

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



1999

Public sitting

held on Monday, 16 August 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

Southern Bluefin Tuna Cases

*(New Zealand v. Japan;
Australia v. Japan)*

(Requests for provisional measures)

Verbatim Record

<i>Present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Budislav Vukas
		Joseph Sinde Warioba
		Edward Arthur Laing
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
	Judge <i>ad hoc</i>	Ivan A. Shearer
	Registrar	Gritakumar E. Chitty

Australia represented by:

Mr William Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department,

as Agent and Counsel;

Mr Daryl Williams AM QC MP, Attorney-General of the Commonwealth of Australia,
Mr James Crawford SC, Whewell Professor of International Law, University of
Cambridge, Cambridge, United Kingdom,
Mr Henry Burmester QC, Chief General Counsel of the Commonwealth of Australia,

as Counsel;

Mr Mark Jennings, Senior Adviser, Office of International Law, Attorney-General's
Department,

Ms Rebecca Irwin, Principal Legal Counsel, Office of International Law, Attorney-
General's Department,

Mr Andrew Serdy, Legal Office, Department of Foreign Affairs and Trade,

Mr Paul Bolster, Adviser to the Attorney-General,

Mr Glenn Hurry, Assistant Secretary, Fisheries and Aquaculture Branch, Department
of Agriculture, Fisheries and Forestry,

Mr James Findlay, Fisheries and Aquaculture Branch, Department of Agriculture,
Fisheries and Forestry,

Mr Tom Polacheck, Principal Research Scientist, Marine Research, Commonwealth
Scientific and Industrial Research Organisation,

as Advisers.

New Zealand represented by:

Mr Timothy Bruce Caughley, International Legal Adviser and Director of the Legal
Division of the Ministry of Foreign Affairs and Trade,

as Agent and Counsel;

Mr Bill Mansfield,

as Counsel and Advocate;

Ms Elana Geddis,

as Counsel;

and

Mr Talbot Murray,

as Adviser.

Japan represented by:

Mr Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan,

as Agent;

Mr Yasuaki Tanizaki, Minister, Embassy of Japan, Berlin, Germany,
Mr Ichiro Komatsu, Deputy Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan,

as Co-Agents;

Mr Nisuke Ando, President of the Japanese Association of International Law,
Professor of International Law, Doshisha University,
Mr Minoru Morimoto, Deputy Director General of the Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries of Japan,
Mr Robert T. Greig, Partner, Cleary, Gottlieb, Steen, Hamilton,

as Counsel;

and

Mr Nobukatsu Kanehara, Director of the Legal Affairs Division, Ministry of Foreign Affairs of Japan,
Mr Yoshiaki Ito, Director of the Fishery Division, Ministry of Foreign Affairs of Japan,
Mr Koichi Miyoshi, Assistant Director of the Ocean Division, Ministry of Foreign Affairs of Japan,
Mr Yutaka Arima, Assistant Director of the Legal Affairs Division, Ministry of Foreign Affairs of Japan,
Ms Makiko Mori, Legal Affairs Division, Ministry of Foreign Affairs of Japan,
Mr Akinori Tajima, Fishery Division, Ministry of Foreign Affairs of Japan,
Mr Ryozo Kaminokado, Councillor, Fisheries Policy Planning Department, Fisheries Agency of Japan,
Mr Masayuki Komatsu, Director for International Negotiations, International Affairs, Division, Fisheries Policy Planning Department, Fisheries Agency of Japan,
Mr Hisashi Endo, Deputy Director, International Affairs Division, Fisheries Policy Planning Department, Fisheries Agency of Japan,
Mr Kenji Kagawa, Deputy Director, Far Seas Fisheries Division, Resources Development Department, Fisheries Agency of Japan,
Mr Morio Kaneko, Far Seas Fisheries Division, Resources Development Department, Fisheries Agency of Japan,
Mr Shuya Nakatsuka, International Affairs Division, Fisheries Policy Planning Department, Fisheries Agency of Japan,
Mr Jiro Suzuki, Director, Pelagic Fisheries Resources Division, National Research Institute of Far Seas Fisheries,

Mr Sachiko Tsuji, Section Chief, Temperate Tuna Research Group, National
Research Institute of Far Seas Fisheries,
Mr Douglas S. Butterworth, Professor at the Department of Mathematics and Applied
Mathematics, University of Cape Town, Cape Town, South Africa,
Mr Moritaka Hayashi, Professor at Waseda University School of Law,
Ms Atsuko Kanehara, Professor of Public International Law at Rikkyo University,
Mr Akira Takada, Associate Professor of Public International Law at Tokai University,
Mr Yamato Ueda, President of the Federation of Japan Tuna Fisheries Cooperative
Associations,
Mr Tsutomu Watanabe, Managing Director of the Federation of Japan Tuna
Fisheries Cooperative Associations,
Mr Kaoru Obata, Associate Professor, School of Law, Nagoya University, Attaché,
Embassy of Japan, The Hague, The Netherlands,
Mr Matthew Slater, Cleary, Gottlieb, Steen and Hamilton,
Mr Donald Morgan,

as Advocates.

