taiwan. In the aggregate these sources account for a much greater amount of SBT catch than the incremental catch involved in the EFP. Unlike Japan, none has offered to limit its catch in the future if its present level of fishing turns out to threaten the recovery of the SBT stock. Australia and New Zealand assert claims against Japan under UNCLOS that are purportedly independent of their rights under the CCSBT and thus could be asserted equally well against other SBT-fishing countries. That Australia and New Zealand abstained from taking steps to open dispute-resolution procedures with these countries under UNCLOS is eloquent demonstration of the fact that the claims of imminent damage they are making in the present case are hollow.[25] This case is not about conserving SBT stocks. Instead, it is about misusing the process of this Tribunal as a piece of theater for domestic political consumption in Australia and New Zealand.[26]

(c) A clear demonstration of Australia's and New Zealand's failure to consult, and their failure to act towards Japan in good faith, is the fact that they have submitted to this Tribunal – at the eleventh hour – scientific assessments of the SBT stock issues that had not been communicated to Japan and on which Japan has had no fair opportunity to comment. Thus, Australia and New Zealand have armed themselves with new scientific ammunition purportedly relevant to issues on which they should have been in discussion with Japan over the last several years. Their behavior is consistent only with the proposition that neither State

[25] Proceedings against Indonesia and the Republic of Korea under UNCLOS would be less problematic than the case Australia and New Zealand are attempting to assert against Japan. Neither Indonesia nor Korea is a party to the CCSBT; thus, there would be no issue of exhausting dispute-resolution procedures in a regional arrangement.

[26] In order to manage constructively the SBT stock, it is essential in the near term to bring other countries and areas which exploit this fishery into consensual arrangements to prevent unnecessary harmful techniques and overexploitation. Attempts by Australia and New Zealand to bring Japan against its will before tribunals never intended by the parties to be used for this purpose inevitably send a message to countries and areas that will make attempts to reach consensual agreements more difficult.

wished in good faith to resolve these scientific issues by consultation, negotiation and recourse to independent expertise, as they are required to do by the provisions of both the CCSBT and UNCLOS. Instead, for whatever reason, they have made litigation their goal.

71. The inevitable consequence of the positions taken by Australia and New Zealand has been spuriously to create a "dispute" that could be asserted to be within the jurisdiction of this Tribunal and an Annex VII tribunal. While neither Australia nor New Zealand has articulated its motive, it is obvious that they believe that Part XV's procedural provisions and this Tribunal's powers with respect to provisional measures are more favorable to their position than the proper means for resolving the dispute – implementation of the dispute-resolution procedures under Article 16 of the CCSBT.

72. It is understandable why a litigant would seek to maneuver itself into a position that will permit recourse to the tribunal it thinks is likely to be most favorable. Such "forum-shopping," however, is entirely at odds with the spirit and letter of UNCLOS,[27] which is intended to foster settlement of disputes through direct dealings and consensual procedures to the fullest extent possible before recourse is had, as a last resort, to the procedures set forth in Section 2 of Part XV.

73. In committing acts of bad faith or abuse of right for purposes of invoking the provisions of Part XV of UNCLOS, Australia and New Zealand have violated their obligation under Article 300. This Tribunal should not countenance such violations by proceeding with this case.

C. EVEN IF THIS MATTER WERE CONSIDERED AS ARISING UNDER UNCLOS, THIS TRIBUNAL SHOULD ABSTAIN FROM PROCEEDING BECAUSE AUSTRALIA AND NEW ZEALAND HAVE NOT EXCHANGED VIEWS AS REQUIRED BY ARTICLE 283

74. Even if Australia and New Zealand were to succeed in their attempt to disguise a difference of opinion arising under the CCSBT as a dispute under UNCLOS, this Tribunal and the Annex VII tribunal nonetheless would not have jurisdiction, because Australia and New Zealand have failed to discharge their obligation to exchange views under Article 283.

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[27] Memorandum concerning jurisdiction in the dispute between Australia/New Zealand and Japan (**Annex 6**).

75. Article 286 makes recourse to the settlement procedures of Section 1 of Part XV, including exchange of views under Article 283, a precondition to application of the procedures set forth in Section 2.

76. As the statement of facts makes clear in the contacts among Japan, Australia and New Zealand up to the present time, no concrete consultations have been held regarding the resolution of any dispute concerning the interpretation or application of the UNCLOS, much less concrete consultations regarding the true nature or subject matter of the instant dispute or what kind of peaceful means would be most appropriate for its resolution.

