

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



MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 18 TO 20 AUGUST 1999

*Southern Bluefin Tuna Cases
(New Zealand v. Japan; Australia v. Japan), Provisional Measures*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DU 18 AU 20 AOUT 1999

*Affaires du thon à nageoire bleue
(Nouvelle-Zélande c. Japon; Australie c. Japon), mesures conservatoires*

Minutes of the Public Sittings held from 18 to 20 August 1999

Procès-verbal des audiences publiques du 18 au 20 août 1999

REPRESENTATION

PUBLIC SITTING HELD ON 18 AUGUST 1999, 10.00 A.M.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Judge ad hoc SHEARER; Registrar CHITTY.

For Australia:

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,

SOUTHERN BLUEFIN TUNA

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

as Advisers.

For New Zealand:

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;

Mr Talbot Murray,

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For Japan:

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,
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Doshisha University,

REPRESENTATION

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;

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,
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Ms Makiko Mori,
Legal Affairs Division, Ministry of Foreign Affairs of Japan,

Mr Akinori Tajima,
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Mr Ryoza 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,
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SOUTHERN BLUEFIN TUNA

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Ms Atsuko Kanehara,
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Mr Donald Morgan,

as Advocates.

AUDIENCE PUBLIQUE DU 18 AOÛT 1999, 10 H 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. SHEARER, *juge ad hoc*; M. CHITTY, *Greffier*.

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comme agent et conseil;

et

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Attorney-General d'Australie,

M. James Crawford *SC*,
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M. Henry Burmester *QC*,
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M. Paul Bolster,
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M. Glenn Hurry,
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M. James Findlay,
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THON À NAGEOIRE BLEUE

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Mme. Elana Geddis,

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Bas,
La Haye, Pays-Bas,

M. Matthew Slater,
Cleary, Gottlieb, Steen and Hamilton,

M. Donald Morgan,

comme avocats.

Opening of the Oral Proceedings

The Registrar:

Today the Tribunal commences the hearing on the Requests duly filed on 30 July 1999 with the Registrar of the Tribunal by New Zealand and Australia for the prescription of provisional measures in the *Southern Bluefin Tuna* (provisional measures) *Cases*. New Zealand's Request was received first and was entered in the List of cases as Case No. 3. Australia's Request was subsequently entered in the List of cases as Case No. 4. They have been listed as the *Southern Bluefin Tuna* (Requests for provisional measures) *Cases*.

The requests for the prescription of provisional measures are made under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, which provides for the prescription of provisional measures by the International Tribunal for the Law of the Sea pending the constitution of an arbitral tribunal in accordance with Annex VII to the Convention to which the merits of the dispute have been submitted. The Tribunal was informed that the notification concerning the arbitral proceedings was conveyed to Japan on 15 July 1999.

The President:

This public sitting is being held, pursuant to article 26 of the Statute of the Tribunal and article 90, paragraph 2, of the Rules of the Tribunal, for the oral proceedings in the *Southern Bluefin Tuna* (provisional measures) *Cases* submitted to the Tribunal by New Zealand and Australia against Japan.

The Requests for provisional measures were filed on 30 July 1999. The Requests are in identical terms.

I call on the Registrar to read out the provisional measures which New Zealand and Australia request the Tribunal to prescribe.

The Registrar:

The Applicants request that the Tribunal prescribe the following provisional measures:

- (1) that Japan immediately cease unilateral experimental fishing for SBT;
- (2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna, subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
- (3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
- (4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
- (5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render.

The President:

Upon the filing of the Requests for the prescription of provisional measures, signed copies thereof were transmitted to the Government of Japan, in accordance with article 89, paragraph 4, of the Rules of the Tribunal.

By Order of 3 August 1999, the President fixed the date for the opening of the oral proceedings for 18 August 1999.

On 9 August 1999, Japan filed a single Statement in Response to the Requests by New Zealand and Australia. In its Response, Japan submits that the requests for provisional measures by New Zealand and Australia should be denied. Japan submitted a "conditional counter-request" for provisional measures against New Zealand and Australia.

I call on the Registrar to read out the measures that Japan requests the Tribunal to prescribe.

The Registrar:

Japan in its Response asks that

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 article 89, paragraph 5, of the Rules of the Tribunal, Japan respectfully requests that the Tribunal grant Japan provisional relief in the form of prescribing that New Zealand and Australia 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 Experimental Fishing Programme and the determination of a total allowable catch 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 the parties' 1998 agreement and subsequent Terms of Reference of the Experimental Fishing Program Working Group ..., referred to the panel of independent scientists for their resolution,

and that the

Tribunal should require Australia and New Zealand to fulfil their obligations to continue negotiations over this scientific dispute.

After consultations with the parties the Tribunal decided, by Order dated 17 August 1999, to join the proceedings in the two cases.

In conformity with article 67, paragraph 2, of the Rules of the Tribunal, copies of pleadings filed in the cases and documents annexed thereto are being made accessible to the public as of today.

The President:

I note the presence in court of His Excellency, Mr Tim Caughley, Agent for New Zealand. I note the presence in court of His Excellency, Mr William McFadyen Campbell, Agent for Australia. I also note the presence of His Excellency, Mr Kazuhiko Togo, Agent for Japan.

I now call on His Excellency, Mr Tim Caughley, Agent of New Zealand, to note and introduce the representation of New Zealand.

Mr Caughley:

Mr President, Mr Vice-President and distinguished Members of the Tribunal, it is my privilege as the New Zealand Agent to open this joint presentation by introducing those representing Australia and New Zealand (the Applicants acting in the same interest). Before I do so, I also wish to acknowledge our counterparts representing the Government of Japan.

First, the Attorney-General of Australia, the Honourable Daryl Williams QC, will speak. As you will know, Mr President, the Attorney-General is the pre-eminent legal officer in the Australian Federal Government and is a member of Cabinet. He will provide an overview of the joint case and set out the reasons why Australia attaches so much importance to the proper management and conservation of high seas fisheries. He will also outline the importance for UNCLOS and this Tribunal in securing that objective. In addition, the Attorney-General will address the applicability of the precautionary principle, given the issues of scientific uncertainty in this case.

May I say in advance that the Government of New Zealand fully shares the perspective which will be presented by the Attorney-General. New Zealand's concern to ensure the proper management and conservation of southern bluefin tuna is deeply held for a range of reasons, including its intrinsic worth, its ecosystem significance and its economic value, notwithstanding in the latter cases that our share of the catch is a comparatively small one. In that regard, Mr President, I must note that the amount intended to be caught by Japan in its current experimental fishing programme is five times New Zealand's most recent total allocation of southern bluefin tuna.

After the Honourable Attorney-General has addressed the Tribunal, the Australian Agent, Mr Bill Campbell, will provide a brief review of the dispute, the fishery to which it relates, the scope of the 1993 Convention for the Conservation of Southern Bluefin Tuna, and the practice of the parties pursuant to it. This presentation sets out the essential factual background for the dispute before the Tribunal. The aim of Mr Campbell's presentation will be to demonstrate that the pattern of conduct of Japan which gave rise to this application – a pattern of seeking unsustainable increases in the catch of southern bluefin tuna in the face of serious biological concerns – is contrary to its obligations under UNCLOS.

Mr Bill Mansfield will then address the Tribunal. Like myself, Mr Mansfield was a New Zealand delegate to the Law of the Sea Conference throughout its work. He will develop the argument about the scope of the 1993 Convention, asserting in particular the primacy of UNCLOS and refuting the arguments on jurisdiction contained in Japan's Response.

Professor James Crawford SC, Whewell Professor of International Law at Cambridge University, will follow. He will assert that Japan's actions which are the subject of this dispute are *prima facie* contrary to UNCLOS, so as to raise issues which merit protection at the level of provisional measures. To this end, he will lead scientific evidence from an independent British scientist, Professor John Beddington, Professor of Applied Population Biology at Imperial College, London.

Then will follow the Chief General Counsel in the Australian Government, Mr Henry Burmester QC, who will cover the provisional measures being sought by Australia and New Zealand and the justifications for them.

Mr President, Members of the Tribunal, before these substantive presentations begin there are three preliminary points I should mention.

The first of these concerns the position where two States Parties to UNCLOS have brought claims in the same interest. I refer, Mr President, to the Tribunal's decision of 16 August that the cases of Australia and New Zealand have been joined. Throughout the presentations this week we will refer to the Applicants collectively and only refer to Australia or New Zealand separately where the context so requires.

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A second point, Mr President, relates to your task in assimilating a considerable body of material which has been put before you, especially the voluminous Japanese Response. We have tried to confine the material we have tabled to what we believe is necessary in an application for provisional measures. In that respect we have sought to assist the Tribunal without flooding it with paper. Mr President, if the Tribunal wishes further information from us we will be pleased to provide it. In that regard I would note that we will respond to the questions which you informally raised with the parties yesterday in the course of our presentations today. In the case of those questions which simply required a brief factual answer we will provide that separately in writing.

Finally, may I just mention that to facilitate the flow of our presentations we will not repeat references to cases and materials; these are set out in the written version of our statements, which we have made available to the Registry.

Mr President, Members, I would now ask you to call on the Honourable Attorney-General of Australia, Mr Williams QC. Thank you, Mr President.

The President:

Thank you, Mr Caughley. I would like to invite the Agent of Japan to make the presentation. Do not introduce the evidence but just make the presentation for the Tribunal.

Mr Togo:

Mr President, honourable Judges, it is indeed a great honour for me to be at this historic occasion at this Tribunal. Our detailed representations will be done tomorrow, but might I just introduce those who are going to intervene tomorrow. Myself, Kazuhiko Togo, Agent of Japan and Mr Robert Greig, Counsel to the Japanese Delegation, and Professor Nisuke Ando, who is President of the Japanese Association of International Law. Thank you very much.

The President:

I thank His Excellency the Agent for Japan.

The Tribunal will hear the submissions of the Applicants New Zealand and Australia at today's sittings. This morning's sitting will be interrupted at 11.30 and resume at 12 noon until 13.00 hours. The hearing will continue from 15.00 hours to 16.30 hours this afternoon.

The Tribunal will hear the submissions of Japan tomorrow. The parties will have the opportunity to respond to each other's submissions at the sitting on Friday, 20 August 1999.

In accordance with article 80 of the Rules of the Tribunal, any witnesses and experts to be called by the parties shall remain out of court until they are requested to testify. At the request of the parties the Tribunal has decided to suspend the application of this provision in respect of experts in these proceedings. Accordingly experts called by the parties may remain in court before and after their testimony. I emphasize, however, that this applies only to experts. All witnesses must remain out of court until they are called upon to testify.

I now invite the Honourable Attorney-General of Australia, Mr Williams, to commence the presentation on behalf of New Zealand and Australia.

Argument of Australia and New Zealand

STATEMENT OF MR WILLIAMS
COUNSEL OF AUSTRALIA

Mr Williams:

Mr President, Members of the Tribunal. As the Attorney-General of Australia, it is an honour to appear before this Tribunal and to do so at a time when the effectiveness of the new law of the sea is being put to the test. It is also an honour to appear in this case since it concerns a central issue of that new law, the conservation of the living resources of the high seas. Nobody can doubt the importance of that issue today. It is well known that there are major problems with the management of high seas fisheries. These have been summarized in a recent FAO report in the following terms:

At present, a large proportion of the world's exploited fish stocks are fully exploited, over-exploited, depleted or in need of recovery ... Major ecological damage, which may or may not always be reversible, and economic waste are already evident in many cases. New technological developments, such as GPS, radar, echo-sounders, more powerful vessels and improved processing methods ... continue to enhance the ability of fishers to exploit more living resources more intensively, potentially increasing the severity of the problem.

The existing status of the world's living aquatic resources is largely a result of a failure of the present process of fisheries governance to achieve responsible and effective management of fisheries ...

Those remarks are not limited to coastal fisheries, and they certainly apply to the state of Southern Bluefin Tuna stock at present.

But this Tribunal and UNCLOS more generally have important roles to play in addressing some of the problems identified by FAO in the passage I have just read, and in ensuring that States fulfil their express obligations to conserve marine resources, especially high seas resources.

In this case, Japan effectively calls on you to abdicate any such role in advance and for the future.

If the Tribunal were to accede to the Japanese arguments, it would put the future conservation of high seas resources, including SBT, in jeopardy. Accordingly, the Applicants invite you to reject the Japanese arguments.

Mr President and Members of the Tribunal, you have a clear and express mandate in relation to these issues in UNCLOS itself. In introducing the Applicants' case I seek to set out that mandate, to place our case in its proper perspective, legally and practically, and to outline the role of this Tribunal at this stage of the proceedings.

Before I turn to these issues, however, I observe on behalf of Australia in respect of our opponent today, the Government of Japan, that the relationship with Japan is one of Australia's most important international relationships. It is multifaceted and strong. Because of that strength and the many aspects of our relationship, it can survive disagreements on particular questions, such as the conservation of southern bluefin tuna.

In fact the early record on that front was promising. After initial over-exploitation of the stock, Australia, New Zealand and Japan agreed to take measures initially informal, and then under the auspices of the Commission for the Conservation of Southern Bluefin Tuna.

For a time it appeared that those measures might be beginning to reverse the downward trend of the stock.

The Applicants believe that these earlier and tentative gains are now seriously at risk. My colleagues will explain in more detail the grounds on which we hold this view.

We hold it strongly, to the point of bringing these proceedings to press our concerns, and to try to break the cycle of unilateral over-quota fishing by Japan. In this respect I am disappointed that Japan has, only now, in its Response alleged that my Government is acting in bad faith in bringing this claim. Mr President, this is an unworthy accusation.

There are grounds for serious concern as to the state of the SBT stock, and recent events have made these concerns even more pressing and grave. In that context to talk about bad faith is unhelpful. I hope that it was a pleading extravagance; it certainly does not reflect the normal tone of the relations between our two countries.

As I am providing the overview in the joint action I should note that the New Zealand Agent has asked me to record that New Zealand joins Australia in repudiating the allegation of bad faith made in the pleadings.

Mr President, Members of the Tribunal, the Applicants attach great importance to the new law of the sea, as set out in the 1982 Convention.

Some of you will remember the effort Australia and New Zealand made during the Law of the Sea Conferences to develop and clarify the law, and to strike a reasonable balance between the rights of States and their responsibilities.

Australia and New Zealand attach great importance to the system of dispute resolution contained in Part XV of the Convention, of which this Tribunal forms an important part.

Binding and compulsory dispute settlement procedures were seen as critical to the acceptance of the new and important obligations the Convention established.

It is clear from the text as well as from the preparatory works that Part XV was intended to provide effective mechanisms for resolution of disputes concerning the interpretation and application of the Convention as a whole. An indication of the principle of effectiveness in relation to Part XV is to be seen in article 287, which gives parties a choice of means in relation to dispute settlement, but nonetheless deems them to have chosen arbitration unless some other permissible forum is selected.

If the parties have chosen or are deemed to have chosen arbitration, then there will be a gap of some months and maybe longer before the arbitral tribunal is established. Again in such a case Part XV provides an effective mechanism. Article 290 gives this Tribunal a compulsory and binding provisional measures jurisdiction in the period before an arbitral tribunal is established.

Furthermore the provisional measures jurisdiction is broader in scope than that given to the International Court of Justice by its Statute, as Mr Burmester will elaborate. Under Part XV, provisional measures can be ordered where it is "appropriate" to preserve rights or prevent harm to the marine environment; this is a broad jurisdiction. And under article 290, paragraph 6, provisional measures are expressly binding on the parties.

Not only is Part XV mandatory; it is also general in its application. It applies unless otherwise stated to the whole range of UNCLOS obligations.

When the drafters wanted to exclude any provision of UNCLOS from the scope of compulsory dispute settlement under Part XV, they did so expressly, in particular in articles 297 and 298.

Those exclusions do not apply in this case.

That in itself goes a long way to refuting Japan's arguments that the provisions of UNCLOS relating to conservation are vague and effectively non-justiciable. Article 297 even envisages that Part XV will apply to certain cases relating "to the exercise by a coastal State

STATEMENT OF MR WILLIAMS

of its sovereign rights or jurisdiction”, and this shows the importance attached to the element of effectiveness in Part XV.

I refer in particular to article 297, paragraph 3, which states that:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 ...

Section 2 (articles 286-296), of course, makes provision for compulsory dispute settlement entailing a binding decision. Article 297 provides in paragraph 3 for one, and only one, exception. That concerns the sovereign rights of a coastal State in the exclusive economic zone. That exception, of course, does not apply here. Japan is not a coastal State with respect to southern bluefin tuna, and it has no sovereign rights over that resource, such as a coastal State has over resources in its EEZ.

The UNCLOS provisions I have referred to go a long way to clarifying the Tribunal’s role in the present case. You have an express mandate to order appropriate provisional measures in cases relating to fisheries beyond the EEZ. This in turn implies that the provisions of the Convention relating to conservation and management of high seas fisheries are justiciable, and that they impose real obligations which can be invoked under Part XV and before you. Were it otherwise article 297, paragraph 3, would be meaningless.

I note the deliberate decision of the drafters of the Convention as to the order of the words “conservation and management”. Conservation comes before management, and if necessary it comes before exploitation. Conservation of living marine resources is a priority where stocks are seriously depleted and the Applicants are in no doubt that this is the case for southern bluefin tuna. Nor, I think, will you be in doubt after you have read Professor Beddington’s report.

Part XV applies to high seas fisheries even though UNCLOS also envisages that co-operation in the conservation and management of those fisheries will occur under specific conventions: Indeed, it requires States to cooperate to establish regional fisheries organizations (article 118).

Despite the existence of specific organizations and conventions, the overarching provisions of UNCLOS apply to fisheries and Part XV applies to disputes concerning fisheries. These obligations arising under UNCLOS provide the essential legal matrix in this case. A dispute concerning the conservation and management of a high seas fishery entails the application and interpretation of the particular articles 116-119. In this case article 64 on highly migratory species is also in issue. Such a dispute clearly falls within Part XV, and the jurisdiction of tribunals under Part XV is only excluded if there is, in effect, some other provision under another agreement entailing a binding decision.

Mr President, Japan has made a lot of these and other jurisdictional points, and they will be dealt with shortly by Mr Mansfield. But the Applicants think the position is quite clear. Under article 290, paragraph 5, you only have to determine whether an arbitral tribunal under Annex VII has *prima facie* jurisdiction. The Applicants submit that there is clear jurisdiction under Part XV and this Tribunal has clear jurisdiction in relation to the provisional measures being sought. Any remaining issues can be dealt with later if Japan presses them.

Let me turn now to the merits of the case presented before you. It is, at present, a claim for provisional measures which you have express power to order if they are appropriate and if the other conditions laid down in article 290 are met. There is no requirement that you

finally determine whether there will be jurisdiction under Part XV. It is, as I have said, sufficient that there is *prima facie* jurisdiction.

Similarly, you do not determine the merits of the dispute, despite the volume of material relating both to jurisdiction and merits that is put before you. What you do need to do, and are expressly mandated to do, is to order provisional measures if that is appropriate and urgent. If there is *prima facie* jurisdiction, and I have already shown that there is, the parties seem to disagree over what provisional measures should be ordered, rather than over whether they should be ordered. Mr Burmester will deal with these issues later.

The Applicants accept that, while you certainly do not need to deal with the merits of the case, you do need to know enough about the Applicants' case and Japan's Response to it to form a view on the issues of appropriateness and urgency. In doing so, of course, you also have to interpret and apply the relevant provisions of UNCLOS dealing with conservation and management of high seas resources. Indeed we may find that, as in certain developing areas of domestic or national law, the so-called "interim phase" becomes important in giving guidance to the parties in the settlement of pressing disputes.

In the Applicants' submissions the essential principle here is the primacy of conservation over exploitation in respect of a seriously depleted stock. Japan is exploiting the resources in a quite unnecessarily risky way, and is thereby in breach of its express obligations under articles 116 to 119 of UNCLOS. Specifically, the Applicants say the following things:

One: The stock of southern bluefin tuna is seriously depleted and is at its historically lowest levels. Indeed this is not seriously in dispute, although projections of recovery are in dispute. As Professor Crawford will show, there are many projected stock recoveries for every stock that actually recovers. There is no reliable indication at all of recovery in the present case.

Two: In the circumstances, States are obliged to take action to conserve the depleted stock. That means, in the present case, not taking any catch over previously determined allowable limits, and in particular not doing so if by doing so there is a significant added risk of non-recovery of the stock.

Three: In the absence of agreement or of a scientific consensus on the action that should be taken to conserve a seriously depleted stock, States should act in a precautionary manner, emphasizing the sustainability of the resource for future generations.

Four: Japan is failing to take necessary action to conserve southern bluefin tuna stocks. On the contrary, it is further endangering them by a so-called "experimental" programme which is (a) unilateral; (b) contains a high component of outright commercial fishing; and (c) does not comply with agreed guidelines for experimental fishing. Through this conduct it is setting a terrible example for third States which are themselves increasingly imposing extra stress on the resource. By refusing to agree to a continuation of the previous total allowable catch, Japan has precluded the parties from relying on the total allowable catch as a basis for restraining the action of third States. In all these respects, Japan is in breach of its express obligations with respect to the conservation and management of these resources.

Five: These breaches are confirmed and aggravated by the fact that they concern a highly migratory species, to which the obligations in article 64 are applicable. Australia and New Zealand are coastal States through whose EEZ the tuna migrate, and this gives each a specific legal interest in the conservation of the stock. As things stand, Japan is expecting Australia and New Zealand to show restraint in fishing of juvenile tuna in their EEZ, but it is showing no restraint itself in the high seas fishery. This makes its conduct even more inequitable and even more clearly in breach of the obligation of conservation.

STATEMENT OF MR WILLIAMS

Six: Faced with these obligations, Japan seeks to defend its conduct in carrying on unilateral fishing by relying on its “experimental” or “scientific” character. But as our scientific report shows, and as will be further demonstrated by Professor Crawford, that excuse cannot prevail. It certainly does not make it any the less appropriate for you to order provisional measures now. The Applicants accept that a properly controlled and organized EFP could be useful, and the parties actually agreed in 1996 on the criteria which such an EFP should meet. The Japanese programme does not fulfil those criteria and, as so far conducted, cannot significantly improve our understanding of the stock. It amounts to commercial fishing in disguise.

Mr President, Members of the Tribunal, that, in summary, is our case and, to the extent necessary, it will be developed by my colleagues today. In conclusion I offer three remarks about the legal basis for this case.

The first concerns the nature of the so-called “right of high seas fisheries” under the modern law of the sea. According to one view, this used to be a traditional high seas right, essentially unfettered; a right to fish to the point of depletion of the stocks, absent agreement to the contrary.

The International Court has already rejected that view for modern international law in its well known dictum in the *Fisheries Jurisdiction* cases in 1974, and this Tribunal will, I am confident, reject it equally for the 1982 Convention. Indeed, it is clear from article 116 of the Convention that the right of high seas fishery is a qualified one, expressly qualified by the rights, duties and interests of coastal States in respect of highly migratory species under article 64, and expressly qualified also by the obligations of all States in respect of conservation under articles 117 to 119.

To quote the words of the authoritative Virginia Commentary: “the concept of high seas fishery rights is fundamentally altered in the 1982 Convention”. But this makes it even clearer that the obligations of conservation expressly referred to in article 116 are legal obligations: if they were not, the old “free-for-all” basis of high seas freedom would have returned by the back door. Indeed, many of the Japanese arguments, and its underlying attitude to this case, imply precisely that. Those attitudes are not compatible, either with the text or with the purpose of the Convention.

Secondly, I should stress some things which this case is not about. It is not about freedom of navigation on the high seas. Still less is it about unilateral enforcement by one State of the obligations of another in high seas fisheries. The Applicants are not suggesting that they have unilateral rights to enforce their view of the tuna stocks against Japan. The issues that arose between Canada and Spain over the *Estai* case have nothing to do with the present dispute. But at the same time as Australia and New Zealand do not claim any unilateral right to enforce their views over high seas fisheries, they deny to Japan any right itself to take unilateral measures, such as the current EFP, which put the stock at risk.

The very fact that this case is not about unilateral enforcement on the high seas highlights the role of this Tribunal. Unless there is an appropriate vehicle for authoritatively resolving disputes over the conservation of high seas fisheries and highly migratory species, then the express obligations of the parties to UNCLOS in that regard are undermined and yet again the old anarchical freedom to fish to the point of depletion of stocks will return by the back door.

So this case presents an important opportunity for the tribunals with jurisdiction under Part XV, and especially this Tribunal, to take a leading role in the resolution of disputes which the parties, despite extended efforts, have been unable to resolve for themselves.

My third point concerns one of the principles which we believe should be applied in resolving those disputes, the precautionary principle, also referred to as the precautionary

approach. Precaution is an essentially common-sense notion associated with conservation and the minimizing of risk in the face of scientific uncertainty. For our purposes, the precautionary approach provides the practical basis for implementation of the general concept of precaution and conservation in fisheries management. In that sense it is already implicit in UNCLOS itself.

As the Virginia Commentary notes with respect to article 116(b), this language “points to the precautionary principle of fisheries management”. Similarly, Professor Orrego Vicuña, in a leading work entitled *The Changing International Law of High Seas Fisheries*, records as one of the achievements of UNCLOS “the introduction of the precautionary principle even if conceived at the time in a different language.”

Since that principle or approach is already implicit in UNCLOS, and since it reflects the good common-sense idea of minimizing serious harm in the face of uncertainty as to the consequences of one’s actions, there is no difficulty in giving it full effect in the interpretation and application of articles 116 to 119. In that regard I would commend to the Tribunal the approach taken by the World Trade Organization Appellate Body in the *Shrimp-Turtle* case.

The Appellate Body under the Presidency of Professor Feliciano noted that the concepts in treaties referring to exhaustible natural resources were not static but “by definition, evolutionary”, and that they had to be interpreted to take account of “contemporary concerns of the community of nations about the protection and conservation of the environment”, having regard in particular to “the objective of sustainable development”.

In the present case, this evolutionary approach is particularly called for, given that any conceivable threshold for a precautionary approach has been exceeded, and given the perilous state of the SBT stocks.

But I should add that, for our purposes, we do not need to rely on those formulations of the precautionary principle or approach which are specifically designed for cases where information is lacking or highly uncertain.

In such circumstances the effect of the precautionary approach can be summarized very simply: to err is human, but the law now says that, faced with serious risk and real uncertainty, if at all possible you must err on the side of caution. This Japan has failed to do, prompting the Applicants to seek a specific measure referring to the principle.

But in our submission the Applicants’ case does not depend simply on the notion of scientific uncertainty.

As Professor Crawford will show, there is quite enough scientific information available to take us well within the bounds of the obligation of conservation without the aid of the precautionary principle.

Nonetheless, the conditions for the application of that principle are met; they reinforce the Applicants’ case for provisional measures.