1 **THE CLERK OF THE TRIBUNAL:** The International Tribunal for the Law of the Sea
2 is now in session.

3
4 **THE REGISTRAR:** On 30 July 1999, New Zealand and Australia duly filed Requests
5 for the prescription of provisional measures in their dispute with Japan concerning
6 Southern Bluefin Tuna. New Zealand's request was received first and was entered in
7 the List of cases as Case No. 3. Australia's request was subsequently entered in the
8 List of cases as Case No. 4. The requests for the prescription of provisional
9 measures are made under article 290, paragraph 5, of the United Nations
10 Convention on the Law of the Sea, which provides for the prescription of provisional
11 measures by the International Tribunal for the Law of the Sea pending the
12 constitution of an arbitral tribunal in accordance with Annex VII to the Convention to
13 which the merits of the dispute have been submitted. The Tribunal was informed that
14 the notification concerning the arbitral proceedings was conveyed to Japan on
15 15 July 1999.

16
17 **THE PRESIDENT:** This is a common public sitting of the Tribunal on two identical
18 Requests for the prescription of provisional measures submitted by New Zealand and
19 Australia, respectively, against Japan in the dispute concerning Southern Bluefin Tuna.
20 I note the presence of His Excellency Mr Tim Caughley, Agent for New Zealand. I note
21 as well the presence of His Excellency Mr William McFadyen Campbell, Agent for
22 Australia. I also note the presence of His Excellency Mr Kazuhiko Togo, Agent for
23 Japan.

24
25 I call on His Excellency the Agent for New Zealand to note and introduce the
26 representation of New Zealand at this sitting.

27
28 **MR CAUGHLEY:** Thank you Mr President. Mr President, Members, I have the honour
29 to appear before you as the Agent for the Government of New Zealand in this important
30 case and I have with me as counsel for New Zealand Mr Bill Mansfield.

31
32 **THE PRESIDENT:** I thank His Excellency the Agent for New Zealand. I call on His
33 Excellency the Agent for Australia to note and introduce the representation of Australia
34 at this sitting.

35
36 **MR CAMPBELL:** Mr President and Members of the Tribunal, it is an honour to appear
37 before the Tribunal today on this important case and I formally announce my
38 appointment as Agent for the Government of Australia. Other counsel and advocates
39 for Australia in this case are; the Attorney-General of Australia, the Honourable Daryl
40 Williams QC, Professor James Crawford SC, Whewell Professor of International Law at
41 the University of Cambridge, Mr Henry Burmester QC, Chief General Counsel for the
42 Commonwealth of Australia. Both Professor Crawford and Mr Burmester are here
43 today, the Attorney-General arrives in Hamburg later today in time for the
44 commencement of the proceedings on Wednesday. Thank you.

45
46 **THE PRESIDENT:** I thank His Excellency the Agent for Australia. I now call on His
47 Excellency the Agent for Japan to note and introduce the representation of Japan at
48 this sitting.

1 **MR TOGO:** Mr President, Honourable Judges it is indeed a pleasure and an honour for
2 me to appear to this court. Let me introduce the members of the Japanese delegation;
3 myself, Kazuhiko Togo, Agent of the Government of Japan. As counsellors we have
4 Professor Nisuke Ando, President of the Japanese Association of International Law,
5 Mr Ichiro Komatsu, Deputy Director General of the Treaties Bureau, Ministry of Foreign
6 Affairs, Mr Minoru Morimoto, Deputy Director General of the Fisheries Agency of Japan
7 and Mr Robert Greig, partner of Cleary, Gottlieb, Steen and Hamilton Counsel to the
8 Government of Japan. And as advocates, we have quite numerous advocates, I'll just
9 read their names: Mr Nobukatsu Kanehara, Mr Yoshiaki Ito, Mr Koichi Miyoshi,
10 Mr Yutaka Arima, Ms Makiko Mori, Mr Akinori Tajima, Mr Ryoza Kaminokado,
11 Mr Masayuki Komatsu, Mr Hisashi Endo, Mr Kenji Kagawa, Mr Morio Kaneko,
12 Mr Shuya Nakatsuka, Mr Jiro Suzuki, Dr. Sachiko Tsuji, Dr. Douglas S. Butterworth,
13 Mr Moritaka Hayashi, Ms. Atsuko Kanehara, Mr Akira Takada, Mr Kaoru Obata,
14 Mr Matthew Slater, Mr Donald Morgan, Mr Yamato Ueda and Mr Tsutomu Watanabe.
15 Thank you very much.

16
17 **THE PRESIDENT:** I thank His Excellency the Agent for Japan. By notification dated
18 30 July 1999, New Zealand submitted to the Tribunal a Request for the prescription of
19 provisional measures in accordance with article 290, paragraph 5, of the Convention in
20 the dispute concerning southern bluefin tuna instituted by New Zealand against Japan
21 before an arbitral tribunal to be constituted pursuant to Annex VII to the Convention.