77. Although, Australia and New Zealand claim that the exchange of views required under Article 283 already has been completed, the truth is that up to the present time no exchange of views between Japan and Australia/New Zealand concerning the resolution by peaceful means of any dispute relating to the interpretation or application of the UNCLOS ever has occurred. Up to May 31, 1999, Australia and New Zealand consistently treated the consultations between Japan and Australia/New Zealand as consultations under CCSBT Article 16(1) concerning a dispute on the interpretation or implementation of the CCSBT.

78. It was not until Australia's Note Verbale (NoLGB99/223) of June 23, 1999,[28] and New Zealand's Note Verbale (801/14/7/10/3)[29] of June 24, 1999, that Australia and New Zealand suddenly changed their attitude, claimed that the instant dispute was a dispute under UNCLOS, and inaccurately referred to the exchange of opinions on the interpretation or implementation of CCSBT as consultations on UNCLOS.

79. Although the Australian and New Zealand Notes Verbale (NZ: 701/14/7/10/3; A: 98/318) of August 31, 1998,[30] made reference to UNCLOS, they formally requested consultations only under CCSBT Article 16. Moreover, the references to UNCLOS in the August 31, 1998 Notes Verbale were extremely abstract; there was no explanation of why Japan's EFP was claimed to constitute a violation of these duties, or specifically which Articles of UNCLOS allegedly were being violated. Thus, Australia and New Zealand recognized the instant dispute as a dispute over the CCSBT and at most referred to UNCLOS as a factor to be taken into consideration;

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[28] *See* **Annex 17** at 36.
[29] *See id.* at 42.
[30] *See id.* at 1, 5.

they did not assert that the subject of the dispute was a difference of views on UNCLOS itself.

80. In response to such abstract references to the UNCLOS on the part of Australia and New Zealand, Japan continually pointed out, in its Notes Verbale of September 9, 1998, June 15, 1999, and July 14, 1999,[31] that the present dispute should be resolved on the basis of the substantive and procedural regulations of the CCSBT.

81. In short, since June 24, 1999, when Australia and New Zealand first began to assert that the consultations under the CCSBT concerning the resolution of the instant dispute also comprised consultations under UNCLOS Article 283(1), they have never attempted to carry out negotiations or consultations for dispute resolution under UNCLOS. There having been no exchange of opinions regarding either the specific content of Australia's and New Zealand's claims or methods for the resolution of any dispute under UNCLOS, there are simply no grounds for asserting that the exchange required under UNCLOS Article 283(1) already has taken place.

82. Negotiation or mediation under Article 16 of the CCSBT, if it had not been thwarted by Australia and New Zealand, would have addressed all the relevant factual issues and would have met all the purposes of requiring exhaustion of amicable dispute resolution procedures. Having refused to engage in any meaningful exchanges of views by imposing patently unacceptable preconditions to such negotiations or mediation, Australia and New Zealand should not now be heard to claim that they have satisfied the requirements that UNCLOS prudently imposes as a precondition to invoking the procedures under Section 2 of Part XV.

D. IN ADDITION TO THE ABSENCE OF PRIMA FACIE JURISDICTION, THE OTHER CONDITIONS FOR THE GRANT OF PROVISIONAL MEASURES ARE NOT MET

83. In order for this Tribunal to grant provisional measures under Article 290(5), pending constitution of an Annex VII tribunal several conditions must be met. None is present in this case.

84. The first is a showing of *prima facie* jurisdiction, which, as demonstrated above, is lacking.

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[31] *See id.* at. 12, 32, and 53.

85. Second, this Tribunal must find that the circumstances of the present case are such that there is an urgent threat of irreparable damage. Well established principles of international law indicate that such urgency must encompass a risk of irreparable damage. Neither the content of the provisional measures sought by Australia and New Zealand, nor the facts and circumstances in which the matter comes to this Tribunal, meet these criteria.

86. In addition, this Tribunal must find that the provisional measures are necessary to preserve the respective rights of the parties to the dispute pending resolution of the dispute.

87. The provisional measures that Australia and New Zealand seek here include two with specific content: (i) immediate cessation of the EFP; and (ii) restriction of Japan's SBT catch in any fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna, reduced by the amount of Japan's catch of SBT during its EFP in 1998 and 1999.