And they enjoin this Tribunal, as well as the parties, to do whatever is reasonably possible to conserve and not further endanger the depleted southern bluefin tuna stock.

Mr President, Members of the Tribunal, this concludes my introductory statement, and I invite you to call on the Australian Agent, Mr Campbell, to continue our joint presentation,

The President:

I thank the Honourable Attorney-General of Australia. I now invite Mr Campbell, the Agent of Australia, to continue the submissions.

STATEMENT OF MR CAMPBELL
AGENT OF AUSTRALIA

Mr Campbell:

Mr President and Members of the Tribunal, it is an honour to appear before you as the Agent for the Government of Australia in this pivotal case relating to the conservation and management of fisheries resources. As Mr Caughley has noted, I will establish that Japan has made a practice of seeking large and unsustainable increases in the catch of southern bluefin tuna in the face of serious biological concerns. This culminated in its two EFPs which were carried out despite its obligations under UNCLOS and despite the clear and express invocation of those UNCLOS obligations by the Applicants.

The relevant provisions of UNCLOS and, in particular, articles 64, 87 and 116 to 119, provide a careful balance between conservation and exploitation. Those provisions require also management by cooperation between interested States and recognize that fishing on the high seas should not prejudice the rights and interests of the relevant coastal States such as Australia and New Zealand.

Unfortunately, the actions of Japan in relation to southern bluefin tuna suggest that it is more interested in the short-term commercial exploitation of southern bluefin tuna than in its short and long-term conservation and sustainability. Its focus on the goal of commercial exploitation carries with it a failure on the part of Japan to give effect to the international obligations which I have just mentioned. It is this failure which has given rise to the current dispute and it is this failure and the urgency of the current situation which has forced the Applicants to seek these provisional measures.

Mr President, my submissions are divided into three parts. First, I will describe the southern bluefin tuna fishery and status. Secondly, I will outline the development of management practices relating to the fishery with particular reference to UNCLOS and the 1993 Convention. Thirdly, I will relate various steps in the development of the present dispute. It seems that Japan accepts there is a legal dispute – albeit it seeks to confine the dispute to one arising under the 1993 Convention.

First, SBT is one of the highly migratory species of pelagic fish expressly referred to in Annex 1 to UNCLOS. It can grow up to 2 metres and 200 kilograms and can live for up to 40 years or more. Also, it is highly valuable. One fish can sell for tens of thousands of dollars. Assuming 2,000 tonnes of SBT were to be taken by Japan in its current unilateral programme, it would be worth about US\$ 30-50 million on the Japanese market.

It is a single stock with a single spawning ground south of the Indonesian island of Java. As illustrated on the screen (Figure 1), the juveniles migrate along the west coast of Australia and tend to spend their summers in the southern and eastern coastal waters of Australia. During winter they migrate to deeper oceanic waters where they are harvested by the long-line fisheries. Upon reaching maturity, individuals return to the spawning grounds south of Java, a trip they make a number of times. In summary, the SBT ranges across a broad part of the oceans of the southern hemisphere, including in the exclusive economic zones of Australia and New Zealand. It is not found in the marine areas subject to the jurisdiction of Japan.

There do remain important uncertainties about SBT biology, including the mean age of maturity, the length of time that individuals spend on the spawning ground and whether individuals spawn each year. However, what is absolutely clear is that, as a relatively long-lived species with a lengthy pre-maturity period and virtually life-long exposure to fishing pressure, the SBT stock is slow to recover from depletion. This contrasts with other species like some tropical tuna which have a three to four year breeding cycle. This vulnerability of

SOUTHERN BLUEFIN TUNA

SBT only serves to heighten the need for compliance by States with their international obligations relevant to the conservation and utilization of SBT.

The history of that utilization, particularly in its early years, is not a pretty one. In this respect I am not singling out Japan for criticism: Australia too was involved in what was an unsustainable level of exploitation. Significant commercial harvesting of SBT, both in the long-lining and surface fisheries, commenced in the early 1950s with a peak of over 81,000 tonnes being taken in 1961. The cumulative reported catches of SBT in tonnage over that period since 1950 are shown on the screen (Figure 2). The catches of Japan are in red, those of Australia in green and those of New Zealand in blue. Figure 2 illustrates that historically by far the highest proportion of catch is that of Japan. Since 1997, the Japanese catch has not included any EEZ fishing.

The ratio of the current size of the parental stock to that at the very beginning of exploitation is a key statistic for measuring the degree of exploitation. A common benchmark is that serious over-fishing has occurred when that ratio is below 20 per cent. Assessments for SBT point to figures well below this, typically in the range of 6-12 per cent.

The expectation when parental stock has been reduced so markedly is that this will be accompanied by declines in recruitment of fish to that stock, recruitment being the key to the future well-being of the stock. This is exactly what has happened in the case of SBT. Recruitment is estimated to be around one-third of the level of that prevailing in the 1960s and there is no indication of any increase. I emphasize this is not the Applicants' view alone; it is an agreed view of the Scientific Committee established under the 1993 Convention.

The sorry state of the stock with a depleted parental biomass and significantly reduced recruitment is not in question. So how have the parties responded? That brings me to my second point concerning management practices.

Prior to the early 1980s, there was no form of multilateral regulation of SBT. The interaction between the parties at that stage was primarily on a bilateral basis. For example, in 1979 Australia and Japan entered into an agreement on fisheries which provided for yearly subsidiary agreements concerning Japanese tuna long-line fishing. These enabled entry into the Australian EEZ by Japanese vessels for the purpose of long-lining.

In the early 1980s Australia voluntarily placed its own limitations on the catch of juveniles following a collapse of a major component of the surface fishery off the south-east coast of Australia. Given the highly migratory status of SBT, such voluntary restraint in the EEZ component of the fishery needed to be complemented in the high seas component of the fishery.

From the mid-1980s until 1993, the management and conservation of SBT was determined under a trilateral arrangement between the three parties to these proceedings. These arrangements were consistent with the then obligations of the parties under international law as reflected in the text of UNCLOS. Under these trilateral arrangements, annual global and country catch quotas were established for southern bluefin tuna from the three countries. Japan first agreed to a catch limit on SBT in 1985 when a global quota of 38,650 tonnes was set. There was a major reduction in both the TAC and quota in 1988. Nevertheless, even then, the catch limit allocated to Japan considerably exceeded the actual catch its long-line fleet was able to take. In 1989, there was a further major reduction and it was agreed that the TAC should be 11,750 tonnes, with an allocation to Japan of 6,065 tonnes, to Australia of 5,265 tonnes and New Zealand 420 tonnes. In response to a matter raised by the Tribunal, I should state that all the commercial catch by Australia and New Zealand within their EEZs does form part of the TAC. Also, all of the New Zealand catch and almost all of the Australian catch of SBT is caught within their respective EEZs.

In 1993, Australia, New Zealand and Japan adopted the 1993 Convention. It entered into force in 1994. The Preamble to the 1993 Convention demonstrates that it was intended to

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assist in the implementation of the international obligations of the parties as reflected in UNCLOS, even though UNCLOS had not yet entered into force. The inter-relationship between UNCLOS and the 1993 Convention will be explained in some detail by Mr Mansfield.

Deliberations under the 1993 Convention, both in the Commission for the Conservation of Southern Bluefin Tuna and in the Scientific Committee, have been long, laboured and difficult. In the submission of the Applicants, this is because Japan routinely has sought a higher degree of commercial utilization of the stock than can be justified both under relevant principles of international law and on the scientific evidence. It has done so despite the consistent conclusion of the Scientific Committee that the low level of the parental biomass is a cause for serious biological concern. Let me give an example from the Scientific Committee's reports, which Japan has put in evidence. In 1995, the Scientific Committee reported:

The current parental biomass level is considerably lower than the 1980 level. The continued low abundance of SBT parental biomass is cause for serious biological concern. The 1980 level of parental biomass corresponds to commonly used thresholds for biologically safe parental biomass. Below that threshold, the risk of poor recruitment is expected to increase while the stock becomes more likely to experience abrupt and unpredictable recruitment decline.

As I have noted earlier, recruitment has indeed declined markedly.

Yet, at the second meeting of the Commission in 1995, Japan sought an increase of 6,000 tonnes in the total allowable catch. This would amount to an increase of over 50 per cent in the existing TAC. Given the assessment of the Scientific Committee, it is not in the least surprising that no consensus was reached on the total allowable catch or its allocation at that meeting. Therefore, the Commission convened a special meeting in October 1995. At that meeting, Japan submitted an alternative proposal that an experimental fishing quota be set. That "experimental" quota was, coincidentally, 6,000 tonnes. The practice of Japan in seeking an increase in TAC and then seeking the same level of increase, characterized as experimental fishing, clearly suggests that its experimental fishing is a disguised form of commercial fishing. Indeed, in 1995 it expressly indicated that the figure of 6,000 tonnes for its proposed special experimental quota could be reduced if the TAC were increased by the same amount.

It was not until a second special meeting of the Commission in May 1996 that the Commission decided that for the 1995-1996 fishing year the total allowable catch would remain unchanged at 11,750 tonnes with the same allocations.

Mr President, this may seem a somewhat lengthy example but the simple point is this: how can an increase of 6,000 tonnes be consistent with a conclusion that the continued low abundance of the SBT parental biomass is cause for serious biological concern? Part of this 6,000 tonnes of increased catch would have been taken from the parental stock, thereby directly reducing the parental biomass. The remainder would have been taken from younger age groups, removing fish that otherwise would have contributed to maintaining or perhaps increasing the future parental biomass. This is in the context of the parental stock being well below biologically safe levels.

On top of all this, in 1997 Japan then proposed changes to the existing mechanism for determining allocations of TAC among parties. The proposed mechanism would have provided a considerably more favourable national allocation of the TAC to Japan at the

expense of Australia. In short, Japan has been determined to get additional commercial catch, whether by way of an increase in TAC, by way of an experimental fishing programme or by favourable changes to the long-standing national allocations of TAC. Such instances, of which I have given just one example, demonstrate a lack of cooperation and a lack of elementary care for the conservation of the stock.

Until 1998, the practice of Japan within the Commission and in the Scientific Committee served to cause significant delays in the setting of TACs. However, in 1998 and in 1999, delay turned into failure to agree. This was due solely to the promotion of increases in commercial catch by Japan, increases which were and are, on any dispassionate judgment, unsustainable. For example, despite the conclusion in 1998 by the Scientific Committee that "the continued low abundance of the SBT parental biomass is cause for serious biological concern", Japan proposed raising the total allowable catch by 3,000 tonnes or more. Again, there was no agreement, so again the spectre of experimental fishing was raised and then implemented unilaterally, albeit at a lower tonnage.

By contrast, in the absence of agreement, Australia and New Zealand restrained their catch to the level first established in 1989. Moreover, this restraint has been most markedly exercised in relation to the fishery for juveniles in the Australian EEZ. Japan has sought, and has largely achieved, a fully policed restraint by Australia and New Zealand in respect of their EEZ fisheries. It has failed to show similar restraint on the high seas. Yet it now accuses Australia and New Zealand of bad faith, an accusation which is unfounded and uncalled for.

The Applicants are not opposed to the concept of an experimental fishing programme as a means of enhancing the understanding of the stock and reducing uncertainty as to the state of the stock. However, both Australia and New Zealand are vehemently opposed to experimental fishing of SBT being conducted on a unilateral basis, in a form which will not deliver scientifically valid and meaningful results and which has the serious potential to contribute to a decline in the stock.

Mr President, this leads me to the dispute which is presently before the Tribunal. In this respect, let me particularly refer the Tribunal to Annex 2 to the Applicants' Statements of Claim. This is a document entitled *Objectives and Principles of the Design and Implementation of an Experimental Fishing Programme*. These were agreed by the Commission in 1996. The preamble to that document refers to the utility of experimental fishing as a measure to improve the quality and quantity of the scientific information. It states:

Increasing removals above the current TAC should provide an opportunity for experimental fishing to proceed. This could happen where there is agreement within the Commission that the risks of such removals are outweighed by the benefits.

This passage demonstrates two things. First, it was always anticipated that experimental fishing should be done by agreement, by consensus and not unilaterally. It was also agreed that the risks of extra removals from the fishery by way of experimental fishing must be outweighed by the benefits.

The proposals put forward by Japan for experimental fishing programmes, and the unilateral experimental fishing carried out by Japan, do not meet those objectives and principles, as will be demonstrated by Professor Crawford.

In February 1998, Japan refused to extend the TAC arrangements. Japan announced that it would conduct unilateral experimental fishing over a period of three years. After months of discussion, and over the express objections of the Applicants, Japan did conduct unilateral experimental fishing from 10 July until 31 August 1998. This resulted in an

additional 1,464 tonnes of catch of SBT being taken by Japan over and above previously agreed levels of catch. This catch was taken essentially for commercial purposes, with minimal scientific gain.

Before considering whether there is a dispute between the Applicants and Japan over the interpretation and application of UNCLOS, let me first examine the legal requirements for a dispute. The Permanent Court of International Justice in *Mavrommatis Palestine Concessions*, defined a dispute as "a disagreement on a point of law or fact, a conflict of the legal views or of the interests between two persons" (*P.C.I.J., Series A, No. 2*, p. 11). The International Court in the Tunisia-Libya case held that, in order to constitute a dispute "it should be sufficient that the two Governments have in fact shown themselves as holding opposite views ..." (Tunisia-Libya *Continental Shelf* case, I.C.J. Reports 1982). Commenting on this passage, Merrills states that "provided a clear difference of opinion on a legal issue is manifest, negotiation is not a prerequisite of adjudication" (J.G. Merrills, *International Dispute Settlement*, 3rd ed.). Therefore, the legal threshold for the existence of a dispute is not very high. As will be demonstrated, that threshold is clearly met in this case.

A consideration of the various exchanges establishes that this dispute is not simply one over science under the 1993 Convention. Those exchanges establish that this is a dispute about fundamental conservation obligations under UNCLOS.

On 31 August 1998, both Australia and New Zealand formally notified Japan of the existence of a dispute between them over its conduct of unilateral experimental fishing in 1998. They stated that in conducting its unilateral experimental fishing, Japan had placed itself in breach of its obligations under international law and, in particular, its obligations under the 1993 Convention, UNCLOS and customary international law, including the precautionary principle. Express reference was made to the obligations under UNCLOS concerning the "conservation of highly migratory species", "the duty to have regard to the interests of coastal states" and the "the duties to co-operate in, and take such measures necessary for, the conservation of the living resources of the high seas". The relevant diplomatic notes concluded that there was a dispute between Australia and Japan over the conduct of unilateral experimental fishing and its legality under international law. They called for, and Japan agreed to, negotiations under article 16, paragraph 1, of the 1993 Convention. The Applicants also reserved the right to take such measures as might be necessary to protect their legal interests.

Those negotiations under article 16, paragraph 1, in December 1998 failed to resolve the dispute. However, without prejudice to the legal position of the Applicants, the delegations to the negotiations decided that they should develop a future EFP, to be adopted by consensus, which took account of the 1996 Objectives and Principles that I mentioned earlier and the results provided by Japan from its 1998 EFP.

Also, in the course of the December negotiations, both of the Applicants made statements on their legal position in which they referred to Japan's conduct of unilateral fishing as being in breach of the 1993 Convention, UNCLOS and customary international law. These form part of Annex 7 to the Response of Japan. Indeed, the statements of the Applicants' legal position referred expressly to articles 64 and 116 to 118 of UNCLOS. In the light of these statements and of the 31 August 1988 diplomatic notes, the statement by Japan in paragraph 33 of its Response that the Applicants did not identify until June 1999 any provisions of UNCLOS alleged to have been violated is simply wrong.

Between February and May 1999, a series of meetings was held between the parties concerning a joint EFP, many in the forum of an Experimental Fishing Programme Working Group. Japan has sought to paint the Applicants as agreeing to certain elements of proposals

put forward by Japan in the course of those discussions and, on the other hand, of frustrating the negotiations by their own proposals.

However, Japan's single-minded determination to proceed with its own proposals for an EFP, without change, was manifest in those discussions.

At this stage, let me also place on record that Australia does not accept the chronology of discussions regarding the EFP which forms Annex 4(1) to the Response of Japan. It is selective and does not accurately portray the views and positions of the parties in those discussions. Similarly, we do not accept the declarations appended to the Response of Japan as being accurate and comprehensive. However, at the provisional measures stage, it is not necessary for the Tribunal to decide all the issues of fact.

On 26 May 1999, in the course of a meeting between senior officials in Canberra, Japan issued what can only be described as an ultimatum. In effect, it said "agree to our experimental fishing programme by 31 May with an expected catch of 1,800 tonnes, plus or minus 20 per cent, or we will carry out an experimental fishing programme on 1 June, with an expected catch figure of 2,000 tonnes plus or minus 20 per cent".

In paragraph 16 of his declaration at Annex 4 to Japan's Response, Mr Komatsu describes the visit by representatives of Japan to Canberra for the purpose of that meeting as "a last effort at negotiations showing compromise". Mr Komatsu was not at that meeting. I can assure that there was no hint of compromise on the part of Japan. It was take it or leave it. Indeed the delegation of Japan stated that it had no room to change the package that they had brought with them.

The Applicants did not succumb to the ultimatum and noted that if Japan were to proceed with another unilateral EFP from 1 June 1999 then its actions would amount to termination of the 1993 Convention article 16 dispute resolution process. On 31 May, both countries formally requested Japan not to proceed.

Japan informed the Applicants on 1 June 1999 of its decision to commence its unilateral experimental fishing on that date, and both responded by stating that such an action was unacceptable and in breach of international law. On the same day the Australian Foreign Minister called in the Ambassador of Japan to Australia to convey Australia's strong protest over the commencement of unilateral fishing.

There followed a series of diplomatic exchanges concerning how the dispute might be resolved. Given their recent disappointing and fruitless experience of trying to resolve the dispute with Japan by non-compulsory means, the Applicants favoured compulsory dispute resolution under UNCLOS entailing binding decisions. However, Japan continued to favour non-compulsory means under the 1993 Convention. In an effort to accommodate Japan, the Applicants indicated their readiness to again try non-compulsory means such as mediation, provided Japan stopped its newly commenced unilateral EFP and provided the non-compulsory means were expeditious. Japan would not accept these reasonable conditions. One day before the commencement of the Annex VII arbitration, Japan belatedly offered dispute resolution by an arbitral panel under article 16, paragraph 2, of the 1993 Convention, but without agreeing to stop its EFP pending such arbitration. Throughout these exchanges the Applicants noted that the obligations of Japan under UNCLOS and customary international law are core elements of the disputes which must be addressed if it is to be resolved.

In response to an issue of timing raised by the Tribunal let me make the following comments. The diplomatic exchanges, of which the Tribunal has copies, clearly indicate that the Applicants did not stand silently by for six weeks after 1 June before commencing legal action. There was a need for the highest levels of government to consider the impasse. Also, as one would expect the first and proper response was one of strong protest. The Applicants then proposed binding dispute settlement under UNCLOS at the same time as Japan offered

STATEMENT OF MR CAMPBELL

mediation. The Applicants offered to accept this proposal provided the unilateral EFP ceased. When Japan rejected this, procedures were promptly commenced.

Mr President and Members of the Tribunal, this survey of the SBT fishery and Japan's conduct in relation to it establishes a number of matters. First, the records of the Commission evidence the agreement of all the parties that the continued low abundance of SBT is a cause for serious biological concern. Secondly, despite this, Japan in recent years has sought large and unsustainable increases in the total allowable catch, at one point seeking an additional 6,000 tonnes. It has done so both under the rubric of an increase in quotas and of experimental fishing, without much or any distinction between them. Furthermore, in circumstances where it has been unable to get the agreement of the Commission to an additional commercial tonnage as agreed total allowable catch it has sought that tonnage as part of an experimental fishing programme exclusively for the use of its own vessels. Thirdly, throughout the dispute, Australia and New Zealand have consistently invoked the obligations of the Parties under UNCLOS and under customary international law as core elements of the dispute which must be addressed if the dispute is to be resolved.

The question then becomes what legal consequences flow from the facts as I have outlined them. There are here three legal issues. First, is this a dispute exclusively under the 1993 Convention, as Japan argues? The answer is clearly "no", as my colleague Mr Mansfield will establish. Secondly, is the Japanese conduct as I have outlined it *prima facie* inconsistent with its obligations under UNCLOS – at least in the sense of raising a triable issue on the merits? The answer to this question is clearly "yes", as Professor Crawford will show. And thirdly, what provisional measures should be indicated now? This will be a matter for Mr Burmester. So, Mr President, to deal with the first of these legal issues I ask you to call upon Mr Mansfield. Thank you, Mr President.

The President:

Thank you very much, Mr Campbell. I indicated that there would be a break in the sitting. It is now twenty past. There are two possibilities. We could have the break early and come back earlier than envisaged, or ask Mr Mansfield to commence on the understanding that at a convenient point the presentation will break. I would suggest that perhaps it would be more convenient for us to break early, but I will leave it to you to decide. Mr Mansfield, please. Would you like to start and break at a convenient point?

Mr Mansfield:

I think that would be convenient, Mr President, to make sure we keep to time. I will try and find a convenient point to break in about ten minutes.

The President:

That will be acceptable to the Tribunal. May I now call Mr Mansfield to continue the submissions.

STATEMENT OF MR MANSFIELD
COUNSEL OF NEW ZEALAND

Mr Mansfield:

Mr President, Members of the Tribunal, as someone who participated in most, if not all of the negotiating sessions of the Law of the Sea Conference and has a strong commitment to the Convention it produced, may I say it is a great honour to appear before you today.

Mr President, in this presentation I will address the relationship between UNCLOS and the 1993 Convention so far as it is necessary to do so for the purposes of these proceedings. I say "so far as it is necessary", because in our view this is not in fact very far at all. This Tribunal has *prima facie* jurisdiction under article 290, paragraph 5, of UNCLOS. The Applicants make a substantial claim under identified articles of UNCLOS, and the facts *prima facie* sustain that claim; at any rate they clearly raise an arguable issue. It will be for the arbitral tribunal under Part XV - unless the parties otherwise agree - to decide whether any jurisdictional objection Japan may make is valid or not. For present purposes it is enough that the claim is *prima facie* properly brought under Part XV of UNCLOS. That is really the only issue.

Japan of course does not agree. In fact in its Response it spends almost half of its space at this point trying to avoid the jurisdiction of this Tribunal and of Part XV. I will show in what follows that this dispute does in truth arise under UNCLOS and that the dispute settlement procedures of Part XV do apply to it as a matter of law. But the Applicants do not need to go so far. It is sufficient that the dispute is *prima facie* one to which Part XV applies, and this is clearly the case. So what I will say on the issue of substance goes further than is strictly necessary. But I do this for two reasons. First, in order to respond more fully to the extensive argument Japan makes. Secondly, and more importantly, because the reason why Japan's argument on this point is wrong sheds useful light on the relationship between UNCLOS and other implementing Conventions, and thus, for our purposes, on the role of this Tribunal in relation to high seas fisheries. In this respect what I have to say builds on the argument already presented by the Honourable Attorney-General of Australia.

Specifically, I will discuss the primacy of the relevant obligations contained in UNCLOS and the subsidiary nature of agreements such as the 1993 Convention. In particular I will submit that while the 1993 Convention is intended to give effect, in part, to the relevant obligations under UNCLOS, it in no way excludes or replaces those obligations. In that regard I will also submit that the practice of States Parties under agreements such as the 1993 Convention is directly related to the question whether they are fulfilling their obligations under UNCLOS. Japan tries to force implementing agreements such as the 1993 Convention into a separate watertight box, distinct from the obligations of UNCLOS. We submit that this is wrong: wrong in relation to the facts of the present case, and wrong in law as well.

First, Japan's argument is wrong in relation to the facts of the present case. As outlined by Mr Campbell it is the firm contention of the Applicants that this dispute concerns a breach of important obligations under UNCLOS. It has been the constant contention of the Applicants since the dispute was first notified to Japan that the conduct of Japan specified in the Statements of Claim constitutes a breach of its obligations under UNCLOS. The relevant provisions are articles 64 and 116 to 119. The dispute thus turns on the interpretation and application of those particular provisions, related provisions such as article 300 and underlying principles of international law which are relevant to their interpretation and application.

Secondly, Japan's argument is wrong in law as well; it fails to appreciate the central function of UNCLOS as the key convention for the law of the sea, and likewise of this Tribunal with its specific responsibilities under UNCLOS.

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UNCLOS establishes a comprehensive legal regime for all ocean space. It is a regime that carefully balances rights with obligations and looks to create a lasting legal order to promote the peaceful and sustainable use of the oceans and seas for the foreseeable future. What is particularly relevant for this dispute is that in relation to marine living resources it balances both the conservation and use of those resources and the rights and duties of coastal States and distant water fishing States.

Mr President, UNCLOS is often referred to as a “constitution for the oceans” and it creates an overarching regime. It envisages subsidiary processes to develop the detailed measures necessary or appropriate to give effect to its provisions. In many cases it specifically enjoins States to engage cooperatively in such processes. But at the same time it spells out substantive legal obligations for the States which are party to it.

Article 64 on highly migratory species is an obvious case in point. It requires the coastal States and the distant water fishing States in a region to “cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region ...”. It goes further and says that in regions where no appropriate international organization exists coastal States and distant water fishing States must cooperate to establish such an organization and participate in its work.

But the important point is that, even though UNCLOS envisages that some of the most important obligations it establishes should be discharged through appropriate subsidiary organizations the obligations themselves remain – and they are fundamental. They are not excluded, diluted, or modified – let alone eliminated – by the creation of such organizations.

The organizational arrangements established by the 1993 Convention are without question the kind of international organization envisaged in article 64 of UNCLOS. The entire thrust of the 1993 Convention is to provide the detailed practical means by which the parties can give effect to their rights and obligations under UNCLOS with regard to this particular species of highly migratory fish. It does not restate those rights and obligations and it was not necessary for it to do so. For example, there is no equivalent in the 1993 Convention of article 117 of UNCLOS. At the same time, the 1993 Convention contains nothing which can be construed as intended to exclude, override, or modify those fundamental rights and obligations.

This is the last point I will deal with before the break, Mr President.

What then is the relationship between the conduct of a party under a subsidiary agreement such as the 1993 Convention and its obligations as a party to UNCLOS?

UNCLOS anticipates that much of the necessary work in conserving and managing high seas living resources will have to be undertaken by States working together and, in many if not most situations, working together through regional or sub-regional organizations. In these circumstances the way in which States conduct themselves within such organizations must be able to be considered in any assessment of whether a State is fulfilling its relevant obligations under UNCLOS. If that were not the case any such assessment would be virtually limited to whether the State concerned had joined the relevant regional or sub-regional organization. Such an interpretation would deprive the obligations of any content and render the relevant UNCLOS articles essentially meaningless.