22
23 By letter dated 30 July 1999, New Zealand indicated its intention to appoint a judge *ad*
24 *hoc* for the purpose of the request for the prescription of provisional measures. New
25 Zealand named Professor Ivan Shearer AM, a national of Australia, as judge *ad hoc*.
26 New Zealand also stated that it was a party in the same interest with Australia, which
27 has also submitted a Request for the prescription of provisional measures against
28 Japan.

29
30 By notification dated the same day Australia submitted to the Tribunal a Request for the
31 prescription of provisional measures in accordance with article 290, paragraph 5, of the
32 Convention in the dispute concerning southern bluefin tuna instituted by Australia
33 against Japan before an arbitral tribunal to be constituted pursuant to Annex VII to the
34 Convention.

35
36 By letter dated 30 July 1999, Australia also indicated its intention to appoint a judge *ad*
37 *hoc* for the purpose of the request for the prescription of provisional measures.
38 Australia named Professor Ivan Shearer AM, a national of Australia, as judge *ad hoc*.
39 Australia stated that it was a party in the same interest with New Zealand which had
40 also submitted a Request for the prescription of provisional measures against Japan.

41
42 In accordance with article 19 of the Rules of the Tribunal, Japan was informed of the
43 intention of New Zealand and Australia to appoint Professor Ivan Shearer as their
44 common judge *ad hoc* for the purposes of the requests of New Zealand and Australia
45 for the prescription of provisional measures. The name, nationality and brief
46 biographical details of Professor Ivan Shearer, as notified to the Tribunal in accordance
47 with paragraph 1 of article 9 of the Rules of the Tribunal, were communicated to Japan.
48 Japan was invited to furnish such observations as it might wish to make, within the
49 time-limit fixed by the President. The time-limit fixed by the President for this purpose
50 was 9 August 1999. No objection was raised by Japan within the time-limit. No

1 objection to the choice of Professor Ivan Shearer as judge *ad hoc* by New Zealand and
2 Australia appears to the Tribunal itself. Accordingly Professor Ivan Shearer AM may be
3 admitted to participate as a member of the Tribunal in the proceedings on the request
4 for the prescription of provisional measures by New Zealand against Japan and in the
5 proceedings on the request for the prescription of provisional measures by Australia
6 against Japan.

7
8 Article 11 of the Statute of the Tribunal provides that every member of the Tribunal
9 shall, before taking up his duties, make a solemn declaration in open session that he
10 will exercise his powers impartially and conscientiously. Pursuant to article 17,
11 paragraph 6, of the Statute, the requirement of article 11 of the Statute applies to a
12 judge *ad hoc*. Article 9 of the Rules of the Tribunal provides that the solemn declaration
13 of a judge *ad hoc* shall be made at a public sitting in the case in which the judge *ad hoc*
14 is sitting. Paragraph 3 of article 9 of the Rules of the Tribunal states that judges *ad hoc*
15 shall make the declaration in relation to each case in which they are participating.

16
17 Pursuant to these provisions of the Statute and Rules of the Tribunal, Professor Ivan
18 Shearer will, at this session, make the solemn declaration, first, in relation to the
19 Request for the prescription of provisional measures submitted by New Zealand
20 against Japan and, secondly, in relation to the Request for the prescription of
21 provisional measures by Australia against Japan.

22
23 I now invite Professor Ivan Shearer to make the solemn declaration, as set out in
24 article 5, paragraph 1, of the Rules of the Tribunal, as a judge *ad hoc* in relation to the
25 Request for the prescription of provisional measures submitted by New Zealand
26 against Japan.

27
28 All persons are requested kindly to rise. Professor Shearer, please.

29
30 **PROFESSOR SHEARER:** I solemnly declare that I will perform my duties and exercise
31 my powers as judge honourably, faithfully, impartially and conscientiously.

32
33 **THE PRESIDENT:** And I invite Professor Ivan Shearer to make the same solemn
34 declaration as a judge *ad hoc* in relation to the Request for the prescription of
35 provisional measures submitted by Australia against Japan. Professor Shearer, please

36
37 **PROFESSOR SHEARER:** I solemnly declare that I will perform my duties and exercise
38 my powers as judge honourably, faithfully, impartially and conscientiously.

39
40 **THE PRESIDENT:** Thank you very much, Judge Shearer, please be seated. Judge
41 Ivan Shearer is duly admitted to participate as a member of the Tribunal in the
42 proceedings on the Request for the prescription of provisional measures submitted by
43 New Zealand against Japan and in the proceedings on the Request for the prescription
44 of provisional measures submitted by Australia against Japan.

1 The Tribunal will now retire for deliberations prior to the opening of the oral
2 proceedings. The oral proceedings will commence on 18 August as previously ordered.
3 As already agreed, consultations by the President and the Agents of the parties will be
4 held at 09.00 hours tomorrow, 17 August, in the office of the President. The sitting is
5 now closed.

6

7 (*The Tribunal rose at 10.20 a.m.*)

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