88. In addition, Australia and New Zealand ask the Tribunal to order Japan: (i) to act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute; (ii) to ensure that no action is taken which might aggravate, extend or render more difficult of solution the dispute; and (iii) to ensure that no action is taken which might prejudice the rights of Australia or New Zealand in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render. These proposed measures have no specific content, in that they do not indicate in any concrete manner how Japan should behave in order to comply with them.

89. Neither of the two specific provisional measures sought in this case meets the criteria described above. As noted above, there are no rights asserted by Australia and New Zealand in this case under UNCLOS that could be affected by Japan's EFP, nor will their ability to fish for SBT during the pendency of the case be impaired. Moreover, even if there were such effects, there is no urgency that requires interrupting the last few days of the 1999 EFP campaign or reducing Japan's catch for 1999. Australia and New Zealand have not sustained their burden of demonstrating irreparable damage, whereas the requested relief would create irreparable damage to Japan and the interests of science.

i. There Is No Urgency That Justifies Any Provisional Measures

90. Australia and New Zealand have not shown that there is any urgency to justify their request for provisional measures. Under Article 290(5) of UNCLOS, Australia and New Zealand must show that there is such "urgency of the situation" that this Tribunal should prescribe provisional measures before the Annex VII tribunal can be constituted.

91. The legal insufficiency and lack of urgency of Australia's and New Zealand's request for provisional measures must be viewed against the background of the relevant facts. The inescapable fact, which fortunately even Australia and New Zealand appear to admit, is that the principal source of pressure on the SBT stock, by far, is unregulated fishing by non-parties to the CCSBT.

92. In an effort to counteract an obvious weakness in their request for provisional measures, Australia has submitted to this Tribunal, and New Zealand has endorsed, the Polacheck/Preece Report.[32] This paper, however, eloquently demonstrates where the real problem lies:

> "Catches from non-parties to the CCSBT now represent at least one third of the global catch with some estimates substantially greater. The majority of the non-party catches are taken by Indonesia, Korea and Taiwan. Korea has greatly increased the number of longline vessels targeting SBT since 1994, and the number of vessels from Taiwan that are catching SBT has more than doubled in the last 4 years. The Indonesian catch is taken on the spawning ground as a by-catch in their longline fishery for other tunas. The Australian and Indonesian collaborative port sampling program has show a doubling of the Indonesian catch of SBT from 1995 to 1996." Para. 12.

93. Similarly, the same authors, while purporting to find a risk of stock and recruitment collapses relating to Japan's EFP and the non-CCSBT catches in the aggregate, nowhere dissociate the alleged impact of the EFP from the increases in catch (which their own report describes as much larger) that result from fishing catches by CCSBT non-parties.

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[32] The paper is biased and methodologically flawed. *See* Statement of Douglas S. Butterworth, Ph.D. (**Annex 2**). *See also* Declaration of Dr. Sachiko Tsuji, paras. 62–68 (**Annex 3**).

94. Australia and New Zealand, however, in attempting to show that the situation is urgent, have omitted the caution shown by the scientific report they offered and attribute the entire risk of stock and recruitment collapse to the proportionally smaller incremental tonnage involved in the EFP.[33] This is misleading and unjustified.

95. The lack of imminent risk to the SBT stock also is supported by the testimony of eminent scientists. Professor Douglas S. Butterworth, who has intimate familiarity with SBT and with the scientific discussions that have taken place over the EFP, takes strong issue with the scientific report submitted by Australia, finding it both selective and open to question in a number of areas of content and interpretation.[34] Moreover, Dr. Butterworth concludes that the "payback" of EFP catches through a reduction in subsequent catches – something Japan has committed to do if the EFP is found to have caused damage – will deal sufficiently with any risk. Comparing the probabilities of SBT recovery to the 1980 level by the year 2020 with the EFP (assuming payback) and without the EFP, Dr. Butterworth finds only small differences, regardless of which country's preferred weighting assumptions are employed. He concludes that these comparisons "are hardly objectively compatible with an assertion that the Japanese EFP will cause irreparable damage to the SBT population."[35] Similar conclusions are reached by Dr. Sachiko Tsuji[36] and the panel of independent scientists.[37]