To the contrary, Mr President, the Applicants submit:

One: that the obligation under UNCLOS articles 64 and 116 to 119 to cooperate in the conservation of the living resources of the high seas, including highly migratory species, was always intended to be a serious obligation;

Two: that given the sorry state of world fisheries and the ecological, economic and even peace and security implications of that situation, this obligation is assuming ever greater importance;

Three: that the conduct of States within regional or sub-regional organizations formed for the purpose of ensuring the conservation of these resources and promoting their optimum utilization is directly material to the question of whether they are fulfilling this increasingly important obligation.

Thank you, Mr President, if it is convenient to you we could stop at that point.

The President:

Thank you very much indeed, Mr Mansfield. It is convenient for us. The sitting will be suspended for half an hour and we will resume at twelve noon.

The Tribunal adjourned at 11.30 a.m.

The President:

Please proceed, Mr Mansfield.

Mr Mansfield:

Thank you, Mr President. Mr President, Members of the Tribunal, before the break I was making the point that high seas obligations created by UNCLOS are not excluded or modified by the creation of article 64-type regional organizations.

I want to go on to say that just as the 1993 Convention contains nothing that excludes, overrides, or modifies the substantive rights and obligations of parties under UNCLOS, so too the procedural rights and obligations it creates, such as those in respect of dispute settlement, in no way exclude or override the rights and obligations of the parties under Part XV of UNCLOS.

Yes, the 1993 Convention contains its own dispute settlement provision. This is to be expected but it certainly does not imply exclusion of Part XV.

Article 16 relates to disputes between two or more of the Parties concerning the interpretation or implementation of the 1993 Convention. It does not purport to – and does not – deal with disputes relating to the interpretation or implementation of UNCLOS. Indeed it would have been somewhat surprising if it had done so unless it had provided that such disputes were required to be settled in a specific, binding and authoritative manner. Unless, in other words, it had settled on one of the means set out in article 287 of UNCLOS and required any disputes relating to UNCLOS that might arise in the operation of the 1993 Convention to be submitted to that specific means – namely this Tribunal, the International Court of Justice, or an arbitral tribunal constituted in accordance with Annex VII or Annex VIII.

But that is the second point about article 16 of the 1993 Convention. It does not provide for compulsory, binding, third-party settlement. No party is bound to accept any of the forms of dispute settlement to which it makes reference. Rather, the mechanism is based on the mutual agreement of the parties. Paragraph 1 provides that parties are to “consult ... with a view to have the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement” and so on. In paragraph 2 it provides for reference to the International Court of Justice or to arbitration, but only if the parties agree to that course. Finally, in paragraph 3 a simplified form of arbitration is provided for, if the Parties agree to that course.

The effect then is that, although the article gives strong encouragement to the peaceful settlement of disputes under the Convention, it does no more than provide a list of

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possibilities for the parties to choose from by agreement. Nor, as Japan asserts, are the parties required by the article to exhaust all the possibilities for which it provides.

The inclusion of this provision in the 1993 Convention, while no doubt useful in the context of the anticipated operation of the Convention, cannot be read as excluding or replacing the rights of the parties to avail themselves of the compulsory dispute settlement provisions of UNCLOS where a dispute involving the 1993 Convention is at the same time one involving the interpretation or application of UNCLOS. In any event the provision of a method for the settlement of disputes that is not compulsory and binding, and which relates only to the 1993 Convention, cannot preclude the parties from using the mechanisms under UNCLOS for dispute settlement which relate to that convention.

It is worth reflecting for a moment on the situation that could arise if that were not the case. In those circumstances it would be open to a State Party to UNCLOS to circumvent that Convention's carefully negotiated compulsory dispute settlement provisions. It could avoid any risk of being taken to binding dispute settlement in regard to its obligations regarding the conservation of the living resources of the high seas. All it would need to do would be to join a regional or sub-regional organization the dispute settlement provisions of which did not provide for compulsory binding dispute settlement. Then, even if it did not cooperate for the purposes of that organization and its conduct was at odds with those purposes, the other members of the organization would have no effective legal means of holding it to account under the subsidiary organization or, more importantly, under UNCLOS in relation to those fundamental obligations in that convention.

Clearly, this was never the intention and indeed article 282 covers the point. It establishes that the compulsory and binding procedures provided for in UNCLOS will apply in respect of any dispute concerning its interpretation or application unless States Parties have bound themselves to submit such disputes to a particular compulsory procedure that similarly entails a binding decision. This, as I have noted, is not the case with the 1993 Convention.

As explained by Mr Campbell, the first response of the Applicants to Japan's decision to proceed unilaterally with its experimental fishing programme in 1998 was to call for urgent consultations and negotiations under article 16, paragraph 1. The steps that followed are set out in the Applicants' Statements of Claim and have been discussed by Mr Campbell. Suffice it for me to note here that the reason the Applicants embarked on the route of consultations and negotiations under article 16, paragraph 1, on the first occasion on which Japan unilaterally undertook an experimental fishing programme, was that the Applicants entertained a genuine hope that it might prove possible to resolve the dispute through this process. As you will have seen from their diplomatic notes at the time, they were careful to reserve their legal positions and any other courses of action that might be open to them. But they were willing to explore in detail the possibility of resolution and specifically to try to develop an experimental fishing programme that fulfilled the objectives and principles established by the Commission in 1996.

It was the nature and manner of the ultimatum delivered by Japan at the end of May this year, its insistence on recommencing unilateral fishing on its own terms on 1 June 1999 and its steadfast refusal to cease this programme to enable further efforts to resolve the dispute that made it clear to the Applicants that no settlement was able to be reached through the procedures of article 16. These actions confirmed a pattern of behaviour in relation to the 1993 Convention that, in the view of the Applicants, was inconsistent with Japan's obligations under UNCLOS.

In its Response to the request for interim measures Japan argues that this dispute is simply about differences over the operation of the 1993 Convention, not about UNCLOS or general principles of law, and should be dealt with exclusively through the dispute settlement

provisions of the 1993 Convention. But, as I have explained, this is simply not the case. The essence of this dispute is that Japan's conduct in relation to the 1993 Convention places it in breach of UNCLOS obligations that are of major importance to the sustainability of the living resources of the high seas. Moreover, Japan's conduct, including in relation to the exercise of the dispute settlement procedures of article 16, has been such as to make it clear to the Applicants that there was no prospect of resolving the particular points of disagreement (especially over the EFP) through the procedures available under that article in a timeframe that would meet the urgency of the situation. In particular, the ultimatum presented by Japan at the end of May this year and its unilateral commencement of fishing on 1 June were incompatible with a genuine desire to resolve the issues surrounding the EFP and confirmed the impression that Japan simply wished to use the EFP to increase its commercial catch.

It was only after the Applicants had advised that they were considering other options open to them under international law that Japan proposed mediation under the 1993 Convention. But Japan refused to accept the reasonable conditions put forward by the Applicants that the EFP be ceased for the mediation (i.e., that they refrain from another *fait accompli*) and that the mediation be carried out to an expeditious timetable. Similarly they gave no indication of a willingness to cease the EFP when, shortly afterwards, they proposed arbitration under article 16. Japan thus confirmed again that only through the compulsory and binding procedures of UNCLOS and in a context where the substantive obligations of parties to UNCLOS can be examined is there any prospect of the underlying issues in dispute here being resolved in a timeframe that takes account of the fragile status of the SBT stock.

As I have already noted, article 16 does not purport to deal with disputes relating to the interpretation or application of UNCLOS; nor does it provide for compulsory and binding procedures. Equally, however, it does not preclude the parties from resorting to other procedures that may be open to them. Accordingly, the conditions established in article 281 of UNCLOS for the application of the dispute settlement procedure provided for in Part XV are met in this case.

Having dealt with the main points at issue, let me now summarize, by reference to the relevant articles of Part XV, the formal basis on which this Tribunal has jurisdiction to consider the Applicants' requests for provisional measures.

For the purposes of this provisional measures hearing, this Tribunal is required only to be satisfied *prima facie* that an arbitral tribunal established under Annex VII would have jurisdiction (article 290, paragraph 5). The Members of the Tribunal will appreciate the meaning of that phrase and understand that the question of jurisdiction at this hearing does not require the Tribunal to make a final assessment that jurisdiction would exist at the merits stage. That distinction was expressly recognized by this Tribunal in relation to its own jurisdiction on the merits in paragraph 29 of the preamble to its Order for provisional measures in the *M/V Saiga (No. 2) Case* which stated:

Considering that before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case ...

An arbitral tribunal under Annex VII would have jurisdiction to hear this dispute on the basis of article 288, paragraph 1, of UNCLOS.

In order to found jurisdiction for a court or tribunal, article 288, paragraph 1, establishes two conditions. First, it requires the dispute in question to be one relating to the interpretation or application of UNCLOS. Secondly, it also requires that the dispute be submitted to the court or tribunal in accordance with Part XV of UNCLOS.

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As to the first condition, the fundamental point has already been made that this is a dispute concerning the interpretation or application of UNCLOS. The dispute relates directly to the meaning and content of obligations contained in article 64 and articles 116 to 119 of UNCLOS, which will be the subject of more detailed discussion by Professor Crawford.

As to the second condition, the necessary steps have been taken in accordance with the requirements of Part XV.

Section 1 of Part XV imposes a general obligation on States Parties to settle disputes by peaceful means before seeking to invoke the compulsory binding dispute settlement procedures of Section 2. Article 283 imposes an obligation on parties to a dispute to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means, including at the point where a particular procedure for the settlement of that dispute has been terminated. Where no settlement has been reached by such peaceful means, article 286 then permits any party to the dispute to invoke the compulsory procedures set out in Section 2.

As evidenced by the diplomatic notes which have been provided to the Tribunal and the history of this dispute as outlined by Mr Campbell, the requirements of Section 1 have been met. There have been extensive negotiations and exchanges of views in an attempt to settle the dispute.

With the failure to settle the dispute through recourse to Section 1, article 286 allows the parties to invoke the compulsory procedures provided for in Section 2 which, through the operation of article 287, is the establishment of an arbitral tribunal under Annex VII.

In conclusion, Mr President, I have explained why this dispute is in fact a dispute arising under UNCLOS. I have described the relationship between UNCLOS and the subsidiary 1993 Convention. I have shown that the 1993 Convention is a means by which the parties can give effect to their obligations under UNLCOS but that the obligations of UNCLOS, both substantive and procedural, are in no way excluded or overridden by the 1993 Convention. They remain fundamental. I have noted that extensive efforts were made to resolve this dispute through the procedures of the 1993 Convention but that these efforts were unsuccessful and that, in the view of the Applicants, there was no prospect of any further efforts proving timely and effective. Accordingly, the Applicants have exercised their rights to have this matter settled in a manner and a timeframe that matches the importance and urgency of the situation.

For the reasons I have outlined, the jurisdiction of the arbitral tribunal is firmly established on the facts. But, as I have also discussed, it is not necessary for this tribunal to agree with this conclusion. All it has to do is satisfy itself that jurisdiction exists *prima facie*. This is clearly the case.

I now ask you to call upon Professor Crawford who will continue the legal submissions for the Applicants.

The President:

Thank you, Mr Mansfield. I now call upon Mr Crawford to continue the submissions on behalf of the Applicants.

STATEMENT OF MR CRAWFORD
COUNSEL OF AUSTRALIA

Mr Crawford:

Mr President, Members of the Tribunal, it is a great honour to appear before you for the first time. I see that you have copies of my speech. I make no promise that I will stick to that.

My task is to show the basis of our claim against Japan. In essence, the claim is that Japan has failed to conserve and cooperate in the conservation of SBT, especially through its unilateral over-quota fishing of a dangerously depleted stock. Of course, it is not for the Applicants here to establish the merits of that case. That will be for a later phase and, as things stand, a different tribunal. But you are entitled to ask whether there is a sufficient basis of claim for our request for provisional measures to be taken seriously. This is because you need to decide whether the request is appropriate.

Fortunately, this does not require you to go very far into the scientific arguments, and this is for several reasons. The first reason I have already given: the scientific issues are for the merits and, as far as possible, you should not prejudge them. The second reason is that, as I will show, the agreed fact is that the status of the tuna stock calls urgently for conservation and certainly not for a 30 per cent increase in the Japanese catch. So you do not have to form a view about scientific issues which are in dispute. You may find that that is something of a relief but it is true. The scientific issues that are not in dispute are quite enough for our purposes. But there is a third reason as well why you do not have to go into the disputed scientific issues.

Once the Applicants' scientific concerns are seen to be reasonable, then the balance of risks and benefits tips sharply in favour of the provisional measures. If Japan is right, the tuna stock is recovering and so it will be able to fish with security in future. Its extra fishing will simply be deferred for a while to accommodate our genuine concerns about the stock. On the other hand, if the Applicants are right, the position is quite different. At best, Japan is helping to put off to a more remote and uncertain future the possible recovery of the parental stock to biologically safe levels; meanwhile Japan is preventing the parties from reaching that agreed goal, and it is placing further stress on an already highly depleted stock. At worst, Japan's actions in frustrating the conservation goals of SBT might actually cause or contribute to a further stock collapse, in which case there will be no fish for a considerable period of time, and no possible payback in quotas will compensate for that. Japan's action also limits the Applicants' opportunity to engage third parties in relation to their fishing of SBT.

So the Applicants have to show for present purposes that their concerns about the state of the stock and the impacts of unilateral Japanese actions are reasonable or plausible. I think we can show much more than that and, to assist the Tribunal, we are proposing to explore the matter further than we need to do, in particular, by calling Professor Beddington here and by having him subjected to cross-examination. But, whatever the ultimate strength of the Applicants' claim, we can certainly show here and now that the situation facing the stock is a grave one and that worst case scenarios are not excluded. That is a quite sufficient basis for the Tribunal to order provisional measures now.

So my task is to set out, in simple terms, the likely position as to the state of the stock, and I will show, by reference to UNCLOS, that if the stock is or may well be in that position, then Japan is obliged to conserve it and not to aggravate the situation, as it is currently doing through its over-quota fishing and its so-called "EFP". Mr Burmester will then show the provisional measures that flow from this, recognizing of course the flexibility and discretion that the Tribunal has with respect to the content of provisional measures.

STATEMENT OF MR CRAWFORD

I turn to the scientific reports you have before you. These have to be read in the light of the point I have just made. It is not your task to decide scientific disagreements at this stage, but to consider whether provisional measures are appropriate.

However, there is a prior point. Japan argues that, because there are scientific disagreements, this is not a legal dispute but a scientific dispute. This is of course a false dichotomy, and not the only one Japan tries to impose. Thus it says that, because the 1993 Convention is in some sense involved, therefore UNCLOS is excluded, and again, because science is involved, law is excluded. Mr Mansfield has disposed of the former argument and I do not need to say much about the latter. It is obvious from the text of UNCLOS that it may give rise to questions of scientific fact. The incidence of the obligation to conserve a fish stock depends, obviously, on the state of the stock; if it is plentiful, conduct may be permissible which would be impermissible if the stock were seriously depleted. In this as in many other areas of modern international law these days the law interacts with factual issues, including those which require some scientific input. Courts and tribunals have to do their best in these circumstances to reach a reasonable conclusion, and of course the parties have to assist them. We have sought to do this through the reports of our own scientists, Messrs. Polacheck, Preece and Murray and also an independent scientist, Professor Beddington. Japan itself proposes provisional measures, if you reject its principal jurisdictional argument, so it does not maintain the separation of law and science with much consistency.

Anyway, these proceedings are not really about scientific disagreement. There are vital areas of agreement, so far as the stock is concerned. These, taken alone and without the resolution of any disputed scientific arguments, are a sufficient basis for provisional measures in this case.

Let me try to set out six points on which I believe there is essential agreement. To avoid argument, I will do so by quoting directly from the most recent Scientific Committee and Commission reports. This is agreed language. The points are:

- (1) "the parental biomass remains at historically low levels"
- (2) "the continued low abundance of the SBT parental biomass is cause for serious biological concern"
- (3) "recent increases in the fishing mortality rates on juvenile fish ... will lead to lower recruitment from these cohorts to the parental biomass" and there are "indications that recruitment has dropped in the last few years" – that in 1998
- (4) "the Commission continued to be concerned with the level of catch outside the Commission and recent significant increases of catch by some non-members" – that in 1999
- (5) "the range of predicted future stock size over a 20-year time interval is likely to be very wide"
- (6) "the projections produced by the Scientific Committee between 1982 and 1993 have been shown to be consistently biased upwards and hence have been overly optimistic".

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To summarize, the stock is at historically low levels; there is cause for serious biological concern; recruitment is low and getting lower; catches have recently increased significantly; predictions are uncertain and they include predictions of non-recovery or even collapse, and earlier predictions have been consistently biased upwards. Let me add to these points of scientific agreement one point of management agreement: in 1996 the Commission agreed to a set of principles which any experimental fishing programme has to meet. Mr Campbell has already referred to them. In our view, Japan's EFP does not meet those standards, and I will establish that in a little while.

Mr President, this is an historic case and it has an historic event in the middle of it, because I understand that my learned friend and opponent wishes to put some questions to Professor Beddington on the *voir dire*. This is an unusual procedure in an international tribunal. States are normally entitled to seek independent advice from qualified persons, and Professor Beddington's CV is contained at the end of his report. However, in his own time or, if the Tribunal has time, in the Tribunal's time, my friend is entitled to put any questions to Professor Beddington that are relevant to his testimony today, and I am perfectly happy to give him the opportunity to do so.

Examination of Expert – *voir dire*

EXAMINATION OF MR BEDDINGTON ON THE *VOIR DIRE*
BY MR SLATER (JAPAN)

The President:

Does the Agent of Japan want to make an intervention at this stage?

Mr Togo:

I would very much like to do so.

The President:

Very well.

Mr Togo:

Mr President, I would like to introduce Mr Matthew Slater, one of our advocates who will act as counsel representing Japan in connection with the examination of the witnesses for Australia and New Zealand.

The President:

Thank you very much.

Mr Crawford:

I bear in mind, Mr President, that at this point we are talking about the *voir dire*. We are not talking about cross-examination. I have some questions to ask Professor Beddington after this process. For those Members of the Tribunal who are not familiar with it, the *voir dire* is an American procedure to test the eligibility of a witness. After that procedure, it was agreed in our meeting yesterday that we would nonetheless hear the evidence of Professor Beddington and that the Tribunal would take into account the outcome of those questions to the extent that they might be relevant. So the procedure will be the *voir dire* first, not in Australia and New Zealand's time, then some questions from me, then the cross-examination, then redirect, and then hopefully we can have some lunch! Thank you, sir.

Mr Slater:

Mr President, honourable Judges of this court, my able and worthy adversaries, representatives, agents and counsel for Australia and New Zealand, may it please the court. I am Matthew Slater, a partner of Mr Greig, Counsel for the Government of Japan. As Professor Crawford has just indicated, we had agreed that there would be an opportunity for examination of the witness in advance of his direct testimony, for the agreed purposes of testing both the credibility and the capability of this witness to offer specialized expertise on matters relevant to the case before the court. For that purpose, I appreciate this opportunity right now.

The President:

In accordance with article 79 of our Rules, an expert called by a party must make the declaration that is required under our Rules.

Mr Slater:

I would very much appreciate that.

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The President:

I request that the expert be given the opportunity to make a declaration, please.

Mr Beddington:

I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief.

Mr Beddington, sworn in

Mr Slater:

Dr Beddington, at the beginning of your written statement presented to the court and, in addition, in the statements by Mr Caughley this morning, you have been referred to as an independent scientist who will comment on a report attached to Australia's and New Zealand's Request for provisional measures, and I would like to examine that issue with you just a little. First, when were you first contacted about providing an opinion in this matter?

Mr Beddington:

In the middle of July, I believe 15th or 16th July.

Mr Slater:

So it was after Australia and New Zealand had submitted their request for an arbitration under UNCLOS, is that correct?

Mr Beddington:

I believe that is correct, yes, sir.

Mr Slater:

By whom were you contacted?

Mr Beddington:

I was contacted I think initially by Mr Bill Campbell and then subsequently by James Crawford.

Mr Slater:

You were not asked by the Commission for the Conservation of Southern Bluefin Tuna to deliver an opinion, were you?

Mr Beddington:

No, I was not.

Mr Slater:

You were not asked by this Tribunal to do so?

Mr Beddington:

No, I was not.

Mr Slater:

In your curriculum vitae, which is attached to your paper, you have listed a number of external appointments. Have those been at the invitation of fishery management organizations

to provide an independent assessment of scientific issues, or have they been at the request of national delegations participating in such organizations?

Mr Beddington:

The latter.

Mr Slater:

So strictly on behalf of national delegations?

Mr Beddington:

Yes. It depends on your definition of a fishery management organization but, in general, most of my activities on international fishery organizations and their scientific committees have been as a member of the British delegation, in fact.

Mr Slater:

On behalf of a particular side?

Mr Beddington:

Yes.

Mr Slater:

When you have participated in those sorts of activities, how have you typically performed your work?

Mr Beddington:

Could you clarify that question, please?

Mr Slater:

Have you generally attended the meetings of the fishery organization that has been involved?

Mr Beddington:

Yes, I have.

Mr Slater:

Have you examined the scientific literature accumulated by the organization on the stock in question?

Mr Beddington:

Yes. Usually, these things have a continuity and it depends on the organization. For example, I would characterize the commission that I have had the most experience with, which is the Commission for the Conservation of the Antarctic Living Marine Resources. That started out with simply having a scientific committee which reviewed papers and formed judgments on that. As the work of that Commission evolved, it felt that it became far too technical to simply operate on a scientific committee working for approximately four or five days. So working groups were established which dealt with the very detailed technical material. Assessments were done and then a report of the working group was presented to the scientific committee for review; that is the area that I have had most experience in. In fact, I think that is the practice of many of the international commissions. Some of the international commissions that I have been involved in and are represented in my CV are bilateral

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commissions. For example, the UK has one jointly with Argentina. In that situation, scientific assessments are done prior to the meeting of the commission by essentially a joint group of Argentine and British scientists, and similar activities occur in other commissions that I am involved in, for example that with Mauritius and that with the Seychelles.

Mr Slater:

When you have been involved with these organizations in the past, who has selected the literature that you have read in connection with your work?

Mr Beddington:

Usually, the practice of these procedures is that there is a record of the meetings of the scientific committee, including bound volumes of the scientific literature that has been presented to the proceedings meeting. There are also documents that are presented to the actual meeting itself, and these are available sometimes before, sometimes at the meetings. But, of course, one might be guided, for example, by recently published scientific papers in the mainstream scientific literature.

Mr Slater:

So you have read the range of scientific literature that has been produced by the organization itself and by the member States of that organization, as well as your own readings in the scientific literature, is that correct?

Mr Beddington:

Yes, you would have that as background. You would not necessarily read everything. When you work in a complex commission – for example, CCAMLR deals with five or six stocks – you might be involved in detail in one and not at that meeting read others.

Mr Slater:

Have you been involved in computer modeling of fishery stocks?

Mr Beddington:

Not for about ten years.

Mr Slater:

That is not your area of expertise?

Mr Beddington:

It used to be my area of expertise, but I regret that academic life in Great Britain means that you become more an administrator than an active scientist after a while.

Mr Slater:

Turning back to the Commission for the Conservation of Southern Bluefin Tuna, are you aware that the Commission has in the past invited outside independent scientists to help with the stock assessment and projection process?

INTERVENTION BY MR CRAWFORD
COUNSEL OF AUSTRALIA

Mr Crawford:

Mr President, I do not see how that question is relevant to the qualifications of this witness. What CCAMLR has done has absolutely nothing to do with the qualifications of this witness. He can ask it in cross-examination as much as he likes. The question is whether he is qualified to give his testimony.

The President:

I was going to say, Mr Slater, that you will, of course, have an opportunity to cross-examine. I understand that the purpose of the present proceeding is to enable you to put in context something connected with the suitability or expertise of the witness. I suggest that you restrict it to that. You will still have an opportunity to cross-examine him on the substance.

Mr Slater:

I very much appreciate that. I think it is important that the court should have the opportunity to understand the distinctions between how this assignment has been handled by this witness and how he has handled his professional assignments in the past and to understand in full context whether or to what degree this witness is being presented as an independent scientist and whether his opinion should be accepted on that basis, which is what has been presented to the court so far.

The President:

As I said, you are permitted, by agreement between the parties, to lead questions to that effect. The point that I am making, and the point that Professor Crawford made, is that when it comes to whether the expert is capable of providing the scientific evidence, that is part of the evidence itself. If there is something to suggest that the expert is not a suitable, independent person, that is the purpose of your questioning at this stage. I think you should try to draw a distinction between the two, his independence, and therefore suitability, as a witness, and his capacity and expertise. The latter question belongs to the cross-examination stage.

Mr Slater:

I will certainly try to focus on the question of independence, and that was really the question that I was asking, which was this witness's recognition that the Commission has selected independent experts itself in the past.

Mr Crawford:

Mr President, the behaviour of the Commission has nothing to do with the qualifications of Professor Beddington. The question of whether Professor Beddington is qualified to give the evidence is given. What the Commission has done is a completely different question and can be asked about in cross-examination.

Mr Slater:

The Commission has identified for itself, that is Australia, New Zealand and Japan have collectively by consensus identified a number of independent scientific experts who, they have agreed, could present independent evidence and advice to the Commission. I think it is important that the Tribunal should have an opportunity to understand the difference between

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those independent experts, those independent scientists, who have themselves made a statement to this court, and this witness who is being offered on behalf of a party.

The President:

Mr Slater, I do not think that the fact that somebody not selected by a commission as an independent expert rules that person out as an independent expert. It is quite plain that there are always a limited number of experts who can be chosen. There is also the question of whether those who make the choice are aware of the abilities and interests of a particular person. Therefore, I do not think we can accept that merely because the Commission has chosen some independent experts, one could draw the conclusion that therefore anybody who is not on that list is *ipso facto* not an independent expert.

Mr Slater:

I appreciate that, Mr President, and I will try to ask some different questions of this witness if you do not wish to have those on this occasion.

EXAMINATION OF MR BEDDINGTON ON THE *VOIR DIRE* (CONTINUED)
BY MR SLATER (JAPAN)

Mr Slater:

With regard to what you have done specifically with respect to this case, Professor Beddington, you have indicated in your paper that you were invited to comment on the Polacheck and Preece paper that was submitted as Annex 4 by Australia. My question is, is that the first thing with which you were provided in order for you to do your work?

Mr Beddington:

No, it was not. I was asked to comment on that but it was not at that time, as far as I am aware, finished. I got the chance to comment on it somewhat later, but what in fact I was sent by the Agent for Australia, Mr Campbell, was – sorry, let me just recall, there is rather a lot of material to try and think.

I was sent the basic scientific documents from I think the three preceding meetings of the Scientific Committee. I was sent the documents that were concerned with the Stock Assessment Working Group - I think it is called the Stock Assessment Group – in 1998, the documents from the reports of a variety of meetings to do with the experimental fishing programmes, and some other sort of scientific material that was felt – I am trying to recall the exact detail of it. As you are well aware, Mr Slater and gentlemen, this is rather voluminous, but by and large relatively comprehensive information in the sense that I had the reports of the Scientific Committee, its deliberations, its conclusions. I had the background papers that were part of the bound volumes that are attached to those reports, and they were – I do not think they were bound, but there were quite extensive reports of the various meetings about the experimental fishing programmes and some of the background material to those. I may have missed some out, I would apologize if I have, but I did not have a list in front of me.

Mr Slater:

Did you see the Polacheck paper in draft form?

Mr Beddington:

Yes I did.

Mr Slater:

And did you comment on it?

Mr Beddington:

Yes, I asked for clarification.

Mr Slater:

You asked for clarification to be put in the paper itself?

Mr Beddington:

No, I said I did not understand a particular point. I was asked to comment on it, so I inquired.

Mr Slater:

And were you provided with written materials in respect of those questions?

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Mr Beddington:

Yes, we were communicating by e-mail. I read a paragraph, and when I did not understand it I asked for clarification, and that clarification came.

Mr Slater:

Have those written materials been provided either to the court or to the Japanese Government?

Mr Beddington:

Not as far as I am aware.

Mr Slater:

Your paper lists ten specific references and those include some that came from the Commission for the Conservation of the Southern Bluefin Tuna now.

Mr Beddington:

No, they were selected essentially as I was writing my paper. They are obviously a significant sub-set of all the material I was sent. What I was attempting to do in my paper was to try to synthesize the matters of agreement and areas where I could try as best as I could to characterize where there was disagreement and why and its implications. So in a sense this was selection once my paper was finalized of the larger set of material that I was provided with. It was not a selection made by anyone other than myself.

Mr Slater:

In terms of the material that you read, those were selected for you?

Mr Beddington:

No, in terms of all the material that was sent to me, that was all that was available. I did in fact look at other material myself, for example I looked at a report of the meeting of the Scientific Committee of ICAT which dealt with the western stock of southern bluefin tuna, because I believe there were parallels, but this I did out of the researches available in Imperial College Library.

Mr Slater:

Focussing specifically on the materials from the Commission for the Conservation of Southern Bluefin Tuna, the materials from that Commission that you relied upon were all sent to you by the representatives of Australia by their selections?

INTERVENTION BY THE PRESIDENT

The President:

Mr Slater, once again I believe that these are matters which you could deal with in cross-examination. We are dealing here not with the basis on which the documentation was produced, I think we are dealing here with the question of whether this expert can be accepted as an independent expert. If he is an independent expert, the fact that he had material sent to him by the parties would not be either extraordinary or improper.

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EXAMINATION OF MR BEDDINGTON ON THE *VOIR DIRE* (CONTINUED)
BY MR SLATER (JAPAN)

Mr Slater:

The question is what range of materials was sent to him, and I just have a few questions on that subject. By way of example, I did not see any reference to the Protocol for the Pilot Experimental Fishing Programme that was conducted in 1998. Did you review that?

Mr Beddington:

I did read it, yes, but I did not reference it because I did not actually see in the context of the paper that I wrote that it was pertinent to quote directly from it, and as you will see, I think I have only included in the references in my paper those where I have actually made a direct quote or referred across.

Mr Slater:

Did you review the results and analyses reported by the Japanese scientists concerning the 1998 Experimental Fishing Programme?

Mr Beddington:

Not in any detail.

Mr Slater:

Did you review the Protocol for the 1999 Experimental -

EXAMINATION OF EXPERT – INTERVENTION BY THE PRESIDENT

INTERVENTION BY THE PRESIDENT

The President:

Mr Slater, I do not think the expert should answer these questions at this time. We are not talking about whether the work was done expertly. We are talking about whether the expert is an independent expert, and I would suggest that we keep those two issues separate.

Mr Slater:

I will reserve the remaining questions for later. Thank you, Mr President.

The President:

You are excused for the moment.

Examination of Expert

EXAMINATION OF MR BEDDINGTON
BY MR CRAWFORD (AUSTRALIA)

Mr Crawford:

Mr President, Members of the Tribunal, now you have seen a *voir dire*. Professor Beddington, your curriculum vitae is attached to your report. I will not take you through it, but it is your curriculum vitae?

Mr Beddington:

That is correct.

Mr Crawford:

I think the Members of the Tribunal can read that. Is this your Report?

Mr Beddington:

It is.

Mr Crawford:

Did anyone tell you what to put in it?

Mr Beddington:

At no time did anyone ask me to put any particular material in it. I have, however, to give you a complete answer, Mr Crawford, I was asked to clarify matters which were unclear, primarily, I think, by Dr Polacheck.

Mr Crawford:

Thank you. Professor Beddington, you will have heard me earlier identify the six points of agreement in relation to this stock, drawing on the papers, a complete set of which you were sent. Do you agree with those six points?

Mr Beddington:

I can certainly agree without qualification to the first five points. I think I would probably qualify point six to a slight extent in the sense that the wording talks about being consistently biased upwards, being overly optimistic. The point I make is, I am afraid, a slight academic quibble in the sense that we do not know what the truth is. What I could qualify and say is quite clear is that they are biased upwards in the context of the latest assessments of the scientific community, and we would hope that the later ones are closer to the truth than the latter ones. That is the progress of science. So with that academic quibble, I would say that I can agree to that.

Mr Crawford:

I am sorry, complete your answer.

Mr Beddington:

It was not clear to me, Mr Crawford, whether you were asking comments on these six points initially.

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Mr Crawford:

Yes, I was.

Mr Beddington:

Yes.

Mr Crawford:

The effect of that answer is because there was still uncertainty in actual stock assessments we cannot be unequivocally clear as to the state of the stock, but on the basis of the most recent analysis of the state of the stock, earlier predictions of the recovery have been consistently biased upwards?

Mr Beddington:

That is exactly correct.

Mr Crawford:

Taking those six propositions as the present state of scientific agreement, in the light of those six propositions what would your advice be to a government or to a group of governments which was responsible for managing this stock?

Mr Beddington:

My advice would be that the evidence was such that the stock was in an extremely poor state, and I would recommend a reduction in catches, and not increasing those catches following that reduction until there was clear evidence that there was some recovery in the stock.

Mr Crawford:

Does the answer you have given me depend upon your view about the precautionary principle or precautionary approach? Are you simply being precautionary as it were?

Mr Beddington:

I would not say that. Clearly any proper management for conservation involves rational utilization, and to that extent fishery management advice will properly be taking place with a precautionary element to it. You do not wish to take undue risks. I certainly would not be invoking the precautionary principle to give that advice, and indeed what I would probably add, to perhaps anticipate a subsequent question, is that if you were invoking the precautionary approach and the precautionary principle I would expect that the reduction in catches might be rather higher, and that the evidence that you would require for there to be an increase, that the stock has increased and can therefore increase the catches, would be more stringent.

Mr Crawford:

Do you think in the light of the advice that you would give in those conditions that the present Japanese EFP is contributing to the conservation and management of this stock?

Mr Beddington:

Let me take conservation first if I may, Mr Crawford. In the context of conservation, as I have just said in answer to your earlier question, I believe that it would be an appropriate conservation measure to reduce the total catches from the stock. Therefore in the sense that you are asking me whether an increase in catches is compatible with conservation, I would

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say the answer is no, and I think my paper makes that clear. In the context of management, which of course involves trying to improve on scientific uncertainty in some sense, I would say that the experimental fishing programme does contribute to an improvement over current uncertainty, but I would qualify that, by saying that, for reasons I outline in my paper, I do not think it actually improves it a great deal.

Mr Crawford:

You have read Professor Butterworth's report.

Mr Beddington:

Yes, I have.

Mr Crawford:

Does it cause you to change anything in your report?

Mr Beddington:

No, it does not, except one very minor point I would say is that I had not planned to quote from the paper by Hilborn, Butterworth and Ianelli in my paper, because it was characterized as a draft paper in the proceedings of the Scientific Committee in 1998, but as I saw that Professor Butterworth was quoting it I felt it was clearly appropriate to do so. That was the change I made.

Mr Crawford:

Can I take you to a graphic which is in Professor Butterworth's report. It is Figure 6 in his report and it shows a curve with the heading SBT Stock Recruitment. It is, I think, Members of the Tribunal, tab 3 in your folders. I understand that is called a stock recruitment curve, but could you explain it to us?

Mr Beddington:

Yes, okay. The first point would be that if you take the X axis, sorry, the bottom horizontal axis, this is a plot of the position of the estimated spawning stock biomass which has been used earlier in the proceedings to be the parental biomass. They are equivalent in this context. So each point is a realization of the spawning stock biomass, and on the vertical axis it is also a realization of the level of recruitment that has been estimated to be associated with that parent stock. I think the point here that may not be appreciated is that this graph also has information about time. It has information about time because the spawning stock biomass according to the paper by Hilborn and others in fact shows that the spawning stock has been declining monotonically; i.e. it never changes, it continues to go down on and on. So the very furthest right hand point of the graph is actually the earliest piece of information, and the very furthest left point on the graph is in fact the latest information you have. So for example if you take the very lowest point that is illustrated on the graph you actually have the latest estimate of the spawning stock and the latest estimate of the recruitment that has been associated with that spawning stock.

Mr Crawford:

So what you are telling us is that the earliest date of the information is, as it were, on the right hand side, it is a bit counter-intuitive. You would normally think it went the other way. The most recent information is on the left hand side of the graph?

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Mr Beddington:

That is exactly right.

Mr Crawford:

And it is also the case that although there is some fluctuation in the graph at the top end as it goes down, as it goes to the left, or more recently the line flattens out?

Mr Beddington:

Well, I think what I would observe from this graph is that as you look at the spawning stock above, let us say, something in excess of units of 500 or so, you see that as the stock has been reduced - the spawning stock - there has been variation in recruitment and a modest trend, although there are clearly differences in what is happening at some point, an increase possibly due to environmental factors, and a rapid decrease over another period. If you look for the latest information, what you are seeing is a very closely linked relationship between the spawning stock and the recruitment it is producing. Clearly it shows that, as the spawning stock is being reduced, recruitment is actually declining alongside. The curve is, I would have thought, a statistical fit of all the data, but it is clearly a slightly odd fit to the most recent information.

Mr Crawford:

Professor Butterworth says at paragraph 56 of his paper that this curve shows “surprisingly low steepness”, and that it shows that most of the decline in recruitment of southern bluefin tuna has already occurred. Do you agree with that?

Mr Beddington:

I really don't understand how he can make that assertion. If you look at the bottom left hand corner of the graph you are seeing a decline in spawning stock biomass and a decline in recruitment, and they are approaching what I suppose is the one degree of certainty, which is that when spawning stock biomass is zero recruitment will be zero and it is moving towards that point. Whether in fact it is moving at a speed that I would expect or not expect I couldn't comment, but quite clearly recruitment is declining with spawning stock declines.

Mr Crawford:

Finally, Professor Beddington, the Tribunal has raised the question of how a management authority with responsibility for SBT should treat catches by third parties. There are catches by third parties, we know. How, in your view, should a management authority treat that question?

Mr Beddington:

This is a very difficult question, one I have had a little experience of in the context of the South Atlantic Fisheries Commission, which is a Commission jointly between the United Kingdom and Argentina. There is a fishery for squid and the Elex squid, which is actually caught both in the Argentine EEZ, the waters around the Falkland Islands in the Falkland Islands conservation and management zone and on the high seas. It is very difficult, because the high seas fishing is not controlled by either the Argentine or the British Governments. What we have actually done in that context is to agree procedures to take into account the high seas catches, and indeed on two occasions in the last six years there has been an agreement between Argentina and the UK to close the fisheries in their respective zones, taking into account that fishing will continue on the high seas. I guess the answer is that if

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you are in favour of a strongly conservation approach and you wish to preserve a stock you must be prepared to make that sort of sacrifice. In the context of the southern bluefin tuna I really could not say, but it is obvious that if catches increase, in my view, the danger to the stock increases, so that if you are the responsible parties and wish to have as your major goal conservation, then you are probably going to need to take account of these third-party catches and reduce your catches in the light of them.

Mr Crawford:

Thank you very much. I have no further questions, Professor Beddington. Perhaps we can resume the cross-examination of Professor Beddington.

The President:

Mr Togo, it is now about four minutes to one o'clock. Do you think you want to start the cross-examination now, or would you like to postpone it until we come back?

Mr Togo:

Mr President, thank you very much. I think we would like to adjourn for luncheon, as you have suggested, and resume our cross-examination at the beginning of the afternoon session. Thank you very much.

The President:

Very well, we will do that. Professor Beddington, you are excused for the moment and you will come back in the afternoon. The sitting is closed.

The Tribunal rose at 1.00 p.m.

EXAMINATION OF EXPERT

PUBLIC SITTING HELD ON 18 AUGUST 1999, 3.00 P.M.

Tribunal

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge ad hoc* SHEARER; *Registrar* CHITTY.

For Australia: [See sitting of 18 August 1999, 10 a.m.]

For New Zealand: [See sitting of 18 August 1999, 10 a.m.]

For Japan: [See sitting of 18 August 1999, 10 a.m.]

AUDIENCE PUBLIQUE DU 18 AOUT 1999, 15 H 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. SHEARER, *juge ad hoc*; M. CHITTY, *Greffier*.

Pour l'Australie : [Voir l'audience du 18 août 1999, 10 h 00]

Pour la Nouvelle-Zélande : [Voir l'audience du 18 août 1999, 10 h 00]

Pour le Japon : [Voir l'audience du 18 août 1999, 10 h 00]

The President:

Mr Slater, are you ready to commence the cross-examination?

Mr Slater:

Yes, thank you, Mr President.

The President:

Professor Beddington, you are still on your declaration.

Mr Beddington:

Yes, sir.

Examination of Expert (continued)

CROSS-EXAMINATION OF MR BEDDINGTON
BY MR SLATER (JAPAN)

Mr Slater:

President Mensah, honourable Judges, may it please the court. Professor Beddington, turning back to the Commission for the Conservation of Southern Bluefin Tuna, I know that you are aware that the Commission engaged a panel of independent scientists to conduct a peer review of the Scientific Committee in 1998, is that correct?

Mr Beddington:

Yes, I am aware of that.

Mr Slater:

Do you know who the members of the peer review panel were?

Mr Beddington:

I believe it was Maguire, Tanaka, Mohn and - I am sorry, it has escaped me. It is an Irish name based in New York.

Mr Slater:

Professor Sullivan?

Mr Beddington:

That's right, yes. My apologies.

Mr Slater:

You view them as qualified scientists, do you not?

Mr Beddington:

Yes, I do.

Mr Slater:

These gentlemen were selected by consensus of the three parties, were they not?

Mr Beddington:

As far as I am aware, yes.

Mr Slater:

You are aware that they were selected because the Commission was troubled by the lack of consensus within the Scientific Committee on the probability of stock recovery, is that right?

Mr Beddington:

Yes, I believe that was their brief.

Mr Slater:

Professor Beddington, you mentioned in your paper that such use of outside experts is not uncommon when fishery management organisations encounter difficulties with stock assessment and projections, is that right?

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Mr Beddington:
That is correct.

Mr Slater:
In the case of the CCSBT you were not engaged to play that neutral peer review role, were you?

Mr Beddington:
No.

Mr Slater:
Do you know what the peer review panel did to fulfil their assigned role on behalf of the parties?

Mr Beddington:
Not in any detail.

Mr Slater:
Mr President, is there a problem with the translation?

The President:
It is too fast.

Mr Slater:
I am terribly sorry. May I repeat the question? I was asking you, Professor Beddington, if you are aware of what the peer review panel did to fulfil their assigned role in 1998?

Mr Beddington:
No, not in any detail. All I've done is read their report.

Mr Slater:
From your review of the report are you aware that they attended the stock assessment group meeting in 1998?

Mr Beddington:
Yes, I was aware of that.

Mr Slater:
Are you aware that they attended the Scientific Committee meeting in 1998?

Mr Beddington:
On that I don't recall, but I am perfectly happy to believe it.

Mr Slater:
From your review could you tell that they had read the papers that had been submitted both to the stock assessment group and the Scientific Committee?

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Mr Beddington:

I don't think it would be possible from a short report to be able to deduce that, but I wouldn't query their competence or the way they went about their work and their reason to do so.

Mr Slater:

Are you aware that the parties directed that a panel be involved in facilitating the development of a joint experimental fishing programme for 1998?

Mr Beddington:

Yes, I was.

The President:

Professor Beddington, excuse me. In order to enable the interpreters to translate Mr Slater's question, maybe you should allow a little pause in between the question and the answer.

Mr Slater:

Do you know who was selected by the parties for the panel in 1999?

Mr Beddington:

I don't recall, I'm afraid.

Mr Slater:

Was it the same folks?

Mr Beddington:

I believe it was, but I don't recall. I'm speaking too quickly again, and I'm sorry, sir. I will try to force myself to pause.

Mr Slater:

I think we are complementing each other in the wrong direction. Again, do you know what the panel did in regard to the 1999 experimental fishing programme?

Mr Beddington:

No, I am not aware of that in any detail.

Mr Slater:

You reviewed the reports of the four multi-day meetings of the experimental fishing programme working group, did you not?

Mr Beddington:

I read them. I would not say I went into them in comprehensive detail, as I think I made clear in my paper.

Mr Slater:

But you are aware that at least some of the panel members did attend those meetings?

Mr Beddington:

Yes, I am.

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Mr Slater:

They made recommendations for decision rules, did they not?

Mr Beddington:

Yes, they did, as far as I am aware, but as I said in answer to your previous question, I have not studied that piece of work in any significant detail.

Mr Slater:

Are you aware that the panel made other suggestions to help forge a consensus for a joint programme for 1999?

Mr Beddington:

Yes, I was aware that they made some proposals.

Mr Slater:

Are you familiar with the fact that the parties directed that the panel could be invited to play an adjudicating role on issues where there was not consensus?

Mr Beddington:

Yes, I believe I was aware of that. I am sorry to appear to be equivocal, but I have read a lot of material and that is a particular issue that I did not focus on.

Mr Slater:

Honourable Judges, here I refer your attention and that of the witness to Japan's Annex 7, page 107274, paragraph 2, which was the record of the agreed results of the first negotiations among the parties in dispute resolution concerning the 1999 experimental fishing programme. I just highlight the language inviting the independent scientists to play an adjudicating role in completing the working group's advice to the Commission. Does that refresh your recollection?

Mr Beddington:

Just slightly, but not completely.

The President:

Yes, Mr Crawford?

INTERVENTION BY MR CRAWFORD
COUNSEL OF AUSTRALIA

Mr Crawford:

I wish to object. I do not want to make a habit of it, but we did not call this witness to give evidence as to what happened within these working groups. We called him to give evidence on the state of the stocks. This is not a document which he has been asked to review. If he is asked legal questions about it, it is not within his competence to answer them.

The President:

Mr Slater, yes?

Mr Slater:

The witness's written statement has made extensive commentary on both the 1998 pilot programme and the 1999 experimental fishing programme that has been conducted by Japan. We think this is relevant to the testimony that he has provided, Mr President, and to give the court context for the comments that he has made.

The President:

Please proceed and we will see how it develops.

CROSS-EXAMINATION OF MR BEDDINGTON (CONTINUED)
BY MR SLATER (JAPAN)

Mr Slater:

Turning to another question, Professor Beddington, it is not uncommon to rely on a commercial fleet for some or all of an experimental fishing programme, is that correct?

Mr Beddington:

Not uncommon, no.

Mr Slater:

For example, in Australia's proposal for a scientific research programme in which it proposed to have commercial vessels engaged in random fishing, Australia acknowledged that the programme would cost the fisheries about 9.4 million dollars, which Australia equated to about 1,429 tonnes of fish in addition to any that might be taken during the experimental fishing. Were you aware of that?

Mr Beddington:

Only peripherally, as I indicated in my answers to your earlier questions. I have not studied this textually and I would find it very difficult to recall or confirm that I have actually read this and remember those figures, but clearly if they are an extract from the report I would not be disputing them.

Mr Slater:

For the Tribunal's reference, this is the page on the screen at the moment, in Annex 11 of Japan's submission, page 107040. Professor Beddington, from the perspective of a fish it does not matter whether it has been caught by a Japanese vessel engaged in the experimental fishing programme, or by an Australian net or by a vessel of some other nation or area, does it?

Mr Beddington:

It is a slightly curious question to ask myself, to think myself into the role of a fish that's going to be caught in some method or other. I find it rather difficult to answer. Would you like to explain in a bit more detail what your question is?

Mr Slater:

The impact on the stock of whether the fish is caught by Japan or another country is indifferent?

Mr Beddington:

Clearly, if the fish is caught by a different method, it would depend if it is the same fish, the same age, the same size and the same location: if that is the case, the answer is clearly yes. If, on the other hand, fish is caught, and we talk in more generic terms, for example, fish caught that is smaller or in a different location, then obviously the answer will be different.

Mr Slater:

From the perspective of the parental biomass recovery, the method of catch does matter, does it not?

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Mr Beddington:

In terms of the effect on the parental biomass, clearly if you actually have a catch that is directly affecting that parental biomass, that will be an immediate result; i.e. if you are taking fish that are older than some age of maturity, so you're taking directly from the parental stock. If you are taking younger fish, it will ultimately affect the parental stock but only subsequently after a period of time. So, to flesh that out, if you catch something aged four, it is clearly not going to grow to be aged eight or ten and become sexually mature. If you catch something that is already mature, then you immediately remove the fish from the stock.

Mr Slater:

One of the principles on which you agreed with Mr Crawford this morning is that in the current situation the juvenile catch should be reduced. Is that correct?

Mr Beddington:

What I actually said in answer to Mr Crawford's question is that the catch should be reduced.

Mr Slater:

And one of his principles was with respect specifically to the impact of the catch on juveniles; was that correct?

Mr Beddington:

I do not recall that that was it but I would be prepared to stand corrected and look at a transcript. My recollection is that he asked me about the overall catch and I responded that I believed the overall catch should be reduced.

Mr Slater:

But his third principle was that recent increases in fishing mortality of juveniles will lead to lower recruitment.

Mr Beddington:

Yes, I am sorry, I misunderstood the way you were posing the question. Yes, indeed, I would say that is correct.

Mr Slater:

And so from that perspective, a precautionary approach would protect against the juvenile catch. Is that correct?

Mr Beddington:

It would protect against the catches both of the juveniles and against the adult spawning stock. As I was trying to explain earlier, there is a direct effect if you are catching the adults, those that are sexually mature, and an effect after a period of time and therefore with some corresponding uncertainty if you catch younger fish.

Mr Slater:

If you are catching younger fish, it takes more of them to make up one tonne of catch; is that correct?

Mr Beddington:

Yes.

EXAMINATION OF EXPERT

Mr Slater:

And you are aware that the juvenile catch in the case of SBT is taken principally by the Australian surface industry; is that correct?

Mr Beddington:

Yes, I am aware of that.

Mr Slater:

More generally, Dr Beddington, you are aware that Australia and New Zealand were prepared to agree to experimental fishing programmes for 1999 involving annual catches in the 1,200–1,500 tonne range in addition to the commercial allocations, are you not?

Mr Beddington:

I was aware of material that indicated that. I have no direct knowledge of it.

Mr Slater:

You are aware that their position was that, within the 1,200-1,500 tonne additional allocation, each nation should take an experimental catch proportionate to the national commercial quotas; right?

Mr Beddington:

Again, I do not recall directly but, yes, I was aware that something of that sort had been proposed.

Mr Slater:

Finally, Dr Beddington, you are aware that in the formal introduction to dispute resolution proceedings, Australia advanced specifically the role of their industry, are you not?

Mr Beddington:

I was not aware of that, I am afraid.

Mr Slater:

In the materials that you have read - and I would refer now to our slide 203, honourable Judges and Members of the court, and the witness to Japan's Annex 7, page 107278 - Dr Beddington, did you not see the statement by the head of the Australian delegation that:

Australia notes that we have an important SBT industry in Port Lincoln employing 1400 people whose take of SBT is within the limits imposed by the Commission. Therefore, there is an expectation not only from Australia, but also from its industry, that Japan will provide restitution for the additional catch taken in the course of the EFP.

Mr Beddington:

I have certainly read that on one occasion but I would say that again, as in my answer to some of your earlier questions, I have not read it carefully in the sense that my brief was to comment on the scientific status of the stock and this particular point, as I see it, goes to the material of this dispute.

SOUTHERN BLUEFIN TUNA

Mr Crawford:

I have no re-examination.

I do not know whether Members of the Tribunal have questions for Professor Beddington. That may be described as an unusual procedure but, since he is here as an independent witness, I would have no difficulty if Members of the Tribunal did have questions that they wanted to ask?

The President:

We have no questions at this point.

Thank you, Professor Beddington. You may stay in the courtroom, as I have said.

Argument of Australia and New Zealand (continued)

STATEMENT OF MR CRAWFORD (CONTINUED)
COUNSEL OF AUSTRALIA

Mr Crawford:

Before lunch, I was talking about the issue of scientific agreement and I quoted from a series of recent papers, Scientific Committee papers and so on, which indicated key points of agreement. You heard Professor Beddington say, with one qualification which was the sort of qualification that a good academic scientist would make because of course we do not actually know precisely the state of the stock, that he agreed with the six propositions. You also heard the advice he would have given to those responsible for fisheries management on the basis of those six propositions. That advice was: reduce the TAC.

I have to say that he did of course appear as an independent witness, and we are not putting him forward in support of an argument for that proposition. But that was the advice he gave.

Let me turn to some questions of scientific disagreement. Mr President and Members of the Tribunal, there are some disagreements, as you will have observed from the paper.

I repeat the point that all you need to do for present purposes, given the areas on which there is agreement, is to conclude that the Australian and New Zealand views about the stock are reasonable and that there is a reasonable basis for concern.

Of course, if for some unexplained reason the Applicants are bringing this action in bad faith, I suppose the question might be different. This may explain that extraordinary allegation made for the first time in the Japanese written response. The Tribunal has heard the Attorney-General of Australia and it has heard Professor Beddington on the state of the stock and it has read the materials. You can decide whether the claimants are acting in bad faith. But assuming that they are acting in good faith, I suppose it is reasonable to say something on the issues of scientific disagreement, even though we say it is not necessary for you to resolve those disagreements.

The first point I want to make about the scientific disagreement is that it is not in essence a disagreement about the present state of affairs. It is a disagreement about the future. It is a question of projection. Projections are just predictions. They are based on the available data and on a series of assumptions. In this respect they are like weather forecasts. Weather forecasts require a lot of science and they require a lot of observation. They are based on a set of assumptions and yet, of course, as we know daily, in Hamburg as well as in The Hague, the weather is still uncertain, even from day to day. With fish stocks the uncertainty is much worse because in our case we are trying to predict the state of the fish stocks a considerable period in advance, something like 20 years. Such projections are difficult and may require very sensitive assumptions about a range of matters.