96. In a backhanded recognition that the true threat to SBT lies elsewhere, Australia and New Zealand argue that "the continuing unilateral actions of Japan are . . . making it more difficult to gain the cooperation of non-parties to the 1993 Convention."[38] This assertion, baldly made without any proof, is at odds with reality. The only way to attract non-parties to the CCSBT is to make it possible for them to continue fishing within the scope of the CCSBT's restrictions and without unacceptable damage to their

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[33] Australia and New Zealand cite percentages by which the EFP represents increases over Japan's allocation of the last TAC approved by the Commission for the Conservation of Southern Bluefin Tuna. The Tribunal will, of course, recognize that such percentage increases are meaningless in terms of impact on the SBT population. What is significant is the absolute increase in catch – especially as it results in catches of larger numbers of fish or of spawning fish by reason of Australian and Indonesian fishing practices, which are particularly damaging to the SBT stock. The absolute increase in tonnage is principally attributable to fishing by CCSBT non-parties.

[34] *See* Statement of Douglas S. Butterworth, Ph.D., para. 46 (**Annex 2**).

[35] *Id.*, at para. 44

[36] *See* Declaration of Dr. Sachiko Tsuji, paras. 47, 61, 65 (**Annex 3**).

[37] *See* Southern Bluefin Tuna: Panel Statement on Experimental Fishery Program at p. 4 (**Annex 1**).

[38] New Zealand Request for Provisional Measures, para. 21.

fishing industries.[39] One way to accomplish this would be for Australia and New Zealand voluntarily to reduce sharply their own allocations, something neither seems ready to offer.

97. Alternatively, research on the SBT stock must be done in the hope that it will show that there is room for a larger TAC. Yet, Australia and New Zealand have resolutely thwarted Japan's attempts to establish a trilateral EFP under the CCSBT, forcing Japan ultimately to pursue its own program as an alternative to no scientific inquiry at all.

98. The hollowness of the position espoused by Australia and New Zealand, were these States truly to believe in the conclusions of the Polacheck/Preece Report, is laid bare by the fact that they have taken neither of the two steps that would be most effective to confront an alleged risk of imminent SBT collapse: reduction of their own fishing activities or meaningful attempts, including litigation where possible, to restrain those of the CCSBT non-parties. To the contrary, both Australia and New Zealand continue to catch SBT up to the full limit of their last CCSBT allocations. Nor, to the best of Japan's knowledge, have they made any serious effort to assert against those CCSBT non-parties that are parties to UNCLOS (including Indonesia and the Republic of Korea) the arguments under UNCLOS or general international law that they are asserting against Japan in this matter.

99. The claim of urgency is further belied by the terms of the Applicants' own submission. New Zealand, for example, asserts that failure to take measures this year would "threaten the conservation and recovery of the SBT stock in both the medium and long term." No short-term effect is alleged, nor is any reference made to the fact that "payback" – a remedy Australia and New Zealand themselves are seeking – is accepted by scientists as effective to remedy any damage Japan's EFP might cause.

100. Japan's 1999 EFP will end on August 31, 1999. Thus, terminating the EFP before the Annex VII tribunal is constituted will reduce this year's catch by only whatever minimal tonnage remains between the date of an order

[39] As the Republic of Korea advised the CCSBT:
Korea is seriously concerned about recent discord among member states over the function of the organization and about the dispute with other tuna organization on territorial jurisdiction. It is because that such instability of the organization might exert any influence upon Korea's consideration to accede to it. . . . However, what is hindering Korea's most above all is CCSBT's insufficient offer of quota for Korea which is far from the present fishing reality of Korean SBT industry. **Annex 18** at 00598.

by this Tribunal and the end of this month. In all likelihood, this will be none at all or, at most, a few hundred tons. Compared to the estimated total 16,500 tons of SBT caught per year (including large catches by nations that are not parties to the CCSBT), this figure is negligible and can have no significant impact on the SBT stock.

101. If the requested provisional measures are meant to prevent the EFP from being resumed in the year 2000, they are inappropriate because of the schedule of next year's EFP. This, in all likelihood would be after any initial hearing by the Annex VII tribunal. Even if the Annex VII tribunal's initial hearing were to be delayed beyond that point, that tribunal, if it found jurisdiction, would have the power, under Article 290(1), to prescribe any provisional measures it deemed necessary. Accordingly, this Tribunal's task is only to determine whether urgency requires provisional measures to cover the period before the Annex VII tribunal is constituted. The answer is no.