Japan in its EFP focuses on only one matter: that is the density of fish in unfished areas. But that is only one aspect of one uncertainty in stock assessment and projections. There are others which are important and which cause much more of the difference between our projections and those of Japan.

Those other matters include: the size and composition of the plus group – I will come back to that in a moment; productivity of SBT at historically low levels; the age of maturity and so on. I apologize if in this speech I have to use scientific terms. I am not a scientist; I will try to be as clear as I can, but I have had to do a crash course in fisheries science in order even to get to this preliminary stage. The plus group is the group of all of the rest. In the case of SBT it is the group of fish twelve years and older.

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So there are uncertainties on all of these questions and those uncertainties contribute much more to the difference in the projections than the question of the density of fish in unfished areas. Moreover, the problem about projections is that they can be spectacularly wrong, partly because if they begin to predict a recovery in the stocks, then they build on themselves and the predicted fish, as it were, breed even more predicted fish. So a recovery can be produced on paper which bears no relationship to the real world.

Just to illustrate that point, I want to show you a graphic, which shows very clearly and graphically the difficulties of stock projection. This is taken from an article on northern cod. You may be aware of the collapse of northern cod as a commercial stock in 1992. That came as a huge surprise to Canadians. It had devastating social and economic consequences in the maritime provinces and Quebec. The descending line that you see on the graph from left to right – this time I would stress that we are going forward in time from left to right – is our current best estimate of the parental biomass figure over time for northern cod. You can see that in 1991 it is going down. In 1992, for commercial purposes, it disappeared from the chart.

You can also see that there are seven lines, which are essentially perpendicular to the direction of the downward line. Those seven lines were stock projections made at various times during the 1980s by the North Atlantic Fisheries Organization and by a Canadian consultative body. In other words, that is a series of lines, there are seven of them shown on that chart, each of which predicted the rapid recovery of northern cod. The striking factor is that they are perpendicular to the actual line of the stock. Despite those seven projections, the stock collapsed.

You can see how wrong those projections were. In the case of northern cod, the road to stock collapse was paved with good projections. I stress that when we are talking about stock collapse we are talking about the collapse of a fishery; we are not talking about physical extinction of a stock. In modern times there is only one documented case of the physical extinction of a stock due to fishing. This was the stock of common skate in the Irish Sea. You may think the title “common skate” was unfortunate because they became extinct. This was a slow-growing, long-lived species. It became extinct in the Irish Sea as a result of bycatch. But commercial collapse can be extremely painful. The cost to the Canadian Government of the collapse of northern cod, totally unpredicted, in 1992, was about \$3 billion (Canadian) in re-establishment costs, in social security costs and so on. Of course, that was a much bigger fishery but it shows the pain that commercial collapse can cause.

So we are not talking about physical extinction. I have to say that I note a recent Japanese scientific paper published in the scientific literature in which it is said that, if catches of SBT continue at the 1997 level, the southern bluefin population will be below 500 mature individuals within the next 100 years and may be listed as vulnerable. What they mean is vulnerable to extinction. So that in the long term there is a significant risk of extinction of this single stock. The common skate has a different stock in the North Sea and therefore the species survived. Southern bluefin has a single stock which breeds south of Java. If that stock goes, southern bluefin goes.

So in the long term if fisheries continue at the 1997 level, that is even on the cards, as that Japanese paper cited in the footnote demonstrates.

Just as with northern cod, so with SBT: the history of predictions based on CPUE, that is catch per unit of effort, commercial catch rate, is that they have been too optimistic, and that is true of both the Australian and the Japanese predictions, but it is especially true of the Japanese predictions. Let us look, for example, at Japan's 1995 projection in relation to SBT. You can see it on the screen; it is tab 5 in your folders. I should say, Members of the Tribunal, that you may find it easier to look at some of the graphics, especially the coloured

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ones in your graph, because the colour may come out more clearly. The black and white ones seem to show up sufficiently on the screen.

This was Japan's 1995 stock assessment. It showed the decline in parental biomass and you can see that in 1995 it showed a sharp recovery. The thinner lines are the orders of magnitude of possible disagreement or the degree of uncertainty. The middle, dark line is the projected line. You can see that, in accordance with that projection, the SBT stock was predicted to recover to 1980 biomass by the year 2000 or slightly before, possibly by this year.

The Scientific Committee had this to say in 1995 about that Japanese projection:

Japanese projections indicate very rapid recovery of the parental biomass to 1980 levels in 3-4 years. This recovery results from the current age structure of the SBT population as estimated by Japanese VPAs and does not depend on any assumption about the stock recruitment relationship.

So there was a prediction of rapid recovery.

Earlier Australian projections were also optimistic. In 1991, Australia predicted that the stock would recover in five years. It is 1999 and it is agreed that we are nowhere near recovery to 1980 levels. Since 1993, Australia's projections have become much more conservative. They show possibly a gradual rebuilding of the stock, but on the assumption that catch rates do not increase. Catch rates have increased for the last two years and have increased significantly. Therefore, the assumption underlying even the projection of gradual recovery is undermined. By contrast, Japan's projections have generally continued to predict a rapid recovery. In effect, it would be fair to say that Japan is taking considerable amounts of extra SBT on the basis of a projected recovery of the stock, and Australia objects to that.

In the light of this experience and the experience of the unreliability of the predictions of rapid recovery, and of all the data, there is every basis for Professor Beddington's conclusion at paragraph 42 of his report, as follows:

There is a substantial probability that, under 1997 harvest levels, the spawning stock will not recover to 1980 levels ...

- the level of the safe biological level as agreed –

...by 2020.

– the date by which that is supposed to happen.

Indeed, there is a distinct probability that it will not increase at all under 1997 harvest levels.

1998 harvest levels were higher than 1997 and, because of the increased EFP 1999 levels, will be higher again. So you can see the basis of concern.

In the light of the six agreed propositions that I have outlined and of Professor Beddington's report and his testimony today, I invite the Tribunal to hold that some provisional measures are appropriate; the threshold of an arguable case is already met, and the parties are accordingly under an obligation to conserve the stock so as to ensure the recovery of the stock to biologically safe levels within a reasonable time. In particular, they are under an obligation not to increase their catches above the previous agreed level. This is

why you do not need to go any further into the scientific issues at this stage. The situation as agreed by the Scientific Committee and as portrayed by Professor Beddington is well above any threshold at which urgent conservation action is necessary. It is well above any threshold at which the precautionary principle would come into play.

However, there are a number of reasons for supporting the Applicants' projections as against Japan's projections. Those reasons, which I am going to list, are well above the level of a good arguable or *prima facie* case. There are good reasons for believing that the Applicants' concerns as to the current and likely future state of the stock are not merely arguable but are actually justified. We do not have to show that they are justified but I think we can. Let me give five reasons which powerfully reinforce and validate the Applicants' concerns.

The first reason that I would give is that the projections which you have seen are based on virtual population analysis (VPA). That is a computer-generated prediction based upon a mathematical model of the stock. These VPAs depend in this case on commercial catch rates. There is no independent survey data. The reason why the northern cod projections, which I have shown you, were so hopelessly wrong is that they too were based on CPUE, not upon independent surveys. In fact, in the case of northern cod there were independent surveys, but there were not very many of them and no one believed them. They believed the CPUE figures instead.

There are serious difficulties in relying too much on CPUE. Hilborn and Peterman describe it as "extremely fallible". To a layman such as me, one of these sources of fallibility is really remarkable, and I could not believe it when I first found out about it. It is this: In order to compare CPUE over time, the assumption - you have to be able to make a comparison over time because the catch rate in any one year does not tell you anything - the assumption is made that fishing power, that is the capacity to catch fish, remains stable. In other words, 1,000 hooks in 1969 is the same as 1,000 hooks in 1999. That assumption is just not credible. Compared with 1969, fishers these days have global positioning systems (GPS), they have satellites that tell them the surface temperature of the water, they have lots of gear improvements and so on. It may be that they cannot catch the last fish in the sea but they can do very well. It would be more realistic to estimate that fishing power increases with time.

In the case of northern cod after the collapse, it was suggested that the fishing power had increased at the rate of about 3 per cent per annum over time. That means that over a period of about 25 years fishing power would actually double; the capacity to catch fish would double. But in the case of SBT at least, the CPUE indices assume that there has been no change in fishing power, so it tends to tell an over-optimistic story. It is, as the article by Hilborn and Peterman says, "strongly biased by technological change" and biased upwards.

Given the fallibility and possible bias of CPUE as an indicator, it is very important to try to get other indications of the state of the stock so that you can act as a cross-check. In the case of SBT, the other indications that we have are largely negative in terms of any predicted recovery. Following the fishery collapse off south-eastern Australia in the late 1970s, there has been no recovery of the surface fishery for juvenile SBT. Tagging and aerial surveys tell a similar negative story. So we should be very sceptical about relying on stock predictions, such as the Japanese, which predict a rapid recovery.

That brings me to my second reason for doubting the Japanese predictions of rapid recovery. This is a slightly complicated story but I think it is worth telling because it demonstrates graphically what is going on. It concerns what has been happening to SBT since the catch reductions of the 1980s. There were two groups of catch reductions in the 1980s, once it was clear that the fishery could not sustain the levels at which it had been fished. First, Australia cut back significantly on the juvenile fishery in the EEZ, and it did this in 1983-1984. Then the three parties to this case adopted voluntary global catch restraints which took

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effect, in the sense of starting to limit the amount of fish, in the late 1980s. Taken together, these measures should have resulted in a significant increase in four-year-old fish in the early 1990s, because those fish would not have been caught.

If you look at tab 6 in your folder, you will see perhaps more clearly than on the screen the CPUE effort indices for four-year olds in that period. If there had not been some increase in the four-year-old fish in the early 1990s, the situation would have been very serious indeed because a significant cutback in the catch really had to have some effect. There were increasing numbers of four-year olds, as you can see from the graph – based upon CPUE figures, I might say. These increases could have been the basis for a recovery if a substantial proportion of those increased numbers or those postulated increased numbers based upon CPUE had made it through the next seven or eight years and started to reproduce, because they reproduce around the age of twelve; that seems to be the best estimate. The FAO guidelines indicate that that is what should have been done to ensure the recovery of the stock. That period of improved fish should have been allowed through.

Now I draw your attention to the chart shown in Professor Butterworth's paper at page 6. This shows the CPUE-based estimate for six to seven-year-old fish. They are a couple of years older than the fish that we have just been looking at. Professor Butterworth uses this graph to show there is a difference between the constant squares and variable squares hypothesis. It is true that for ages six to seven there is a difference. Constant squares show more fish than variable squares. That is, of course, an assumption built into the model. It is not necessarily reflecting what is happening in the water.

There is something else that you can also see from that graph, and it may be clearer if we look at it in the coloured form that I have already shown you. I stress that the data that you will see on the form now – and this is tab 7 in your folder – are the same as shown in Professor Butterworth's graph. They are shown in a slightly different way but they are the same. You can see that there is a difference between constant squares and variable squares. You can also see that although there is still some sign of improvement in that cohort, it is not as much as it was. Moreover, although there is a gap between constant and variable squares, both of them show a falling off in that class.

Let us now look at the CPUE data for 8 to 11-year olds a few years later. It is the same age cohort that we are following through which should have been produced by those catch constraints, and this is the 8 to 11-year old CPUE data. You can see, if you look at the period around 1997, that the lines have flattened out. There is very little difference between constant and variable squares. The cohort has been "fished down", as they say; this is another fisheries term. The class of the late 1980s, which benefited from Australia's reductions in its surface fishery and the subsequent agreed reductions, failed to contribute to a recovery; they did not come through. The critical point here is that the first opportunity to rebuild the parental stock was lost, and the amount of fishing since 1997 has gone up sharply, especially because of Japan's EFP, also for other reasons.

You can see essentially the same phenomenon in a different form on the graphic which is now on the screen, and here I would definitely recommend that you look at tab 10 in your folders, where it is much clearer because of the colours. This is looking at the 1980-1991 cohorts, and you can see on the right-hand side various years of the birth of those SBT. If you look at the five coloured lines at the top left-hand side of the picture, you will see that those are the years from 1987 through to 1991, the years that we are talking about, which should have benefited from those catch reductions. To start off, there were high numbers, well below the thick red line which represented the picture in 1980. But you can also see that each of those cohorts over time was fished right down so that it joined the narrow band of cohorts of the early 1980s, when the stock was in a seriously depleted state. So the effect of

fishing, and especially of fishing for four-year-old and older tuna, was to fish the stock right down.

I note that most of that decline is due to long-line fishing for fish of four years old or more. It is not due to Australian surface fisheries which target fish in the one to four-year-old range by and large. It is true, if you look at that graph, that the recruits of 1990 and 1991 still have some potential, but still a bit above the 1980 red line, but so were their predecessors at that age, and look where they ended up. We are talking about a fish that is still nowhere near maturity.

You can see, Mr President, Members of the Tribunal, how crucial restraint is right now. If there is to be any recovery at all of the parental stock, these are the fish that will feed through into the parental stock, and they have gone down to levels where we know they have not fed through to any significant degree. That is my second reason.

Talking of the parental stock brings me to my third reason for concern, and that is the current state of the plus group. The Tribunal will recall that SBT is a long-lived fish which has a long development period. Our papers give the reason for believing that the mean age of maturity is around twelve. That means that with SBT which has a plus group of 12-year-old and older, it actually includes the whole of the spawning stock. The plus group equals the whole parental stock. In some other fish the plus group is really the old-age pensioners. They have already done their reproducing and they are, as it were, what is left over. The plus group for SBT is the critical group, the spawning biomass.

There are actually 28 age classes in it, because SBT live to be 40, or up to the age of 40. Now there are good reasons for believing that the age structure of the plus group is seriously skewed with few young adults and many more middle-aged fish. Due to Australian research in the early 1990s it is now possible accurately to determine how old an individual SBT was. Before that point we could only do that by inferring its age from its length, and that is a rather inaccurate method, especially with older fish, or in situations in which the density of fish is changing. So for the first time in 1994-95 we got a picture of the age profile of the plus group of the mature fish. There was a similar picture taken in 1996-97. The two pictures tell essentially the same story. The bulk of the parental stock is around 20 or more, middle-aged in SBT terms. There is a big gap, you can see, in the period from twelve to 18. These are the new fish coming into the plus group. There is a big decline in new fish.

The next generation is severely depleted, but you saw from the earlier graph how few fish of the 8 to 11-year olds are coming into the plus group. In other words, there is no sign of a recovery, because the 8 to 11-year olds are not recovering either. That is a very worrying distribution of fish. The combination of an apparently ageing parental stock, low levels of pre-spawners, and the fishing down of younger fish indicate that the stock is in a very poor condition. It calls for urgent conservation measures. The thing it does not call for is substantial unilateral increases in catch.

Let me turn now to my fourth reason, which concerns the most recent trends in fishing, and the relations between the Japanese EFP and third-party fishing. The 1997 projections assumed a constant total catch for the next few years. That assumption is already wrong. From 1997 to 1998 the total catch went up by around 22 per cent of which Japan was responsible for 43 per cent, nearly half, with its EFP. So that gives added cause for concern.

Japan's response to that – and you heard Professor Beddington say there should be a reduction in TAC, there has been an increase for one year of 22 per cent, and it has gone up again this year – Japan's response is to say that third parties are at least as much to blame, so why don't we go off and sue the third parties. But the answers to that are obvious enough. First of all, Japan's proposed 1999 EFP take of 2,000 tonnes, plus or minus a certain percentage, taken alone, will be of the same order as the fishing for each of Indonesia, Korea and Taiwan. So the take in 1999 is of the same order of magnitude as the take of those three

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States, which are the third States most responsible for new catching, and they have come in relatively recent years.

Secondly, the percentage increase of catch for Japan in 1998 was 30-40 per cent over and above its previous quota. In effect Japan has seized an over-quota catch of that proportion at a time when there was no scientific case whatever for increasing the TAC. Moreover, a substantial fraction of Japan's EFP catch was, on any view, commercial fishing, and it could have been taken within the limits of its previous quota. As to the argument that the Applicants could have sued third parties for substantial new fishing, the fact that other parties may be acting in that manner does not justify Japan doing so. To the contrary, the fact of additional third State fishing provides a reason for reconsidering previous quotas down, and you heard Professor Beddington on that, as well as taking other measures to contain or deter further increases. Far from acting as a deterrent, Japan's action must be a positive encouragement to third parties to grab what they can as well, in what has become – because of Japan's refusal to agree to a continuation of the TAC – a virtually unregulated fishery. That is the fourth reason.

Then, Mr President, I come to the fifth reason, which confirms our concerns as to the state of the stock, and this is the question which I have to say has been called “lack of fit”. It is a technical issue, and I hope very much not to have to bring it before you, because it took me a long time, and I still do not think that I understand it, but I will do my best. One of the reasons for doing that is that Professor Butterworth tries to make something of it, he accuses us of bias, and so I think we need to respond.

Lack of fit is a widely used statistical term used by scientists to test whether the past observed data are compatible with the model you use to predict the future. So you are taking the model and trying to see whether the past data fits it. As I have said, VPA is a mathematical model which takes input data such as historical catches and catch rates and produces estimates of stock sizes for the future. If we are to use VPA models to make projections of the future, the models should at least fit the input data. In other words, what degree of plausibility can we give to predictions about the future from a VPA model which fails to fit the trends in past data. There is agreement amongst the scientists that this question of lack of fit should be incorporated into the predictions being made from the VPA results. So much is agreed. However there is no agreement on how to do that. Australian scientists have developed a procedure; it has been independently reviewed and published in the scientific literature. It has been provided to the Scientific Committee for review. Yet there has been no feedback from Japanese scientists. In spite of the agreed importance of this issue, Japanese scientists have not suggested any other alternative for dealing with it.

Why is this lack of fit important for VPA projections, why cannot we just let the scientists and mathematicians get on with it? The answer is that those VPA models which tend to predict a high probability of recovery are those that have a very significant lack of fit. In other words there is something statistically wrong with them. High probabilities of recovery tend to come from the VPA models which do not fit the data which has gone into the model. That raises a serious doubt as to their capacity reliably to predict the future. The effect of all of this on the predictions of the scientists can be seen in the figure which is now on the screen, and again I think given the problems with the screen I am looking at, which is a little better, but you may prefer to look at it in tab 12 in your folders.

On the left you see the difference in the projections without taking into account lack of fit, and you can see there is a huge difference. Japan's probability of recovery to 1980 levels by 2020 is nearly 70 per cent. Australia's is very much less, and New Zealand's is less still. That is without taking into account that statistical difficulty. But it is straightforward to see that when lack of fit is taken into account on the right hand side of the graph the estimates

of recovery decrease for all three sets of predictions. The difference between the estimates was also reduced substantially, much more than might have been expected even from a well designed EFP, so that the lack of fit procedure itself, if agreed on, goes much further to settling the difference between the predictions you see on the left than a well designed EFP, a fortiori an EFP such as we have now. Even more importantly, the estimates of the three parties when lack of fit is taken into account all indicate that recovery is unlikely. These results were based on assessments done in mid 1998. They do not take into account the increased catches that have occurred since then, including those from this year's Japanese EFP in progress. If you apply the lack of fit procedure it is obvious in what direction appropriate conservation action lies. It lies in the direction of urgent conservation.

Now Professor Butterworth has accused Australian scientists of "wishing away" data in applying this lack of fit procedure. Let me assure you that this is not the case. There is voluminous documentation and discussion on the problems in the SBT data in the Australian scientific papers, and this shows how seriously the question of how best to fit all of the data has been considered. Some of the alternatives considered for estimating the plus group do not rely upon the 12-plus CPUE index, and Professor Butterworth has pointed that out. However, those alternatives have also been adopted by Japanese scientists as possible approaches. These alternatives are not simply "wishing away" data. They are based on a highly plausible observation, one which Professor Butterworth himself makes in his report. This is that the plus group CPUE, because of its size and its range, is unlikely to be a reliable measure of abundance, because of the large number of age classes the plus group contains.

The short point is this. No matter which methods are used to estimate the plus group – in other words the size of the adult stock – a fundamental requirement must be that the methods need to fit the data which has gone into the model. As indicated in the graphic, the Japanese projections that recovery is highly likely do not meet this requirement. When these Japanese VPAs are adjusted to meet this requirement, they cease to predict a rapid, or any, recovery.

Mr President, Members of the Tribunal, let me summarize. The Applicants' view of the SBT stock and its current state is a plausible view, and it indicates a reasonable concern. That is all we need for present purposes. You do not have to decide the merits of this case; that is for the future. What you have to decide is the possibility of a prospective future, that it should be kept open by suitable conservation measures now, and especially by the avoidance of unilateral increases in catch. But in fact the Applicants can show, and have shown, that their view of the stock is not only arguable or reasonable, but that it is the better view, that it is to be preferred, and the five additional reasons I have given powerfully contribute to that conclusion.

To recapitulate, they were first the fallibility and possible bias of CPUE base projections and the negative indications given by other indicators such as aerial surveys.

Two, the fishing down of the year cohorts of the late 80s so that they failed to contribute significantly to any recovery.

Third, the skewed composition, the skewed age composition of the spawning stock, which is ageing and not being sufficiently replaced.

Fourth, the substantial increases in catches in 1998 and again in all probability in 1999, for which Japan is more responsible than any other single party.

Fifth, the failure of Japanese recovery projections to resolve the lack of fit problem and the convergence of negative projections when lack of fit procedures are applied.

The effect of these five points is cumulative. They all point the same way. Even without the precautionary principle, they make the case for conservation now. With the precautionary principle or approach in their support, the effect is decisive.

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So we come to Japan's main defence, which is that even if the EFP involves over-quota fishing, it is justified by its scientific or experimental character.

Mr President, Members of the Tribunal, again it is not necessary for you to take a concluded view on the EFP issue, which again is for the merits. But let me make a few points in relation to the EFP.

First of all, it is said to be justified because it will help to determine the number of fish in unfished areas. This helps us to choose between the constant squares and variable squares hypotheses. You can see how much it helps from the graph which is, I hope, about to go on the screen now. We will see if we can adjust the colour a bit more. It is tab 13 in your folders and would be clearer there.

You can see the red area. That is a recently fished area. We are talking about where the effort was in the experimental fishing programme in 1998. 76 per cent of the effort was in the recently fished area, the red area. Another 17 per cent was in a little narrow strip next to the previously fished area, a tiny strip. Another 4 per cent was in the little tiny strip next to that. One thing you can see very clearly on the screen here is the blue area, the vast areas of the Southern Atlantic and Pacific and of the Southern Ocean. They received 3 per cent of the fishing effort, those blue areas.

Professor Butterworth tells us that the vessels were instructed to fish as widely as possible, but you can see what they did: they fished either in or very near where they had fished before, so from that point of view the experiment was rather useless.

Secondly, there is the question of the focus of the EFP. What was it trying to show? That there were fish in the unfished areas? No one ever said there were not. Neither Japan nor Australia places its main priority on these extreme bounds. Constant squares and variable squares are, as it were, the extreme ends of the hypothesis of possible density.

The graphic on the screen will show that. This shows the preferences for the three possibilities shown here, constant square, variable square and GS statistical. Japan's preferences are in pink; Australia's are in yellow. You can see that Australia places roughly equal weights, not exactly equal but at least some weight on each of the possibilities. Japan places some weight on each but the weights vary. Both prefer the middle ground GS statistical to either of the two extremes.

In the graphs I showed you earlier about the depletion of the years of the late eighties, you saw that the two lines, constant squares and variable squares, moved closer together. Depleted stocks of pelagic fish tend to crowd together. The constant squares hypothesis is more likely to be true of a virgin stock over the range of its habitat, whereas variable squares is more likely to be true of a depleted stock. Australia gives weight to all three indices. So does Japan, but there are differences in emphasis.

You can see from the graphic that Japan's EFP is trying to prove a proposition that there are fish in unfished areas. That Australia has never denied. For the reasons stated in our documents, the design and implementation of that EFP is such that it provides no reliable estimates of the ratio R of the number of fish in unfished area as a whole. Even if it was superbly designed and executed, however, the different weighting of variable squares and constant squares cannot be resolved by a simple experiment over a few months or a few years.

The reason is that the ratio R would only apply to the period observed, a few months or whatever it was. It cannot be extrapolated backwards. Even if it could be it would not resolve the differences between the parties which would still exist and which were due to other reasons. That is the second point.

The third reason for criticizing the EFP is that it does not comply with the 1996 Objectives and Principles which you have in your documents. You can read the Objectives

and Principles for yourself and judge whether you think that this unilateral programme produced in the circumstances outlined by Mr Campbell complies with them.

Let me rather look at the letter from the FAO's Dr Garcia, which is Annex 16 to the Japanese response. According to Japan, it was an unwritten response to their proposal and it was "favourable". It is dated 26th May 1998, five days before the EFP began. The Applicants knew of the existence of this letter. In fact, we had asked Japan for it. We are glad to see it now for the first time. Let me say at once that the Applicants accept Dr Garcia's credentials as an expert in the field as well as an independent FAO official. We do not require a *voir dire*. Any advice Dr Garcia gives is worth relying on.

Incidentally, the Tribunal will be interested in his important 1995 paper in which he recommends "a systematic shift towards the precautionary approach". We must remember, of course, that when he is writing to a government, and especially the Government of Japan, as director of an FAO division, Dr Garcia has to be careful how he says things. A blistering critique of a very important government from the FAO on this matter might not have been well received. He is very careful in what he says and how he says it what he says.

Let me summarize his main points. You can read the letter afterwards and see if it is accurate.

First: he limits himself to the information provided in the Japanese documents, thus judging it in its own terms.

Second: he notes the lack of any "context of the strategy for SBT fisheries management, emphasizing the link between the survey and its results with specific management decisions".

Third: he notes the lack of any reference to costs and benefits.

Fourth: he notes that there is no information given under the entire projected survey and its costs and benefits. This was only the first year.

Fifth: he notes, as I have noted, that while the decline in six to seven-year-old fish in 1993 seems to be reversed, this is not true for seven to eight-year-old fish. He makes the same point.

Sixth: he notes that abundance "seems to be still much below the 1980 level".

Seventh: he notes that the survey "may not allow a significant increase in catches at least in the short term". He implies that this casts doubt upon the costs of the EFP by reference to its potential benefits.

Eighth: he suggests that after reaching the management target, that is recovery to 1980 levels, the fishery data then obtained "might provide better indication of the status of stock without the need to bear the additional cost of the survey". I interpret that to mean first allow recovery before you increase the number of fish.

Ninth: he points out that if the stock were allowed to recover to its 1980 levels, then there could be an increase in catch, and the area of the fishery "might extend from the present relatively small area to a much larger area". Could it be that Dr Garcia does not believe in constant squares?

Tenth: he notes that there is insufficient information underlining the key figure which is "critical for justifying the programme" and especially a lack of specification of "the assumptions involved."

Eleventh: he notes the complex relationship between age cohorts. This is "likely to make the interpretation of results of the pilot study difficult" and may necessitate "very intensive experimental fishing to be carried out for many years". He does not, however, say whether the stock would sustain such intensive fishing for many years.

Twelfth: he suggests that the same results could be obtained from "additional analyses of available data from commercial fishing, including simulations", and suggests that the

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proposal would be technically sounder if these analyses and simulations were undertaken first.

Thirteenth: he suggests that the proposal may assume what it is trying to prove, which is that the fished area has shrunk as a result of the TAC reduction. He notes that there might be other reasons for the shrinkage, of which the most obvious would be a substantial decline in the stock, although he does not say that.

Fourteenth: he says that the experimental design was insufficiently documented. In particular, it is not clear how a reasonable spread of fishing effort across unfished areas is to be obtained. He was absolutely right about that. You saw what a spread of fishing effort there was.

Fifteenth: he says that the conditions for spread of fishing effort are imprecisely specified. He was right about that too.

Sixteenth: he disagrees with the Japanese view that a single year's EFP catch will have an insubstantial effect. He notes "an additional catch of 2,000 tons per year would indeed be very significant if compared with the present TAC." He calls for the overall effect of the entire EFP programme to be evaluated, of which this was only one year of unilateral fishing.

Seventeenth: he notes that compensation by payback, which is the preferred Japanese solution "may not be considered adequate by the other parties involved in case the stock and TAC is further reduced because of the survey catch." He was right about that too.

Eighteenth: he warns that under a payback arrangement Japan may lose out, because the losses to the stock "may be higher than the survey catches".

Nineteenth: he notes that "if the stock effectively decreases it may be impossible to prove that this was not provoked by the survey", that is by the EFP, which implies that further reductions may, in his view, be caused by the EFP. In fact, for there to be any payback Japan actually requires that the other parties prove the decline was caused by the EFP.

Dr Garcia seems to have a different view about the onus of proof, as compared with Japan. But perhaps he was only being precautionary.

Twentieth - you will be pleased to know, Mr President, that this is the last: he complains that for a research survey 100 per cent coverage by observers is generally expected and that the proposed 20 per cent seems to be very low and that there are no countervailing mechanisms to ensure proper reporting. As I have said, you can read the letter for yourself and see whether, in your judgment, it amounts, as Japan argues, to support for its EFP.

Mr President, Members of the Tribunal, with supporters of Japan's EFP like Dr Garcia it does not need many opponents. In fact, this is a stringent criticism of the EFP in its concept and in its execution. No doubt polite and courteous in its expression, but lethal in its implications, it constitutes a clear indication from the FAO authority responsible in this field and a person of great personal authority in the field of the dangers and deficiencies of the EFP.

It is not merely that the same information could be obtained in other ways from existing data and from simulations. It is not merely that the design of the EFP is seriously flawed. Clearly the writer of this letter thought that an EFP of 2,000 tonnes might well in one year have significant adverse effects on the stock and on its recovery. The Applicants agree entirely. The EFP stands condemned.

Mr President, Members of the Tribunal, let me sum up the position. This stock is seriously depleted and yet it is being increasingly over-fished above the previous TAC. There is good reason for believing that the parental or spawning stock is still declining, and that there is a risk of recruitment failure. The agreed objective for recovery to a biologically safe level, the 1980 level, is increasingly postponed. Yet Japan, as Mr Campbell has shown, has

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systematically advocated more fishing, and when it could not get the Applicants to agree to this, it did it anyway, unilaterally, seizing an extra 30 per cent or more above its previous quota.

The so-called scientific or experimental basis for this fishing has virtually no justification or value in terms of the additional information provided. It has been stringently criticized by responsible authorities. In fact, it has done little but increase the risk to a seriously depleted stock, especially in the next few crucial years. If the EFP is to be repeated in future years, as Japan threatened, and as was the basis of the letter to Dr Garcia, the increased risk is cumulative and it is significant.

Those, for the Tribunal's purposes, can be taken to be the facts of the matter. At the very least they represent a likely view of the facts, a good arguable case.

What legal conclusions follow from this? For the reasons already given by the Attorney-General, articles 64 and 116 to 119 of UNCLOS require Japan to conserve and cooperate in the conservation of the SBT stock. The Applicants, as coastal States in the region of the fishery, as partners of Japan in the fishery, as parties with it in the relevant regional agreement, have a legal interest in the performance by Japan of its obligations under UNCLOS. They have a legal interest in the continued security of the SBT stock and a legal right that Japan not take unilateral action which significantly impairs that security. Of course, whether Japan is actually in breach of these obligations is a matter for a later stage and possibly another tribunal.

It is, in our submission, clear from the evidence before you, clear from the basic points of scientific agreement about this stock, clear from what Professor Beddington has written and said, that there is a serious and present threat to those legal rights and interests. This is an ample basis for saying that provisional measures are appropriate.

I would ask you now, Mr President, to call on my friend, Mr Burmester, to explain why the particular measures that Australia seeks are appropriate and urgent in terms of your Statute and Rules. Thank you, Mr President, Members of the Tribunal, for your patient attention, notwithstanding the weight of the science.

The President:

Thank you very much, Mr Crawford. I now call upon Mr Burmester to continue with the submissions.

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COUNSEL OF AUSTRALIA

Mr Burmester:

Mr President, Members of the Tribunal, it is an honour to appear before this Tribunal. I was involved some twenty years ago in meetings concerning the dispute settlement provisions in UNCLOS and it is a privilege to now appear to make submissions about their interpretation and application.

In this last major presentation by the Applicants, my task is to outline why the particular provisional measures sought are, in the words of article 290, paragraph 1, “appropriate under the circumstances to preserve the respective rights of the parties to the dispute”. This is the key requirement under UNCLOS. It requires a consideration of the particular measures requested and the rights asserted.

The present application is, of course, brought under article 290, paragraph 5. That requires consideration of two further requirements – namely that “the urgency of the situation” requires provisional measures and that *prima facie* the Annex VII tribunal which is to be constituted would have jurisdiction. The issue of *prima facie* jurisdiction raised by paragraph 5 has already been covered by Mr Mansfield. He has shown that the provisions invoked satisfy the requirements imposed by that paragraph.

Before turning to a consideration of the particular requirements, I draw the Tribunal’s attention to the widespread jurisprudence on the award of provisional measures. This is, of course, familiar to the Tribunal, in part having been considered in the first provisional measures case heard by this Tribunal, the *Saiga* case. I can therefore be brief.

The position is well summarized by Lawrence Collins in his Hague lectures in 1992. He concluded:

There can be no doubt that the procedural power to grant provisional or protective measures reflects a general principle of law and that principle nowadays is based on the need to prevent the judgement of the court from being prejudiced or frustrated by the actions of the parties.

In order to do that, the object of provisional measures, as is expressly recognized in article 290, is to preserve the respective rights of the parties. To ensure this, it may be appropriate for measures to apply to the parties on both sides of a dispute. This is reflected in the third, fourth and fifth particular measures sought by the Applicants. It is not reflected in the provisional measure which Japan has sought. But what is appropriate to preserve the respective rights of one party may be different from what is appropriate to preserve the rights of another. It is for this reason that the Applicants seek some particular measures applicable only to Japan. Only in this way, as I shall seek to indicate, can their respective rights be preserved.

The use of the phrase “appropriate under the circumstances” in article 290 means that award of provisional measures is a matter within the discretion of this Tribunal. The wording used differs from that in article 41 of the Statute of the International Court which uses the expression “if it considers that circumstances so require”. It is submitted that this Tribunal has a broader jurisdiction. Article 290 was drafted, of course, in the light of the experience of interim measures of protection in the International Court. The drafters of UNCLOS deliberately chose to give this Tribunal a broader as well as a more effective provisional measures jurisdiction than that which the International Court has. For this reason, the Tribunal should be slow to circumscribe the discretion with unstated preconditions, such as

“irreparable harm” or “irreparable prejudice”, terms which have been used in the past in International Court decisions.

Rather, this Tribunal needs to consider all the circumstances put before it with a view to determining what is appropriate to preserve the respective rights of the parties. Obviously, in that context, the nature of the harm likely to be suffered is a relevant circumstance. I shall, therefore, say something about that issue. That should not, however, be seen as a separate requirement. This Tribunal, in the words of paragraph 1 of article 290, needs to consider, given all the material put before it, what is “appropriate under the circumstances”.

It is also important to emphasize that, at the provisional measures stage, this Tribunal does not have to engage in any prejudgment of the merits. This has been stated already on a number of occasions today. This is not to say that it will not be necessary to consider the particular rights asserted by the Applicants. That, however, is for the purpose of determining that they are not manifestly incapable of existing in law. As well, the Tribunal is not required to make definitive findings of fact on the scientific material placed before it. In our submission it suffices, to adopt the words of Judge Anzilotti in the *Polish Agrarian Reform and German Minority* case, that “the material establishes the possibility of the right claimed and the possibility of the danger to which that right was exposed”.

The same approach was reflected in the *Nuclear Tests* cases. The International Court called on France as an interim measure to avoid nuclear tests causing the deposit of radioactive fallout on Australian or New Zealand territory. In the face of the scientific information available to it, the Court concluded that that information “does not exclude the possibility that damage to Australia (and New Zealand) might be shown to be caused by the deposit on Australian (and New Zealand) territory of radioactive fallout resulting from such tests and to be irreparable”.

It was for this reason that the particular provisional measure was regarded as required. The Court did not insist that actual cancer cases arising from the atmospheric tests had to be demonstrated before it awarded the provisional measure in question. Nor, in response to an argument that Japan makes, was the fact that the cessation of atmospheric tests was one of the specific claims made in the applications instituting the substantive proceedings a bar to the award of that particular provisional measure.

Similarly, in the *Diplomatic and Consular Staff* case, involving the United States Embassy in Teheran, the provisional measures order by the Court involved an order for the immediate release of the hostages, one of the matters of relief sought in the application instituting proceedings.

Where, in order to preserve the respective rights of either party, it is necessary to order particular measures, there can be no objection to them on the ground that they are equivalent to an interim judgment on the merits. That they can never be. The issue for the Tribunal is to determine what is necessary to preserve the respective rights of the parties. There is, therefore, no basis for Japan to dispute the award of the particular measures sought by the Applicants, particularly the first and second, on the basis that they may anticipate the merits and amount to a final remedy.

Nor can certain of the measures sought be characterized, as they are by Japan, as remedies for past infringements of rights. That is not their purpose, as I shall make clear. The particular concern of this Tribunal is to consider whether the measures requested or similar measures are appropriate in order to preserve rights asserted and which may subsequently be adjudged by the arbitral tribunal to belong to the Applicants.

Article 290, paragraph 5, authorizes the Tribunal to prescribe provisional measures when an Annex VII arbitration has not yet been constituted where “the urgency of the situation so requires”. This requirement is not set out in paragraph 1 as a requirement for provisional measures generally. It is a procedural requirement that goes only to the

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circumstances in which this Tribunal should act, given that the body that is to hear the substantive dispute is not yet in existence.

What paragraph 5 is designed to ensure is that this Tribunal can protect the rights of a party until an arbitral tribunal is itself in a position to deal with the situation. Once that body is created, it will have power to modify, revoke or affirm any provisional measures on application of a party. But until then, this Tribunal has the power to act and should act where that is necessary to protect the respective rights of the parties. In other words, for so long as the *ad hoc* arbitral tribunal is not established (and this may take some time), the Tribunal steps into its shoes and has all of its powers. Indeed, it is precisely during the period of months before an *ad hoc* tribunal is established that provisional measures may be required. The basic test of appropriateness applies under both paragraphs 1 and 5.

Let us consider what the urgency of the procedural situation requires. This Tribunal needs to consider two issues; first, how long before the arbitral tribunal will be established and will be in a position to consider provisional measures; secondly, what rights of the parties could be damaged or destroyed if provisional measures were not awarded to protect the rights before the arbitral tribunal is able to consider the issue.

The timetable for establishment of an arbitral tribunal is set out in Annex VII, article 3. Applying the time limits demonstrates that the other party has 30 days from receipt of notification to nominate one member. Japan nominated an arbitrator on 13 August within that period. The parties have 60 days from the date of the original notification of the arbitration to try and reach agreement on the remaining members. If there is no agreement, a request can be made within two weeks of the expiry of the 60-day period to the President of this Tribunal to make the remaining appointments within 30 days. Thus, if the full time is taken, it could be up to three and a half months from initiation of proceedings until an arbitration tribunal is fully constituted. Of course, further significant time is likely then to elapse while rules of procedure are agreed, a secretariat is established and arrangements for the Tribunal to sit are made.

The Applicants submit that it is imperative that provisional measures be prescribed in this case, given the period of three or more months before the arbitration is likely to be constituted and capable of functioning. That period takes on to the end of this year's fishing programme.

As well as the procedural urgency just outlined, there are reasons of substantive urgency which also require the immediate prescription of provisional measures. The "urgency of the situation" is closely related to whether in the circumstances the measures are appropriate. The substantive urgency of the situation is such that to require the Applicant States to wait a further three or more months would mean harm and prejudice to the preservation of their rights in relation to the existing SBT stock and its proper conservation. Contrary to what Japan asserts, the prejudice from unilateral additional fishing exists now; it is not only a medium or long term threat.

Let me illustrate why this is so in greater detail. Paragraphs 20 and 21 of the Applicants' Requests refer to the reasons for urgency. In particular, by the end of next month, September, Japan's catch since the beginning of its current fishing season will, with inclusion of the catch taken as part of its 1999 unilateral experimental fishing, probably have exceeded its last agreed national allocation of 6,065 tonnes. One of the measures sought by the Applicants is, of course, designed to limit the overall catch taken by Japan to the level of their last agreed national allocation. If one takes the 1998 experimental fishing catch and includes that as well, Japan has already exceeded their last agreed national catch allocation for both the 1998 and 1999 seasons.

To postpone any consideration of provisional measures until the arbitration tribunal is established would prevent any measures of protection designed to limit the future Japanese catch for the remainder of 1999 before that arbitration tribunal is functioning. It would effectively prevent any other provisional measures directed at the conservation of SBT during the 1999 season.

The scientific material on which you have heard detailed presentation by Professor Crawford establishes that, in the present circumstances, further catch over and above the last agreed TAC substantially increases the risk of further harm to the SBT stock and fishery and makes even less likely its recovery in accordance with the agreed target. That material clearly establishes the possibility of harm occurring now as a result of the increased Japanese catch.

It may be argued – and I understand that Japan argues – that because the 1999 EFP is almost at an end, there is therefore no urgency requiring provisional measures to stop that programme, but that is to consider only one component of the measures requested in isolation. I will say more about that particular measure later. Whatever the position with the 1999 EFP itself, it says nothing about the urgency of provisional measures in this case in terms of a need to limit the overall catch taken by Japan, including that taken during any unilateral experimental fishing prior to the constitution of the arbitral tribunal.

The provisional measures sought are urgent and pressing in order to prevent the further decline in parental biomass and the further deterioration in the stock as a whole, which has been shown to be a likely and certainly possible consequence of the current Japanese fishing effort. Scientific Committee reports consistently attest to the serious biological concern that already exists. In our submission, once this Tribunal considers the scientific evidence of harm arising from increased fishing, once it considers the pattern and size of Japanese fishing, it will become evident that the urgency of the situation cannot be other than to require this Tribunal to prescribe provisional measures now. It cannot properly leave the matter for consideration in some months' time by some other tribunal, by which time this year's Japanese fishing season will be over. By that time, significant and valuable rights of the Applicant States in relation to SBT will have been impaired or lost if no measures of restraint are prescribed. To decline to act now would involve this Tribunal turning its back on the fundamental principles enshrined in UNCLOS relating to the conservation and management of high seas fisheries.

Mr President, I have so far carefully avoided reference to irreparable harm or prejudice. Neither paragraphs 1 nor 5 of article 290 refer to "irreparable harm" as a requirement for the prescription of provisional measures. There is no reference to this requirement in the *Saiga* provisional measures decision by this Tribunal. Any suggestion that it is a separate requirement under UNCLOS should be rejected. This Tribunal, as I have indicated, should be guided by the words of article 290 alone.

This Tribunal should view with caution, therefore, what is urged by Japan, namely the automatic adoption of principles stated by the International Court of Justice. Those principles appear to regard "irreparable prejudice" as an essential element for the award of provisional measures. Judge Laing considered this issue in his Separate Opinion in the *Saiga* case. He said, "if the Tribunal chooses to use this paraphrase, its subsidiarity or supplementarity should be very clearly indicated". Judge Laing also said, "the rather grave standard of irreparability is inapt for universal use, at least in many of the situations under UNCLOS". The Applicants agree.

Rather, the focus should be on identifying the measures necessary to preserve the respective rights of the parties. That is the purpose of provisional measures, to preserve the *status quo pendente lite* by preserving the respective rights of the parties. In some instances, irreparable harm will clearly establish the basis for particular measures. We can give as an

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example the consular convention cases before the International Court. The imminent execution of the individual whose rights were alleged to have been infringed clearly involved a situation where the rights of the parties would be irreparably damaged and not preserved if the execution went ahead. But whatever the position may be with the International Court, provisional measures under UNCLOS and before this Tribunal do not require such life or death situations.

In the present case, we are dealing with the conservation of living resources. Scientific evidence in relation to resources such as SBT does not have, and can rarely be expected to have, the exactness that will necessarily enable actual irreparable harm to be shown at the time. For instance, even if there was an actual recruitment collapse of SBT, it would take at least two years for that to become known, because of the time that it takes from spawning to recruitment of fish into the juvenile fishery. This demonstrates the inappropriateness of requiring irreparable harm or prejudice to be shown.

This sort of harm to stocks of living resources is not capable of being made good by payment of compensation. It deprives coastal States like the Applicants of their rights to fish a sustainable resource. Economic harm to particular communities dependent on the fishing may result from harm to the resource, but that does not define the limit or even the fundamental nature of the harm complained of by the Applicants. It is not the harm in relation to which provisional measures are sought.

I reiterate that what is required is that this Tribunal can reasonably conclude that particular measures are appropriate – not necessary – under the circumstances in order to preserve the respective rights of the parties. In other words, the Tribunal needs to ask whether a particular measure is suitable to preserve the rights of the parties having regard to all the circumstances, including the rights asserted and the damage that could possibly be done to them. That may require the Tribunal to consider alternative measures, including measures different from those specifically sought. This may require consideration of which measures are most appropriate, given that the object of any measures is the preservation of the rights of the parties. As I shall elaborate, one consideration is the need for the Tribunal itself to adopt a precautionary approach.

I turn then to consider the rights of the parties in this case which the particular measures requested are designed to secure.

The rights which the Applicants seek to preserve are set out in paragraph 16 of both Requests. Professor Crawford has indicated how the conclusions from the scientific material raise a strong case of prejudice to the rights conferred by UNCLOS on the Applicants. But, as I have already indicated, this Tribunal does not have to pass judgment on the merits of the case. You do not have to say that the claim is strong or that it is bound to succeed. It is sufficient if the rights asserted are not manifestly unfounded. The rights under UNCLOS and related rights asserted by the Applicants have been amply demonstrated already to have a sound basis in international law and certainly a sufficient basis to found provisional measures to preserve these rights if that is otherwise appropriate.

The effect that particular measures might have on the rights of Japan is, of course, relevant. Measures that preserve the rights of Australia and New Zealand cannot, of course, destroy the rights of Japan. The measures sought do not do that.

Assume that the measures sought by the Applicants were granted, effectively limiting the ability of Japan to take overall catch in 1999 above the last agreed TAC. If the Applicants do not ultimately succeed on the merits, Japan will be free to again take additional catch under an EFP or more generally, and there is scope to adjust future national TACs.

In short, Japan's right to continue to fish for additional amount will have been postponed; it will not have been destroyed. In postponing it, the right may actually be

enhanced, because all scientific assessments point to the parlous state of the stock, and it is an appropriate precautionary measure in any event to postpone additional harvesting.

By contrast, if Japan is allowed to take unlimited catch, or to continue through the means of an EFP to exceed its annual national allocation, the Applicants will have suffered loss both of their future rights to fish for SBT and through the increased risk of a recruitment collapse.

If the stock collapses completely, a possibility which has been dealt with in the evidence, the Applicants will have lost completely their right to exploit SBT. There will be no stock able to be exploited. If the stock does not collapse but the recovery to 1980 levels is delayed significantly because of the increased Japanese tonnages, the Applicants will not be able to increase their own catches commensurately with Japan, thereby giving Japan a disproportionate or unjustifiable benefit. In keeping with the precautionary principle, any increase in catch will be delayed beyond the point when it would have been possible but for Japan's EFP. Either way, this will clearly prejudice, for possibly a lengthy time in the future, the right of the Applicants to exploit the stock. Japan will have gained an immediate benefit at the cost of the rights of the Applicant States to share equitably in the resource. There is no evidence, nor is it likely, that Japan will willingly share any future sacrifice proportionately with the Applicants in a way that takes account of past EFP catches. The point is that there is a possibility of very serious loss to the Applicants. Arguments about the need to continue experimental fishing for data collection purposes cannot be persuasive in the face of the possible impact of continued fishing above the agreed TAC on the rights of the Applicants.

Mr President, Japan suggests in their scientific papers that it would be possible to decrease a country's quota in future years to compensate for any detectable negative effects on the stock from EFP, but that suggestion is naïve. It does not address the existing rights of the Applicants referred to above also to exploit the stock. More to the point perhaps, given the serious present risk, it does not address the rights of those States to have the stock conserved and protected in accordance with UNCLOS in a sustainable way and consistently with the precautionary principle. These rights include the rights of the Applicants to have Japan cooperate in the conservation of the stock and not to engage in unilateral decision-making about its management. Provisions for future adjustment (which cannot be guaranteed and which, in the event of a stock collapse, would be meaningless) cannot, therefore, preserve the existing rights of the Applicants. In particular, I note that Japan has made any offers of payback contingent on its own acceptance that the EFP has caused "substantially negative impact" on the stock, with no indication of the criteria on which it would make that unilateral decision. I refer the Tribunal to page 2 of our Diplomatic Note of 15 July. The suggestion of payback in no way provides a justification not to prescribe provisional measures.

Mr President, I need to turn now to consider the particular measures sought by the Applicants. The first provisional measure requested is "that Japan immediately cease unilateral experimental fishing for SBT". This is self-evidently urgent. The reason this measure is appropriate is that so long as additional catch is taken by Japan through an EFP, any prospect of stock recovery is seriously prejudiced. This then, for reasons already given, prejudices the rights of the Applicants to have SBT properly conserved and managed so that their ability to fish the stock themselves and to enjoy the benefits thereof are not destroyed.

I note that the measure sought only seeks to prevent "unilateral" experimental fishing. If such fishing is agreed by all three parties in accordance with the principles agreed in 1996, it can take place.

The reason this measure is sought is because the Japanese EFP in 1998 and this year is fundamentally flawed for the reasons given in the Australian Scientific Report and also referred to by Professor Crawford. It is not a genuine scientific programme conducted in accordance with the objectives and principles agreed by all three parties in 1996.

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In the light of the deficiencies, I need to indicate why a provisional measure as requested is appropriate. You will be pleased to know that I do not need to recap on the particular deficiencies for the EFP explained by Professor Crawford. However, what that clearly demonstrated was that the unilateral experimental fishing by Japan:

- (a) is seriously flawed as a scientific programme;
- (b) will not from the information obtained provide a basis to resolve uncertainties in relation to the stock assessment or projections for recovery;
- (c) involves the taking under colour of scientific fishing of significant additional catch which properly forms part of the overall commercial SBT catch taken by Japan; and
- (d) involves the taking of additional catch which is significant in terms of the possibility, in fact probability, of serious harm to the recovery prospects of SBT.

One important and essential way in which to ensure that the Applicants' right that SBT stock can in fact recover is to prevent Japan from unilaterally carrying out any future experimental fishing.

The current 1999 EFP is due to finish at the end of this month, according to Japan. However, this does not make a provisional measure as sought moot or inappropriate. There is nothing to stop Japan continuing or recommencing experimental fishing at any time. Moreover, it is only by calling its current EFP "experimental" that Japan can justify fishing at all. For the rest of this year it proposes to take still more fish. This measure is, of course, closely related to the second measure sought. If Japan was merely to be limited to an ordinary national allocation at that last agreed, this may well lead Japan to extend the EFP or undertake additional experimental fishing. There is no guarantee, therefore, that no more experimental fishing will occur after the end of this month until June or July next year.

It is for this reason that a provisional measure as sought is appropriate in all the circumstances in order to protect the rights of Australia and New Zealand.

The second measure requested by Australia and New Zealand is that "Japan restrict its catch in any given fishing year to its national allocation as last agreed by the Commission, subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999".

Mr President, I note that it is not unprecedented for a provisional measure to impose a fisheries catch limitation on a State.

In the *Fisheries Jurisdiction* cases between the United Kingdom and Germany on one side and Iceland on the other, the International Court ordered the United Kingdom and Germany to ensure their vessels did not take an annual catch of more than a particular respective tonnage.

The United Kingdom in its Request had put forward a request allowing it to continue to take an amount of 185,000 tonnes, based on the average annual catch over the ten years from 1960 to 1969. In 1970 the catch had been 164,000 tonnes and in 1971 it was 207,000 tonnes. The Court, dealing with the situation in 1972, settled on a figure of 170,000 tonnes based on the average annual catch for the preceding 5 years, and having done that, they indicated a provisional measure allowing the United Kingdom to continue to take catch up to that level. A similar approach was adopted in the German case, using the particular figures applicable to Germany.

In the present case, all three States agreed to a quota in 1989 as part of cooperative management measure, and there has been no subsequent agreement to an increase. The Japanese experimental fishing is in effect a way in which Japan can get around the agreed catch quota. It leads to a significant increase in the catch taken - as paragraph 20 of the Applicants' requests indicates, the 1998 experimental fishing represented a 12.5 per cent increase in the last agreed TAC. The 1999 experimental fishing of up to 2,400 tonnes

represents a 20.5 per cent increase over the TAC and a 39.5 per cent increase on the last agreed national allocation. These are not small, incidental increases as a result of a scientific effort. They are an effective increase in the commercial catch taken. An EFP could have been conducted effectively with a fraction of this catch.

That this is so is emphasized by the fact that the areas fished and the boats involved in the experimental fishing are largely the same as those engaged in the ordinary commercial fishing. What happens is that the scientific fishing fills the 3 months gap between June and August, which in years when a scientific programme was not undertaken saw the relevant vessels redeployed elsewhere.

The third measure requested is that the parties “act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute.”

The Attorney-General has outlined the importance of this principle to the effective implementation of conservation measures, including those imposed by UNCLOS. The principle dictates that a State cannot under the guise of science or ordinary commercial fishing undertake activities in a way that ignores real risks of harm to living resources, and southern bluefin tuna are no different in this regard from any other living resource.