102. If the requested provisional measures are meant to prevent the EFP entirely, which would be inappropriate in any event as a final remedy (*see* point IV.C.v, *infra*), they are wholly uncalled for at the present time. Given that in the opinion of the independent scientists, "it would be possible to decrease [Japan's] quota in future years [after the EFP has concluded] to compensate for any detectable negative effects on the stock,"[40] applying general standards under Article 290(1), no provisional measures would be called for even if the dispute were not resolved before the time the EFP is concluded.

103. In *Case Concerning Passage through the Great Belt (Finland v. Denmark)*,[41] the ICJ held that a party requesting provisional measures must show that action prejudicial to the rights of either party is likely to be taken *before* the final decision is given. In that case, Finland requested that the ICJ indicate provisional measures to enjoin Denmark from continuing with a bridge project that Finland claimed would interfere with its right of passage through the Great Belt. The ICJ said:

"[P]lacing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would,

[40] Southern Bluefin Tuna: Panel Statement on Experimental Fishery Program at p. 4 (**Annex 1**).
[41] 1991 I.C.J. 12, 17–18 (July 29, 1991).

in the normal course, be completed before that time, [the ICJ] finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings."[42]

104. Similarly, in the present case, since there will be no irreparable damage even at the point when an EFP is concluded, the request that this Tribunal enjoin any future EFP's is unnecessary.

105. Although Australia and New Zealand are claiming that the provisional measures must be ordered before the Annex VII tribunal is constituted, because the current year's EFP is alleged to threaten the recovery of SBT, scientific data and actions by Australia and New Zealand have shown that in fact there is no such urgent threat. Japan's EFP in 1998 indicated that pessimistic modeling assumptions are unwarranted and that the SBT stock may well be recovering.[43]

Australia and New Zealand are aware of these positive results of the 1998 EFP and in the past both themselves have made suggestions for EFP numbers in addition to the TAC quotas. Specifically, during the 1999 EFP negotiations, Australia and New Zealand advocated a trilateral EFP, taking in the range of 1,200 to 1,500 tons outside of the TAC quotas, to be allocated among the parties to the CCSBT, and considered even higher amounts.[44]

106. If, in fact, there were any real urgency to reducing the alleged threat to the recovery of the SBT stock posed by Japan's approximately 2000 ton incremental EFP catch in 1999, then Australia and New Zealand could easily alleviate the problem by making a commensurate temporary reduction of their own catches of SBT, at least until the Annex VII tribunal, if it found jurisdiction, decided on the merits of the case. Neither Australia nor New Zealand appears even to have considered taking such an action. To the contrary, despite not having reached an agreement on a TAC for 1999, Australia and New Zealand began fishing operations on December 1, 1997 and October 1, 1997, respectively, to fish to the full maximum of the 1998 quota.[45] And Australia and New Zealand together are expected to fish a full 5,685 tons of SBT in 1999.

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[42] *Id*., 1991 I.C.J. at 18.
[43] *See* Declaration of Dr. Sachiko Tsuji, paras. 47–48 and Figure 6 (**Annex 3**).
[44] *See* Declaration of Masayuki Komatsu, para. 17 (**Annex 4**).
[45] See **Annex 15**, p. 7 and Appendix A.

107. This situation is similar to the *Case Concerning Pakistani Prisoners of War (Pakistan v. India)*,[46] where the ICJ refused to indicate provisional measures. In that case, Pakistan asked the ICJ, in the course of proceedings on provisional measures, to postpone for an unspecified period further consideration of its request for interim measures. The ICJ held that "it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency" and that such actions by Pakistan showed that "the Court no longer has before it a request for interim measures."[47]