The proposed measure would require all parties to ensure that any fishing effort by them in relation to SBT be consistent with this principle. The 1996 agreed objectives and principles took account of this. They require that any increase in catch above the current TAC in order to accommodate an EFP should not jeopardize the potential recovery of the parent stock by the agreed date of 2020, and that the Commission agree as to the acceptable level of risk to the stock of any EFP. Japan has not shown compliance with these principles in the design of its EFP and in the significant catch undertaken.

This Tribunal should itself have regard to the precautionary principle in considering what provisional measures are appropriate. As you have heard, this principle is now one that applies generally to resource management. This Tribunal, in considering the scientific material before it, should itself act in a precautionary mode. If the Tribunal accepts that this is the correct approach for it to adopt, it behoves it to ensure that the parties themselves in their respective actions in relation to SBT also act in a precautionary mode. Hence, the specific measure requested.

It is no answer to say as Japan does that the proposed measure has no specific content as it does not indicate in a concrete manner how Japan should behave in order to comply. That is not a requirement of a provisional measure. In any case, the assertion that a requirement to act in accordance with the precautionary principle lacks content is demonstrably untrue.

If Japan needs to be provided with specific content, let me make some suggestions:

It could ensure any scientific fishing is in fact consistent with the criteria set out in the 1996 Objectives and Principles. The current EFP manifestly is not.

It could ensure any additional catch taken as part of an EFP is minimal and demonstrably related to the scientific purpose.

Again, the Japanese catch taken as part of the EFP is significant and is for the most part disguised commercial fishing. It is not in accordance with the precautionary principle.

Hence, a measure in the terms sought in the view of the Applicants is an important and appropriate way in which to protect their rights pending consideration of the merits.

Mr President, that then leads to the fourth and fifth requests which are sought, and I have not got too much longer to go.

The fourth and fifth requests apply to all parties. They can in shorthand be described as involving “non-aggravation of the dispute” and “non prejudice of any decision on the merits”. Measures like these are now common in the jurisprudence of the International Court.

STATEMENT OF MR BURMESTER

For instance, in the Cameroon/Nigeria Boundary case in 1996 the Court unanimously indicated a measure to the following effect:

Both Parties shall ensure that no action of any kind, and particularly no action by their armed forces is taken which might prejudice the rights of the other in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before it.

The first two provisional measures ordered in the *Fisheries Jurisdiction* cases in 1972 also ordered the parties to ensure no action was taken which might aggravate or extend the dispute and which might prejudice the rights of the other party. This part of ICJ jurisprudence seems apt for adoption by this Tribunal.

In the present case, these two measures are important. Contrary again to Japan's contention, the lack of specificity is not a reason not to award these measures. It may be open to argument whether particular action by a party is inconsistent with measures in the form proposed. But the existence of the two measures would enable a party which considered another was acting inconsistently with the measure to raise its concern in that regard with the other party. In an extreme situation, a party could return to this Tribunal or the arbitral tribunal if it were then functioning if it considered action by a party offended either of these measures. So the proposed measures are certainly not devoid of content.

Again, to give some examples, in the present case, a measure seeking non-aggravation would in the view of Australia and New Zealand require Japan to continue to participate constructively and in good faith in the work of the SBT Commission. It would for instance aggravate the dispute if Japan or the Applicants were to boycott Commission meetings. So in the circumstances, the Applicants say the measures sought are appropriate in the view of Australia and New Zealand.

That brings me briefly to the Japanese counter-request.

In paragraph 121 of its response it makes a conditional counter-request. Mr President, I must say this came as somewhat of a surprise to the Applicants, given the Japanese insistence that this Tribunal is entirely without jurisdiction. Nevertheless, it is welcome. If *prima facie* jurisdiction is found to exist, as the Applicants contend, then Japan by its counter-request demonstrates that it considers the award of some provisional measures in this case to be appropriate. The only problem in the view of the Applicants is that the measure they propose is not a correct one – it is not appropriate in the circumstances. Let me briefly indicate why.

In the view of the Applicants, it is misconceived and unnecessary. The fourth request by the Applicants which I have just mentioned requires all parties not to take action to aggravate the dispute. As I have already indicated, such a measure would implicitly require all parties to continue to participate in good faith in the work of the Commission and other appropriate fora with a view to securing the proper conservation and management of SBT. However, the Japanese request goes beyond that and would impose a requirement on Australia and New Zealand in particular to negotiate over the issues in dispute in a rigid fixed time limit with a predetermined outcome if there is no agreement. This is not to preserve the rights of the parties. It is to impose a particular course of conduct on two of the three parties which is inconsistent with good faith negotiations. In particular it is not appropriate in a provisional measure to require that negotiations take a particular form in terms of the use of scientific experts or advisers. The future role of scientists may be one matter for negotiation, but it is not something to be predetermined by this Tribunal.

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Finally, in conclusion, Mr President, I need to mention article 290, paragraph 4, which directs this Tribunal to give notice of any measures which may be adopted by it not just to the parties to the dispute but also “to such other States Parties as it considers appropriate”. Japan has made much of the involvement of a number of other States in fishing for SBT. One way in which the Applicants consider this concern could be addressed would be for this Tribunal to draw any measures it may prescribe to the attention of all States Parties. It is certainly no answer to the request of the Applicants for Japan to point the finger elsewhere.

Mr President, that concludes the submissions by the Applicants in this first round. I thank you and the Members of the Tribunal in particular for your patience.

The President:

Thank you very much indeed, Mr Burmester. As you said, that brings to an end the submissions of the Applicants. In accordance with the agreement between the parties the submissions for Japan will be made tomorrow. We will start the sitting at 10 o'clock. The sitting is closed.

The Tribunal rose at 4.55 p.m.

REPRESENTATION

PUBLIC SITTING HELD ON 19 AUGUST 1999, 10.00 A.M.

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge ad hoc* SHEARER; *Registrar* CHITTY.

For Australia: [See sitting of 18 August 1999, 10 a.m.]

For New Zealand: [See sitting of 18 August 1999, 10 a.m.]

For Japan: [See sitting of 18 August 1999, 10 a.m.]

AUDIENCE PUBLIQUE DU 19 AOUT 1999, 10 H 00

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. SHEARER, *juge ad hoc*; M. CHITTY, *Greffier*.

Pour l'Australie : [Voir l'audience du 18 août 1999, 10 h 00]

Pour la Nouvelle-Zélande : [Voir l'audience du 18 août 1999, 10 h 00]

Pour le Japon : [Voir l'audience du 18 août 1999, 10 h 00]

The President:

This sitting, as was agreed, will be devoted to the submission on behalf of Japan. I now invite His Excellency the Agent for Japan to introduce the representation and indicate the schedule of submissions.

Argument of Japan

STATEMENT OF MR TOGO
AGENT OF JAPAN

Mr Togo:

Mr President, distinguished Members of the Tribunal. May it please the Tribunal. I feel it a great honour today to be given this opportunity to speak as Agent of the Government of Japan on this important issue concerning the Japanese catch of southern bluefin tuna. It is indeed such a great privilege, such a unique opportunity for me to be able to speak and to explain to you some of the vision and direction which my country has been harbouring and those concrete achievements we have already made in order to realize the important objective of conservation and optimum utilization of southern bluefin tuna.

But before going into concrete matters, I would like to echo wholeheartedly the statement made by Mr Daryl Williams, that the relationship between Australia and of course New Zealand on the one hand, and Japan on the other, is multifaceted and strong, and precisely because of this strength, our countries will survive disagreements on particular questions such as the conservation of southern bluefin tuna.

Honourable Judges, it is a great honour to appear before you as the Agent of the Government of Japan. As I have already introduced to you yesterday, I appear with Professor Nisuke Ando, President of the Japanese Association of International Law, and Mr Robert Greig, partner with the law firm of Cleary, Gottlieb, Steen and Hamilton of New York.

In presenting our views, our delegation would like to proceed in the following order. First, let me give you a broad overview of the subject matter. Then Mr Greig will take the floor and will discuss the relevant facts. Thus he will refute the Applicants' claims that the conduct of experimental fishing by Japan represents a significant risk to the southern bluefin tuna stock or runs counter to the conservation and optimum utilization of that stock.

After that, Professor Ando will take the floor and he will deal with our legal arguments. Thus he will demonstrate amply why we consider this Tribunal should reject the Applicants' claims seeking provisional measures.

Honourable Judges, as for my presentation of a broad overview, the following six points will be presented in order. First, the importance of maritime living resources for Japan. Second, the importance of southern bluefin tuna for Japan and all our past efforts and endeavours. Third, new challenges as we see them emerging and the importance of an experimental fishing programme to face these challenges. Fourth, today's difficulty and the importance of objective and scientific knowledge to overcome this difficulty. Fifth, a short legal statement and, finally, the conclusion.

Mr President and honourable Judges, Japan is an island country, surrounded by the sea, where people have long cherished fishery resources as their major source of protein. With the growing influence of European culture, meat is becoming another important source of our diet, but for most Japanese fishery resources still are the familiar and traditional component of the national diet.

For this reason Japan and the Japanese people have considered adequate conservation and optimum utilization of fishery resources to be of paramount importance for the wellbeing of our people, now and in the future. To leave abundant fishery resources for our posterity is, so to speak, in the natural and structural interest of the Japanese people. I am confident today in declaring that Japan, as a nation, is firmly committed to the principle of conservation and optimum utilization of maritime living resources. History shows the extent of the engagement we have indeed accomplished and are accomplishing towards this end.

STATEMENT OF MR TOGO

It follows from these facts that the international cooperation in matters relating to the renewable resources of the sea has been and is of great importance for our country. History shows again numerous examples of Japanese initiatives and contributions towards positive international cooperation leading to conservation and optimum utilization of maritime living resources.

In this context I would like to draw your attention to Japan's long-standing commitment to resolving international disputes peacefully. In international negotiations Japan makes every effort to reach agreement with other parties. In this context it is worth noting that this is the first international adjudication to which Japan has been made a party in more than ninety years. As will be shown by the presentations we will make, it is the inflexible attitude of others, not inflexibility by Japan, which has brought us before you today.

Honourable Judges, Japan has an especially strong interest in the conservation and optimum utilization of the southern bluefin tuna, the subject of the case at hand. Japan consumes over 90 per cent of the southern bluefin tuna catch and the cuisine is deeply connected with our traditional culture. Thus, for Japan the conservation and the use of the southern bluefin tuna is a matter of sustaining an important resource for its people now and in the future. For other nations it is mostly a matter of the allocation of market share in sales to Japan. There is a shared commitment in the minds of all Japanese that we do not want to lose this precious resource from the scope of our life and cuisine, and that our children, our grandchildren and all of our posterity should be able to enjoy this precious treasure of the sea.

Mr Crawford has mentioned the sad experience one had to go through on the northern cod catching in Canada. But, if there is one country in the whole world which simply does not want that kind of marine resource extinction to happen, that country is Japan.

So, at the beginning of the 1980s, when it came to the knowledge of all that there had been a decline in the southern bluefin tuna stock around the southern part of the Pacific and Indian Oceans, Japan became an active member of the international community in major efforts to conserve and at the same time achieve optimum utilization of the stock.

From 1985 to 1989 Japan, Australia and New Zealand embarked on a cooperative scheme of substantial reduction of the annual total allowable catch for those three nations from 38,650 tonnes to 11,750 tonnes as stated by the Applicants yesterday. Japan took the greatest burden in achieving this reduction, and its own annual catch fell over this period by more than 17,000 tonnes to the level of 6,065 tonnes, a 74 per cent reduction.

Based on this positive achievement Japan also took the lead in the early 1990s in negotiating and in 1993 agreeing to the Convention for the Conservation of the Southern Bluefin Tuna. This is an ambitious international agreement, with the twin objectives to conserve and to provide for the optimum utilization of southern bluefin tuna, introducing a new concrete structure and rules governing the southern bluefin tuna fishing activities.

Honourable Judges, it is my firm recognition that after those decades of successful cooperation among like-minded countries, at this very closing period of the twentieth century, Japan, Australia and New Zealand and, in fact, all who are in some way or other interested and related to the fishing of southern bluefin tuna, are facing fundamentally new challenges.

Let me explain to you in some detail the problem as we see it arising and the vision, direction and endeavour with which Japan is trying to face and overcome these new challenges. At the centre of these new challenges lies the issue of southern bluefin tuna catch by non-parties to the 1993 Convention. This issue has such an important bearing on the proper management of the southern bluefin tuna stock.

Since the early 1990s countries and an area such as Indonesia, Republic of Korea and Taiwan that are not party to the 1993 Convention have made large increases in their catch of southern bluefin tuna. In factual terms what was said yesterday is correct. Of the roughly seventeen thousand tonnes of southern bluefin tuna caught last year, these non-parties to the

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1993 Convention accounted for about 30 per cent or approximately five thousand tonnes. This is roughly equivalent to the amount caught by either Australia or Japan and more than ten times the amount caught by New Zealand.

For the true long-term conservation and optimum utilization of the SBT, Japan strongly believes it essential to expand the cooperative framework of the Convention for the Conservation of the Southern Bluefin Tuna by bringing into it all countries and areas that fish for the SBT. Faced with this new mutually connected situation, Japan indeed has tried to gather its thoughts: what is the best way to allow the fishermen, not only of my country but of all countries and areas, to become more engaged in cooperative measures for fishing for SBT while, at the same time, not causing irreparable damage to these riches of the sea, so that they may be enjoyed by the next generations? What is the best way to induce those other fishing parties to join in the cooperative framework of the 1993 Convention and to allow their SBT fishing in accordance with adequate conditions for conservation and optimum utilization of the resources? What is the best way to harmonize and satisfy in a fair manner the conflicting interests of various parties in their geographical and "generational" distributions of these natural resources?

In Japan's view, the only way to bring these non-parties into the cooperative framework of the 1993 Convention is to re-establish the proper functioning of that Convention; that is to say, scientifically establish the appropriate level of total allowable catch for long-term conservation and optimum utilization and offer appropriate allocation to each country. Without a share in the fishing of SBT, we cannot imagine any of these non-parties will choose to join the cooperative framework of the 1993 Convention.

Japan has been making constructive proposals to this end. Allegations have been made that Japan is diverting its responsibility by blaming these outside parties. On the contrary, in Japan's view, blocking decision-making by exercising a veto in the 1993 Convention is not at all the best way to induce these outside parties to join it. Indeed, quite to the contrary, it is only by demonstrating that the Convention for the Conservation of SBT can function normally and provide a reasonable basis for cooperation, based on a reasonable analysis of the best scientific data available that we will be able to induce non-parties to join its cooperative framework. This is Japan's goal.

Mr President, honourable Judges, after prolonged and serious deliberations, we came to the conclusion that the only way to achieve our goal is to introduce and implement an effective mechanism of an experimental fishing programme. An experimental fishing programme to be agreed by all the parties concerned could and should become the sole objective basis for any new distribution of its wealth as well as the most effective way of inducing non-parties to join in the cooperative framework of the 1993 Convention.

In order to achieve these objectives, it is of paramount importance, in our view, that the EFP be genuinely effective. Most careful scrutiny has to be given therefore to the geographic area and the period of its implementation.

An allegation we heard yesterday, which we saw on a colourful display, is that 76 per cent of the 1998 EFP was really commercial fishing in disguise. A statement was also made that the 1999 EFP catch would be worth US\$ 30-50 million. These statements are totally false or misleading. One hundred per cent of EFP fishing took place during months or geographical locations that are not currently fished on a commercial basis. In addition, the 1998 EFP operated at a substantial loss, and a similar loss is anticipated for 1999. This loss is tolerated only because it is a scientific, not a commercial, operation, as alleged. My colleague will later expand on this point in a concrete and clear manner.

At the same time, from the outset of our considerations we were of the view that there is one obvious prerequisite to be met: the experimental fishing programme should not create irreparable damage to the stock situation of the SBT. Hence, the key notion of payback is of

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great importance to us: in case the experiment (contrary to expectations) shows that it has caused the SBT stock to decline, then the strict amount of that experimental catch should be subtracted from future allocation of total allowable catch of the country which had implemented the programme.

The allegation we heard yesterday that Japan is advancing EFP "with no indication of the criteria on which it would make that unilateral decision" ignores an important fact that an objective criterion for payback was incorporated in the decision rules proposed by the independent scientists in the EFP Working Group. Japan clearly endorsed that criterion. Thus, any possibility of creating irreparable damage for the conservation of the SBT may be avoided completely.

Honourable Judges, up until quite recently, in fact until May of this year, we were of the view that the Japanese vision and direction towards further consolidation of conservation and optimum utilization of SBT through the experimental fishing programme was shared by our Australian and New Zealand colleagues. Agreement was near, so we thought. In fact, if translated into a simplified form of numerical order, the difference of the amount of expected experimental fishing programme between Japan on the one hand and Australia and New Zealand on the other was only just around a few hundred tonnes, or a few per cent of the total catch of SBT.

Yet, consensus could not be reached by the end of the month of May. After thorough reflection of the overall situation, we came to the conclusion that, particularly given the extreme sensitivity and the importance duly to take into consideration the timing of the EFP, the most constructive approach is to initiate the programme (as we have projected) beginning in the month of June and to show (through the outcome of these exercises) the objective contribution we are going to make for the deliberations of future determination of total allowable catch by the Commission for Preservation of SBT, the main organ of the 1993 Convention.

Yet, contrary to our expectation and to our deep disappointment, Australia and New Zealand did not show understanding for our vision, direction and endeavour. So here we are: Japan is being told by the two countries to take provisional measures for its "failure to conserve, and to cooperate in the conservation of the Southern Bluefin Tuna stock ...". Well, the short answer is this: Japan has been cooperating in this goal and no such "failure" exists.

In coming today to this podium, I have gone through, with utmost care and attention, all the principal documents presented by our colleagues from Australia and New Zealand. I listened carefully to what our Applicants' colleagues said yesterday. As I stated at the beginning, I do not doubt, or rather would like to underscore, the basic soundness of multi-faceted relations between Australia, New Zealand and Japan. But, all the more so, the more I read and the more I became familiar with the contents of the documents and the statements, the more I could not help but feel a strong sense of puzzlement and dismay. Why is our vision, direction and all past endeavour apparently so little credited or understood by colleagues from Australia and New Zealand? Why is it ignored that Japan assisted and even subsidized a part of the Australian SBT industry in its difficult period of transition? Was it not Japan which came up with the best advice for the sake of conserving the stock of juvenile tuna in the catching of which Australia was taking the lead in its fishery activities? Why and how can the Applicants reconcile themselves with two entirely contradictory positions: Mr Crawford's statement of yesterday that "an EFP of 2,000 tonnes might well have significant adverse effects on the stock and on its recovery" and, at the same time, supporting a joint EFP of up to 1,500 tonnes during the negotiations in May this year. Why are the three countries in dispute between themselves for a matter of, figuratively speaking, a few hundreds of tonnes of SBT when a new challenge is emerging of, to put it mildly, a few

thousand tonnes of SBT catch which is coming from outside the framework of the 1993 Convention?

Finally, why did Australia and New Zealand commence this case at so late a date that, even if this Court acts with great dispatch, no decision could be reasonably expected before the 1999 EFP is on the verge of ending? In this context, let me confirm, as Agent of the Government of Japan, my country's clear commitment that the 1999 EFP will end by 31 August.

Honourable Judges, in going over the Australian and New Zealand papers again and again and in listening carefully to what our colleagues from the other delegations have had to say yesterday, it seems to me that the single and profound reason why the two sides cannot agree on a common experimental fishing programme lies in the difference of views concerning the scientific and objective knowledge, first on the status of SBT stock and, secondly, on the evaluation of the implication the EFP will or will not have *vis-à-vis* this stock.

Let me tell you quite frankly that as to the real evaluation of the objective and scientific status of a maritime living resource found in the sea in the southern ocean of the other hemisphere, I am not able to bring in personally authentic views. But, inasmuch as I am personally unable to do this, let me emphasize with my strongest conviction that there is such an overwhelming weight of views among those most distinguished independent scientists that the stock situation of the SBT in recent years is in a tangible recovery, and, even more so, that the projected EFP by Japan, particularly together with its firm commitment to the principle of payback, simply cannot be the source of irreparable damage to the fate of the SBT stock. The papers that we have already presented show this conclusion. The presentations by my colleagues that are to follow will prove it even more clearly.

Mr President, honourable Judges, I have now covered the fundamental points concerning the goals and objectives of my Government for the conservation and optimum utilization of the SBT. However, before concluding, let me as the chief legal adviser on international law of the Government introduce very briefly the gist of the legal arguments of the issue at hand. Professor Ando will develop those arguments in detail later on.

First, I deal with the matter of *prima facie* jurisdiction. Japan respectfully submits that the Annex VII arbitral tribunal cannot be considered to have *prima facie* jurisdiction over this case. Thus, this Tribunal lacks the precondition to order the provisional measures requested by Australia and New Zealand.

This is a dispute under the Convention for the Conservation of the SBT. That Convention alone prescribes the conservation measures to be taken with respect to the SBT in a concrete manner. The United Nations Convention on the Law of the Sea does not. This is why it is absolutely not possible to deal with this dispute under the Law of the Sea Convention independently from the 1993 Convention. By relying solely on article 288, paragraph 1, of the Law of the Sea Convention and not on paragraph 2 of that article, Australia and New Zealand are bringing this dispute to a forum in which it does not belong.

Furthermore, even if one presupposes that the dispute could be submitted to the Section 2, Part 15, of the Law of the Sea Convention, its procedure cannot be applied because not all the procedures in Section 1, Part 15, have yet been exhausted.

Secondly, Japan denies any justification to order the provisional measures requested by Australia and New Zealand. Australia and New Zealand have not, among other things, sustained their burden of demonstrating irreparable damage and urgency. Mr Burmester yesterday proposed a revolutionary, not evolutionary, proposal to ignore irreparable damage as an essential criteria for provisional measures. However, irreparable damage is the core concept needed to prove the "urgency" for the prescription of provisional measures. This has been firmly established throughout the long history of international jurisprudence. Complete

STATEMENT OF MR TOGO

lack of urgency in protecting their alleged rights has been amply demonstrated in my intervention.

I would like to add one word on the "dichotomy" of science and law presented by Mr Crawford yesterday. As you may well appreciate, Japan's position is not as simplistic as Mr Crawford might have liked to have depicted it. The 1993 Convention prescribes, only by consensus, total allowable catch and national quota. TAC should be decided upon scientific data. Quota should be decided after negotiation for the distribution of TAC. Both are of a non-judicial character. They become legally binding only upon the decision of the Commission, and both are decided every year in the Commission. The Applicants' claim that Japan should abide by the 1997 quota in 1998 and thereafter can be raised only in the light of the 1993 Convention, not under the Law of the Sea Convention.

I have to add here that my appearance in this Tribunal is without prejudice to Japan's position on any matters relating to the jurisdiction of the Annex VII arbitral tribunal.

Mr President, honourable Judges, Japan came to this Tribunal with maximum goodwill and a willingness to cooperate. We are prepared to cooperate in any and all spheres as you might consider necessary.

Japan came to this Tribunal with a strong and clear sense of direction. We absolutely wanted to present to you the objective and scientific knowledge which is guiding our activities, as well as the vision, direction and aspiration which underlie our activities for the conservation and optimum utilization of the southern bluefin tuna stock.

Honourable Judges, Japan came to this Tribunal with a view to reiterating its strong determination to communicate and to negotiate in good faith with our Australian and New Zealand colleagues for the sole purpose of enhancing and consolidating our cooperation for the conservation and optimum utilization of the southern bluefin tuna.

In particular, Japan registers a strong plea that there is no more important period for us, the three countries of the 1993 Convention, first of all, to resolve the relatively minor differences of our views on the basis of objective and scientific knowledge, and then to squarely face those new challenges which surround us all.

Japan therefore expresses its strong desire that the proceeding and discussion unfolding here in this Tribunal will provide an opportunity to remove the basic misunderstandings or, perhaps better stated, the lack of a spirit of compromise, which currently exist.

Mr President, honourable Judges, I have spoken here this morning as the representative of my country. I have spoken with my best knowledge and intention from the bottom of my heart and soul. I have spoken so that the Japanese effort for the conservation and optimum utilization of SBT will become elucidated under the bright light of this Tribunal. May justice and wisdom prevail. Thank you for your attention.

With your permission, I would now like to leave the floor to Mr Greig.

The President:

Thank you very much, the Agent for Japan. Mr Greig, please.

STATEMENT MR GREIG
COUNSEL OF JAPAN

Mr Greig:

Mr President, honourable Judges, ladies and gentlemen, it is a great honour indeed to have the opportunity to appear before this Tribunal on this historic occasion. With this its third and fourth matters, this Tribunal has an opportunity to build on its already strong tradition of inclusiveness, fairness and restraint. The Tribunal has the opportunity to further the broad purposes of the Law of the Sea Convention to promote cooperation among nations in conserving and achieving optimum utilization of renewable resources of the sea.

Standing before you, I cannot help but be keenly aware of the rich variety of experience and accomplishment that you judges bring to this Tribunal. Among you are some of the world's most distinguished diplomats, including former ambassadors, fisheries experts, scholars of international law in general and the law of the sea in particular. Given this collective wealth of experience, you could not be better suited to grasp in all its intricacy this dispute and the context from which it springs, and to appreciate the challenges that this dispute poses to this Tribunal as an institution.

The presentation by Australia and New Zealand yesterday demonstrated once again that it is they, not Japan, who seek to evade solemn international undertakings and to substitute judicial processes for dialogue, compromise and scientific debate. Their presentation was mired in old issues. When you understand the actual events that led the parties to this esteemed Tribunal, you will be left wondering why we are all here.

The headline facts are as follows: In cross-examination yesterday, Dr Beddington conceded that the Commission has engaged experts, independent scientists to help forge a consensus on a joint fishing programme, that such use of independent experts is common and can be desirable in fishery management, and that the independent experts in this case were actively involved in the details of the stock assessment process and in the details of experimental fishing programmes.

The parties agreed that, should they be unable to reach a consensus on an EFP, the independent scientists would perform an adjudicative role. Japan has since called upon Australia and New Zealand to abide by their agreement and let the independent scientists resolve the dispute. The Applicants have refused.

Why are we here? Why do Australia and New Zealand resist the views of truly independent scientists? I will explore these and other issues in the course of my presentation today.

Before coming to my principal subject, there is one point that I would like to anticipate briefly. It is a point which will be fully dealt with by Professor Ando. Yesterday, our esteemed opponents argued that to establish a basis for provisional measures, their only burden is to demonstrate "a reasonable concern about a plausible worst case scenario". This is simply not the applicable standard.

As Japan's written response demonstrates, Applicants bear the burden in this court of proving an urgent threat of irreparable damage. Applicants' unsupported argument for a grossly lower standard is tantamount to an admission that they have no possibility of getting over the applicable hurdles of "urgency" and "irreparable harm".