108. As in the *Pakistani Prisoners* case, Australia and New Zealand have taken actions that clearly indicate that they do not believe that there is any imminent threat to the recovery of the SBT stock. Even without taking into account the strong scientific evidence that the SBT stock is recovering, rather than deteriorating, there is no urgent situation that requires this Tribunal prescribe provisional measures. The fact that any risk to the SBT stock from the EFP catch is not an immediate and irreparable damage is evidenced by the fact that Australia and New Zealand are seeking, among other forms of relief, a reduction of Japan's future catch allocations by the amounts caught under the EFP. If Australia and New Zealand believed that the additional tonnage caught in Japan's EFP were the decisive factor in causing irreparable damage to the SBT stock, the "payback" they seek would be entirely nugatory. Japan, for its part, has formally declared to both Australia and New Zealand – well before the commencement of this case – its willingness to "pay back" the EFP catch, if the outcome of a dispute resolution procedure were an agreement or decision that such catch presented a risk to the recovery of SBT stocks. Thus, there is no dispute among the parties as to whether a "payback" will occur, should the outcome on the merits be adverse to Japan. Qualified experts, including those appointed by the CCSBT to provide an independent assessment of the EFP and the SBT stock situation, agree that such a "payback" by Japan would be effective to repair any adverse effect the EFP might have.[48] Australia and New Zealand endorsed similar "payback" provisions in discussions of the proposed EFP's.

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[46] 1973 I.C.J. 328, 330 (July 13, 1973).

[47] *Id*.

[48] *See* Southern Bluefin Tuna: Panel Statement on Experimental Fishery Program at p. 4 (**Annex 1**).

ii. Australia and New Zealand Have Not Shown Any Irreparable Damage

109. Such alleged damage as Australia and New Zealand is claiming is not irreparable, and thus no provisional measures are necessary. Although "irreparability" is not an express requirement for the prescription of provisional measures under the UNCLOS, it is a concept that is integral to both the notion of urgency and the need to preserve the rights of the parties.

110. As the Permanent Court of International Justice held in one of its first cases concerning provisional measures, interim protection is necessary where the rights in question "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form."[49] The ICJ took a similar position in the *Aegean Sea Continental Shelf Case* (Greece v. Turkey),[50] where the ICJ refused to indicate provisional measures because of a lack of irreparable damage. In that case, the ICJ allowed Turkey to continue its exploration of the continental shelf because any damage that occurred could be remedied through economic reparations to Greece.

111. Even if the claimed damage is a non-economic injury (e.g., injury to the SBT stock in terms of its biological sustainability), such alleged damage is not irreparable in this case because the impact of the EFP is negligible to the recovery of the SBT stock. An analysis of the hypothetical results of a three year EFP with a higher level of catch (3,000 tons/yr.) than in fact is contemplated demonstrates that the rate of recovery of SBT stock is affected by a such an EFP by only a very few percent.[51]

112. The alleged damage in this case is easily distinguishable from the irreparable damage found in cases such as the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States v. Iran)[52] or the *Nuclear Tests* cases (New Zealand v. France[53] and Australia v. France).[54] Provisional measures were indicated in those cases because the ICJ found that there was a risk of irreparable damage to human lives that

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[49] *Denunciation of the Treaty of November 2nd, 1865* (China v. Belgium), Series A, No. 8 (November 2, 1865).
[50] 1976 I.C.J. 3 (September 11, 1976).
[51] *See* Statement of Douglas S. Butterworth, Ph.D., paras. 43, 44 (**Annex 2**).
[52] 1979 I.C.J. 7 (December 15, 1979).
[53] 1973 I.C.J. 135 (June 22, 1973).
[54] 1973 I.C.J. 99 (June 22, 1973).

could not be restored with any monetary compensation. As stated by the ICJ, "continuation of the situation . . . exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm."[55] In the present case, to be irreparable the potential damage would have to be the unrecoverability of the SBT stock. As discussed above, however, the viability of the SBT is not in any doubt because of the EFP. Notwithstanding Japan's 1998 EFP, the SBT stock has been recovering at a faster rate than was predicted by the Parties and will continue to recover, reaching its 1980 level by year 2020, if not earlier.[56]

113. If, in fact, Japan were held on the merits to have breached any rights that Australia and New Zealand have in the SBT stock under UNCLOS, reparations easily could be made. Any SBT caught under EFP could be replaced by a reduction in Japan's future catch. Although the results of scientific studies support Japan's position that EFP is not harming the SBT recovery efforts, Japan has committed that it will voluntarily reduce its future national allocation by the amount of the EFP catch, in the unlikely event that Japan's EFP is found to have adversely impacted the SBT stock.[57]

iii. The Requested Provisional Measures Cannot Be Effective to Protect Against Alleged Damage to the SBT Stock

114. A court should not prescribe provisional measures where they will not serve the intended purposes.[58] Even assuming the SBT stock were endangered, the only effective remedy that would stabilize the recovery of the SBT stock would be to reduce the quota for *all* of the parties to the CCSBT, as well as limiting the catches of CCSBT non-parties, so as to avoid imposing the burden of recovery of the SBT stock solely on Japan. As noted above, to the extent such recovery is threatened, the threat predominantly emanates from the activities of CCSBT non-parties about which this Tribunal can do nothing unless Australia and New Zealand take legal action against them.

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[55] *U.S. Staff Case*, 1979 I.C.J. 7 at 20.

[56] *See* Declaration of Dr. Sachiko Tsuji, paras. 47– 48 and Figure 6 **Annex 3**).

[57] *See* Notes Verbale of Japan of 1 June, 4 June, 15 June and 16 June 1999 (**Annex 17** at 26, 27, 32, 33).

[58] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria), 1996 I.C.J. 13 (March 15, 1996) (concurring opinion of Judge Shahabuddeen).

115. In considering the *pro rata* apportionment of the burden, this Tribunal would also have to consider the disproportionate effect that Australian fishing has been having on the recovery of the SBT stock. The records indicate that Australia mainly catches juvenile fish, in comparison to Japan, which targets mainly large-sized fish. Australia's fishing, compared to Japan's fishing, thus has a greater impact on the parental biomass per ton caught.[59]

iv. The Interests Allegedly Protected by the Requested Provisional Measures are Outweighed by the Irreparable Damage they Would Cause to Japan and the Interests of Science

116. Provisional measures are authorized under UNCLOS Article 290 for the purpose of preserving the rights of parties to the dispute or protecting against irreparable damage. Therefore, as part of assessing whether to grant the requested provisional measures, this Tribunal must also take into account the damage they would inflict on Japan and on the interests of science. The EFP is an integrated multi-year program of scientific data gathering. To interrupt that program in mid-stream would impair the scientific validity of both the data that have been collected so far and any data collected after interruption of the program when its resumption was authorized.[60]

117. Such loss of scientific data would be truly irreparable. It would mean that the EFP could have to start over again, delaying by years the contribution that such EFP can make to a better scientific assessment of SBT stocks and the more valid determination of TAC levels. No amount of recompense could restore Japan to the position as it existed before the Tribunal acted.

118. Not only would such an outcome damage Japan, which, *inter alia*, has invested considerable resources in the EFP, it would damage the interests of science. Ultimately, it would be to the detriment of the very interest the Applicants claim they are seeking to vindicate: the proper management of SBT resources to ensure eventual recovery of the SBT stock. These damages, which are immediate and undeniable, far outweigh the conjectural interests put forward by the Applicants.

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[59] *See* Statement of Douglas S. Butterworth, Ph.D., paras. 61–62 (**Annex 2**).
[60] *See* Declaration of Dr. Sachiko Tsuji, paras. 58–59 (**Annex 3**).

v. The Requested "Provisional Measures" are Really Final Remedies

119. Australia's and New Zealand's request that Japan reduce its catch by the amount of 1998 and 1999 EFP catches is entirely inappropriate. Provisional measures are provided under UNCLOS Article 290 for the purpose of preserving the rights of parties to the dispute or protecting against irreparable damage, not for the purpose of providing a remedy for past infringement of rights.[61] To deduct past EFP catches from future allocations is a request for a final remedy[62] and is an abuse of the objectives of provisional measures procedures, even in the event that the SBT stock were found to be reduced as a result of the EFP and Australia's and New Zealand's rights under the law were found to have been infringed upon.

120. A request for provisional measures that asks for the same relief as the merits is in anticipation of the Tribunal's final judgment and is contrary to the object of provisional measures. As stated above, the relief sought in Australia and New Zealand's Statement of Claim is identical to the provisional measures sought in their Request for Provisional Measures. As demonstrated overwhelmingly in the papers submitted by Japan to this Tribunal, there is no reason or circumstance justifying consideration at this time of a grant of the final relief requested by Australia and New Zealand.

V. Conditional Counter-Request For Provisional Measures

121. 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 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 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

[61] The M/V Saiga (No. 2).
[62] Compare para. 8 of New Zealand's Request for Provisional Measures with para. 69(2) of its Statement of Claim.

to the EFPWG (see Paragraph 24 above), referred to the panel of independent scientists for their resolution.

122. The above 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.

VI. Submissions

123. 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.

Respectfully submitted,

[*Signed*]
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6 August 1999

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