My presentation this morning will cover the following points:

1. Japan is committed to the conservation of SBT and to the work of the Commission.
2. Scientific uncertainty prevents the Commission from functioning at present.
3. The Commission retained independent scientists to assist in resolving technical disputes between the parties.
4. An EFP is appropriate to reduce scientific uncertainty.

5. Japan's EFP is scientifically sound and without realistic alternative.

There is simply no urgency justifying any provisional measures. There is no risk of any irreparable damage. The provisional measures requested by the Applicants would be ineffective, and would result in positive harm.

Japan greatly appreciates the opportunity to present this Tribunal the facts relevant to the present dispute – a dispute over how best to resolve the uncertainty within the scientific community over the state of the SBT stock.

That uncertainty exists, everyone acknowledges.

That the Commission set up under the 1993 Convention for the Conservation of SBT desires and needs that uncertainty to be resolved is also undisputed.

That an experimental fishing programme can be an effective way in the short term to help eliminate that uncertainty is also conceded.

That the current state of the SBT stock can support such an experimental fishing programme with no permanent significant adverse effect also has been conceded by Australia and New Zealand during the parties' negotiations.

Despite these areas of substantial agreement, Japan finds itself inexplicably here in court. Without a doubt, there is a range of expert views about the current and future state of the SBT stock and about the best way to conduct an experimental fishing programme. But this range of scientific opinion over highly complex questions is hardly surprising. Indeed, as the panel of independent fishery experts invited by the Commission to review its work notes, and I quote:

In fact it is rare that there is a single correct interpretation of the data with all others being necessarily incorrect. There is room, therefore, for honest disagreement among parties, and in most stock assessment processes we are familiar with, the differences would be resolved cooperatively.

That same panel has put before you its expert opinion that Japan's EFP is necessary, scientifically sound and poses no risk of irreparable harm to the recovery of SBT stock. In fact, the 1998 EFP results, which Dr Beddington admits he did not review, show that the agreed goal of restoring the SBT stock to 1980 levels is well within reach.

The panel of independent experts selected by the parties is made up of Messrs Maguire, Sullivan, Mohn and Tanaka. Their professional expertise and objectivity is graciously conceded by Dr Beddington. They submitted their report directly to this court, and a copy is attached as Annex 1 to Japan's response. Brief biographical statements of these experts appear at the end of their report.

But Japan does not ask this Tribunal to attempt to resolve the scientific dispute that until now has divided the parties and the fishery experts. Rather, Japan asks this Tribunal to affirm that extraordinary provisional measures are appropriate only when there is a clear risk of imminent and irreparable damage – factors not present here. This dispute should have been, and still can be, resolved cooperatively on the basis of neutral scientific principles. In short, this is a dispute to be resolved by the parties based on science. There was a dispute under the 1993 Convention over the scientific data needed to set the total allowable catch, or TAC. The Commission has retained independent scientists. These independent scientists concluded that EFP is necessary to reduce uncertainty, and scientifically sound. Independent scientists agree that any adverse effect of EFP can be remedied through future adjustment of national quotas. There is therefore no basis for any provisional relief.

To understand what this dispute is about, it is necessary to understand the history of Japan's commitment to the conservation of SBT, both before and after its accession to the 1993 Convention and its participation in the Commission.

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Japan has achieved much in the way of conservation of SBT over the last 40 years.

In the 1970s, Japan voluntarily restricted SBT fishing over spawning grounds, recognizing the substantially greater adverse impact that fishing in that area has on the long term status of the species – something that Indonesia, for example, has not followed to this day.

In the late 1980s, Japan agreed that a significant reduction in TAC is necessary. Japan reduced its catch by 74 per cent from previous levels, bearing the greatest share of the overall TAC reduction.

In the early 1990s, Japan provided the Australian fishing industry with technical assistance to enable it to reduce use of methods that depleted the stock of juvenile SBT.

In the mid 1990s, the increase in recruitment of older fish stock was noted, confirming the effectiveness of conservation efforts started in the 1980s.

Today, in the late 1990s, the SBT classes of early 1990s are reaching maturity and are starting to be responsible for the recovery of the parental stock, as you will see graphically in a few moments.

In 1993 the SBT conservation efforts of Australia, New Zealand and Japan were formalized under the 1993 Convention and the formation of the Commission to manage the SBT stock.

The 1993 Convention incorporates two purposes – the conservation and optimum utilization of SBT – two principles that must be afforded equal weight.

What objective did the Commission set in order to achieve the twin aims of conservation and optimum utilization? As a stock management objective, the Commission resolved to restore the parental biomass level that existed in 1980 by the year 2020.

That management objective was put forward some years earlier when it was estimated that the stock level that existed in 1980 was sufficient to ensure no substantial drop in recruitment – the introduction of fish into the biomass. So even though by 1980 the parental stock had significantly declined from the level that existed in 1960 or 1950, the annual recruitments seemed roughly constant. That means that a lesser parental biomass was adequate to maintain the same sustained level of catch of the species. That is why the agreed management objective of all parties was the restoration of the 1980 biomass level, not those of 1960 or 1950.

How best to achieve that management objective and thereby promote the twin goals of conservation and optimal utilization of SBT? SBT is, as you have heard, a highly migratory species, fished by a number of countries across tens of thousands of kilometers of open seas. For the stock to be managed effectively, we need to persuade other nations, now catching large quantities of SBT, to participate in a multinational framework, either under the Commission or some other regional organization. As recent events demonstrate, other nations will not participate unless they can be assured that they will not be bound to national allocations absent their consent. This is what the 1993 Convention and other tuna conventions such as the Indian Ocean Tuna Convention provide – that no one party be permitted to impose its view on the others.

From the outset, the parties to the 1993 Convention understood that consent formed the framework for future action, but that it was only the beginning of the process. Thus there is much work left to be done.

In particular, optimum utilization requires that the TAC be based on scientific principles. Through 1997, Australia achieved its goal of maintaining the TAC at existing levels, not on the basis of scientific assessments demonstrating that such a limit was then appropriate, but based on coercion. That is, Australia threatened to exclude Japanese vessels from Australia's exclusive economic zone and from its ports unless Japan first agreed to Australia's proposal for the annual TAC.

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In addition, it is critical to bring all SBT fishing within the 1993 Convention or other regional framework.

As you can see on the chart, the catch by non-parties to the 1993 Convention, which is shown in purple, has increased dramatically since 1995 to roughly equal in the aggregate the commercial catch of either Japan or Australia. These large, unregulated catches far exceed the size of Japan's EFP.

Article 13 of the 1993 Convention specifically obligates the parties to "cooperate with each other to encourage accession by any state to this Convention where the Commission considers this to be desirable." The Record of Discussions under Article 16(1) of the 1993 Convention, held in December last year, concluded:

The parties recognized strongly the need to control non-member catches of SBT...they also recognized the urgency of taking effective action to persuade non-members to accede to the [1993 Convention] or, for those for whom accession is not possible, to comply with the management measures of the Commission.

But, in order to gain the cooperation of these non-members, they must be offered an economically realistic and scientifically justifiable quota. The Republic of Korea explained its understandable reluctance to join the 1993 Convention in clear terms:

What is hindering Korea most above all is the CCSBT's insufficient offer of quota for Korea, which is far from the present fishing reality of Korean Southern Bluefin Tuna industry.

No State, I submit, will join the 1993 Convention unless it can be given a reasonable quota to make joining viable.

If the EFP were to demonstrate that Applicants' pessimistic projections are realistic it will be practically difficult to induce non-parties to the 1993 Convention to participate. On the other hand, if the EFP leads to more optimistic conclusions, bringing the Republic of Korea and other non-parties into a regional southern bluefin tuna management arrangement should be feasible.

With this background I will now discuss the current state of scientific uncertainty with respect to the work of the Commission, which has made it impossible to date for the Commission to operate effectively. The principal problem facing the Commission, one that it recognizes, is the scientific uncertainty that has developed in recent years over the current and future state of the southern bluefin tuna stock.

The current state of affairs is that there are a wide range of assessments of southern bluefin tuna stock resulting from numerous conflicting assumptions. "Assumptions" is the apt word to describe the situation; the inexact nature of the process inherently requires scientists to make assumptions or estimates as to the future.

A major source of that uncertainty is the status of the stock at times and in areas currently not fished commercially. We have data provided by Japanese long line fishing vessels that helps track the abundance of southern bluefin tuna in the areas currently fished, but in order to assess the overall abundance of the species, one has to make some assumption as to the relative abundance in the stock in the times and areas not fished.

It is precisely because of the widely divergent assessments of the stock that arise, depending on what you assume is the state of affairs in the unfished areas, that the parties are not able to agree on a TAC and have not been able to do so since 1997. Thus, the fundamental stock management tool that the Commission has – establishing a total catch for

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its members and to provide for additional States to join – cannot be utilized unless the uncertainty over the stock assessment is reduced. Simply put, the scientific uncertainty has led to paralysis at the Commission.

As you will see, the only feasible way of reducing that uncertainty in the next few years is by an experimental fishing programme like the one Japan is conducting. The Commission has acknowledged that the degree of uncertainty in the stock assessment process is simply too high to permit the Commission to function effectively.

In 1998 the Commission retained the panel of independent scientists chosen by a consensus of the three parties to advise its Scientific Committee of all aspects of stock assessment. The Commission explained the reason for its decision to invite neutral outsiders to evaluate the process by which quotas were set:

The Scientific Committee's advice is based on valid, high quality scientific analyses taking into account all available data. However, at recent Scientific Committee meetings, there has been a lack of consensus on the estimates of the probability of recovery of the Southern Bluefin Tuna stock. The Commission is concerned about this and decided to undertake a peer review of the stock assessment process by a panel of experts.

That panel of independent experts issues their Peer Review of the Scientific Committee's Stock Assessment Process, which is Annex 13 to Japan's papers. That review found that the process by which the Scientific Committee did its work had become politicized:

The process we have observed in the Stock Assessment Group and the Scientific Committee cannot be described as scientifically neutral. In other scientific processes we are familiar with scientists participate firstly as individuals, not as national representatives.

In the light of the shortcomings recognized by the Commission in the stock assessment process the Peer Review Panel was given a broad mandate. The independent scientists were to review all aspects of the assessment process. In particular, the neutral experts were to review the factors that accounted for the variance in stock assessments, including:

- existing data used in stock assessment;
- availability and necessity of additional data to be used in stock assessment;
- sets of weightings assigned to uncertainties;
- methods of treating uncertainties in models;

and a number of other items. On the critical issue of whether the scientific community had the data that it needed to develop the best possible stock assessment the Peer Review Panel's conclusion was that additional data was required, data that could be obtained only from an experimental fishing programme.

We therefore see a strong need to gather additional information on the fishing grounds because existing data are insufficient to unambiguously resolve the difference in points of view.

The existing data based on information gathered from Japan's commercial fishing vessels needed to be supplemented.

The area fished for any one period of time, shown in red on the map, is only a small portion of the southern bluefin tuna fishing grounds. It therefore becomes more and more

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important accurately to assess the stock status in those unfished areas for which no actual data are available. Under the variable squares analysis favoured particularly by New Zealand, the claimants are giving heavy weight to an assumption that there are no southern bluefin tuna whatsoever outside the red fish area. Applicants are also giving heavy weight to another even more incredible assumption which Applicants did not admit to yesterday.

In fact, Applicants are also assuming that there are no fish even in an area commercially fished, in any month in which there is no commercial fishing in that area. In effect, they are assuming that all the southern bluefin tuna in a given 5 degree by 5 degree area swim away as soon as the commercial fishing ends. In other words, area 8, which is the area of commercial fishing shown, is thought to be devoid of fish in months when the fishing is out of season. That is the reason you have to do some experimental fishing during those months to test that extreme assumption.

Applicants' charts purportedly showing that 76 per cent of the EFP occurred in areas currently fished is highly misleading, because all of this fishing is out of season during periods when the variable squares assumption predicts that there are no fish present.

Under the constant squares analysis the assumption is that southern bluefin tuna have the same density in season and out of season in both the red and green areas. The proper assumption regarding the density of fish in the unfished times and areas will dramatically affect the overall stock assessment and the probability of reaching the 1980 parental biomass level goal by 2020.

As the expert panel explains, actual data are necessary to assess at any given time for any given location which hypothesis is correct – variable squares or constant squares:

Recent catches in the order of 13,000 to 16,000 tons have not resulted in clear changes in catch per unit of effort or CPUE with some assessment hypothesis (variable square) suggesting stable or decreasing stock sizes, while others (constant square) suggesting stability or increases. This lack of signal in the CPUE data is one of the strongest reasons for an experimental fishery program.

An experimental fishing programme is designed to gather the data necessary to make more informed decisions about the future state of the stock by providing hard data where uncertainty previously reigned.

An EFP is a recognized tool of fishery management, as Australia's and New Zealand's experts readily acknowledge. Dr Polacheck, Australia's main witness in these proceedings, and main participant in the prior negotiations, concedes the legitimacy of experimental fishing as a scientific technique:

Experimental fishing programmes, EFP, can be an effective tool for improving the management of a fishery resource in terms of conservation and optimal utilization. In the context of CCSBT discussions and this paper, an experimental fishing programme allows for short-term additional catches taken in a controlled manner to provide specific information to improve the 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.

Likewise, Dr Beddington states in his paper:

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Given the current extent of scientific disagreement about the uncertainties in the SBT projections, it clearly is highly desirable if action can be taken to reduce this. One possible means of doing so is to use data collected during a well designed experimental fishing programme.

Not only do Australia's experts believe that an EFP is a useful tool to eliminate scientific uncertainty, but the parties undertook to develop a joint EFP for 1999.

By the way, the tentative letter Mr Garcia wrote to the Japanese, which my learned opponent made use of yesterday, was actually a critique of an early draft of the 1998 pilot EFP. Most of his comments were taken into account in devising the actual EFP.

In 1998 the parties established the EFP Working Group in an effort to resolve their dispute. The Working Group was charged with developing a joint EFP for 1999 and doing so in time to implement it starting in June or July 1999. The EFP Working Group was also advised by some of the independent scientists who had convened and who had provided advice to the Commission. The Working Group was to rely on the recommendations of the independent experts in the event consensus could not be reached.

Those independent scientists endorse the need for an EFP as the best, short-term alternative for eliminating the uncertainty plaguing the Commission's work. I quote from the Panel's statement:

Several competing hypotheses on how to interpret the indices of stock size currently exist, leading to significantly different pictures of stock status. Additional modelling exercises will not provide a solution as to which of these hypotheses is most likely. With regard to the specific issue of how stock abundance is distributed over the fishing grounds, i.e. constant squares versus variable square 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.

In sum, there is a general consensus that an experimental fishing programme would provide valuable data, a much-needed tool in the management of the SBT stock. Given this fact, Australia's objections to Japan's EFP cannot seriously be said to present a matter of urgent necessity, let alone such urgency as to require this Tribunal to take the extraordinary step of granting provisional measures.

While reasonable scientific minds can and do differ over the technical details of an ideal EFP, the simple fact is that Japan's EFP has been devised in the spirit of scientific inquiry and is based on sound scientific principles. It incorporates the views of scientists exchanged over years of discussion, including the views of Mr Garcia, and is designed to address the major source of uncertainty that leads to the parties' divergent assessments – the status of SBT stock in unfished areas and out of season. In the spirit of consultation and cooperation, Japan has also incorporated Australia's suggestion for a pilot tagging trial to the 1999 EFP. However, as I will explain shortly, Australia's tagging programme is no substitute for an EFP.

There is simply no merit to the allegation made by Australia and New Zealand in the press and in their presentation here that Japan's EFP is merely commercial fishing masquerading as science. The 1996 Objectives and Principles state that an EFP "should be designed for implementation by commercial fishing vessels". While I am quoting from the 1996 Objectives and Principles, which were relied on so heavily by Applicants yesterday, the only item out of seven, with many sub-points, which Japan's EFP violates is that it was done without Applicants' consent.

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Throughout the negotiations Australia and New Zealand readily acknowledge that, whatever version of an EFP might be adopted, the commercial vessels engaged in the fishing would operate at a loss for which compensation would be necessary – either in cash or in fish. In Australia's proposal for a random fishing programme, for example, Australia estimated the net cost at Australian \$ 9.4 million annually, which Australia equated to around 1,429 tonnes of fish.

In accordance with this reality, Japan for its EFP is using a government-supported research vessel and paying other vessels amounts which reflect the added effort necessary to fish areas relatively remote from the areas of commercial fishing.

This map may be a little bit hard to understand, but if you put all the information on it together, the 1,000 which is in thousands reflects the million yen per day supplement that has to be paid in order to induce the vessels to travel so far from the normal fishing areas. That is in the block with a "1" in it and 400,000 yen per day in the block with a "2" in it, and so forth. So you can see that supplemental payments to commercial vessels are essential to make their participation in an EFP viable.

There is no merit to Australia's assertion that Japan's EFP would have a significant adverse effect on the viability of SBT stock. As the chart shows, Australia was prepared as late as May of this year to accept an EFP in the range of 1,200-1,500 tonnes. Japan's EFP is only 500 tonnes larger. Surely Australia and New Zealand would not have been willing to propose an EFP of 1,200-1,500 tonnes per year if they seriously believed that such a programme would irreparably harm the stock of SBT as they now claim in this Tribunal?

Australia and New Zealand complain about Japan's EFP in 1998 and 1999 because they say it "represents an increase in the last agreed total allowable catch". Under Applicants' position, were Japan's catch not to cause an increase in the last agreed TAC, they would have no basis to complain about damage to the SBT stock and we would not be here today. Japan's position on the other hand is that the TAC is not so rigid as to create a dividing line between sound and unsound fishing. However, even under Applicants' theory, the data simply do not support their claim.

In fact, there has been no total catch by the parties in excess of the TAC over the last five years. After taking account of Japan's 1998 EFP that caught 1,464 tonnes, there still remained a difference of 754 tonnes that could have been caught without exceeding the aggregate TAC over the last five years. When one considers that the difference between the Australian EFP proposal for 1999 and Japan's programme was only 500-800 tonnes, using the remaining 746 tonnes for experimental fishing cannot possibly be viewed as material.

As the table on the screen reflects, total catches by the three countries over the last five years have been less than the aggregate TAC for that period by an amount greater than the 1998 EFP tonnage. Using Applicant's terminology, there has been, in effect, payback in advance, which should satisfy even Dr Beddington's way of thinking.

The other criticisms raised by Australia and New Zealand relate to technical details over the deployment of vessels in the unfished areas and whether every rule of decision must be determined in advance before commencing the experiment. The independent scientists who sat through the four Working Group sessions do not believe that all decisional rules must be determined in advance; so there is no basis for enjoining Japan's EFP on that basis.

What then is this Tribunal to make of Australia's and New Zealand's request to have it enjoin Japan's EFP on an emergency basis? As demonstrated by their previous negotiating positions, Applicants' Request for provisional measures certainly does not appear to reflect a good faith belief that the SBT stock is in immediate peril.

In fact, the results of Japan's 1998 pilot EFP demonstrate that the more pessimistic projections proffered by Australia are unwarranted. The data show dramatically that the variable squares hypothesis is not realistic. Moreover, under New Zealand's weightings of the

factors most heavily influencing stock recovery, the results of the July 1998 EFP would mean that New Zealand should calculate the likelihood of achieving the 1980 level at 96 per cent in light of the data provided by the EFP.

As the chart illustrates, the results of the 1998 EFP for July and August each demonstrate that Australia's and New Zealand's pre-1998 models, based on the variable squares hypothesis weightings, were unrealistically pessimistic.

Another illustration of the projected recovery of the parental biomass is shown in this next chart. The horizontal dotted line across the middle of the chart represents the 1980 parental biomass level. The case, shown in red, is based, among other things, on the assumption favoured by New Zealand that there are no fish outside the commercially fished areas. The comparable constant squares assumption yields the case shown in yellow. Taking conservative results from the 1998 EFP into account to choose between these two extreme results, you have the trend line shown in purple. Leaving the unrealistic variable squares case aside, the projections show that the 1980 biomass level will be achieved long before the target date of 2020. Indeed, the projection based on the 1998 EFP shows that more than double the 1980 parental biomass level will be achieved before that date, even after taking into account uncertainties in future recruitment levels, as shown by the small vertical lines as you go out along the principal trend lines.

The President:

Mr Greig, may I suggest that we break now, unless you want to conclude with a particular point.

Mr Greig:

More logically, I could stop in a few minutes.

The President:

Please go ahead then.

Mr Grieg:

The Australian experts assert that spawning stock biomass and recruitment are currently "at historically low levels". But, as the independent experts and Dr Butterworth explain, this assertion is based on a statistical sleight of hand – an assertion that the age of maturity of SBT is suddenly age 12, rather than age 8, the age of maturity historically used by the Commission.

As a threshold matter, there is no reason why this Tribunal should accept an age of maturity other than the one accepted by the Commission's Scientific Committee – and that is age 8. While Applicants base their projections on age 12 as the age of maturity, Professor Beddington testified yesterday that the proper range is 8 to 10.

Indeed, as this chart indicates, the downward decline in the abundance index relative to the 1980 level – the level that the parties are seeking to regain – has indeed turned the corner since 1994 and is on its way back up to 1.0, i.e. the 1980 level. This is due in large part to the conservation efforts that were imposed in the late 1980s and early 1990s when the fish that are now eight years old spawned.

In effect, as Dr Butterworth explains in paragraph 48 of his statement, the result of "increasing the effective age-at-maturity from 8 to 12 ... as Australia seeks to do is simply to shift the turnaround point four years later than in the Figure". In other words, for 12-year old SBT, the turnaround in the recovery occurred not in 1994 but in 1998. In effect, they are blacking out the right-hand area of the chart.

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The graph that is now on the screen shows that by adding four years to the age of maturity, Australia and New Zealand can attempt to argue that the recovery trend continues to decline for 12-year olds, but that is simply misleading, since the 8-year olds of today will in four years be 12, and at that time there will be a greater abundance of such fish than there is today.

As the panel of independent scientists noted, whether the parties use age 8 or age 12 as the point of maturity is less important than that the reference age selected be applied consistently. In this case, since the initiation of the Scientific Committee, the parties have used age 8. Because the data for 8-year olds does not comport with the doomsday scenario that Australia and New Zealand are eager to paint, they seek to change the reference age to an age for which the upturn in the recovery rate has yet to be documented. This Tribunal should not countenance the continued attempt by purported scientists to manipulate the data to further their political agenda.

My Australian colleague states that the 1999 EFP focuses on only one matter and that there are other matters which are important and which cause much more of the differences between the projections. First, I must point out that he is contradicted by the 1998 Scientific Committee report, which indicates general agreement that the plus group options and the CPUE index interpretations were the two major causes of these differences. The EFP addresses one of these two causes. Furthermore, Dr Tsuji's declaration indicates that this CPUE index of uncertainty contributes approximately two-thirds of the overall uncertainty.

Let me now deal with another red herring. Yesterday, Mr Crawford used a chart about erroneous projections of increases in northern cod stocks that continued until a collapse occurred, perhaps leaving the impression that there is good reason to fear an SBT collapse. I will not take time to detail why the northern cod industry is significantly different from that of SBT. However, I do note that the article entitled "Lessons for stock assessment from the northern cod collapse", from which Mr Crawford took his chart, was co-authored by Jean-Jacques Maguire, one of the independent experts who participated in the 1998 review of the functioning of the SBT Scientific Committee and one of the co-authors of the statement of that group of independent experts which has been submitted to this Tribunal. That report is Annex 1.

Mr Maguire, whose expertise and independence were conceded yesterday, surely would not have approved the EFP if he thought that the northern cod experience was applicable here. Indeed, his article explains that the evaluation of risk of underestimation "should be based on a broad historic perspective about the fishery, and on experience with other stocks". Mr Maguire is certainly well versed in the history of SBT and obviously believes that the northern cod industry is significantly different.

As for Mr Crawford's quotation that there is a worst case scenario in which the SBT population "will be below 500 mature individuals in the next 100 years", I ask, what has this to do with something that is supposed to happen in the next three months?

1999 is not the only year in which Australian scientists have predicted disaster. Minutes of a 1988 meeting of scientists from the three countries state, "The only safe catch level we could recommend could be zero". How much unnecessary socio-economic damage would have been caused had this plea been heeded?

Thank you.

The President:

Thank you very much. The sitting will be suspended for half an hour. We will resume at approximately 10 minutes past noon. The sitting is suspended.

The Tribunal adjourned at 11.40 a.m.

The President:

Mr Greig, please proceed.

Mr Grieg:

Rather than a legitimate attempt to address an urgent situation, Japan submits that the Applicants' request for provisional measures is nothing more than an improper effort to have this Tribunal enforce the will of one side on the basis of what the Applicants admit are, at most, plausible worst case scenarios. This is a dispute that can be fairly resolved only through consultation and negotiation, aided by independent scientific opinion.

Moreover, even if the Tribunal were inclined to choose sides in this scientific dispute – and I have no doubt that it will not do so – there is still no need as a matter of fact for prescription of any provisional measures.

On behalf of Japan, I repeat Mr Togo's representation to this Tribunal that the 1999 EFP will be over in less than two weeks. It will be finished on 31 August 1999. The total catch for this remaining two week period will amount to no more than a few hundred tonnes. A few hundred tonnes is less than 3 per cent of the total annual catch of all those fishing for SBT. The remaining 1999 EFP catch therefore cannot be considered to pose an urgent or significant risk to the SBT stock. The Applicants' suggestion that Japan should be enjoined from commencing a new EFP in the next three months is, frankly, an affront to the Government of Japan.

Apart from these few hundred tonnes, what do the Applicants imagine will happen before the Annex VII arbitral tribunal is constituted? Two arbitrators have already been appointed, Japan having appointed Mr Yamada on 13 August. The remaining three arbitrators will be appointed in due course.

Japan's entire three-year EFP programme is scheduled to be completed in August 2001. Before this date, if jurisdiction were to be found to exist, the Annex VII tribunal should have concluded its proceedings. Moreover, at any time during its existence the Annex VII tribunal would be in a position to consider the appropriateness of provisional measures.

In their submissions to this Tribunal, Australia and New Zealand have conceded the lack of urgency by referring exclusively to a supposed threat to the SBT stock in the medium to long term. I quote from the Request for provisional measures:

In the interim, damage would be done to the SBT stock which would threaten the conservation and recovery of the SBT stock in both the medium and the long term.

The Applicants not once identify any short term damage they claim a need to avoid. This Tribunal should not act on an expedited basis, without the opportunity for a thorough presentation of all the legal and factual issues in this complex matter, in the absence of any immediate exigency. Australia and New Zealand do not and cannot allege any exigent circumstances; nor does Japan's EFP pose any risk of irreparable damage to the SBT stock.

As early as 1995, Japan stated that, should its EFP (contrary to all indications) prove to have a significant adverse effect on the SBT stock, Japan would remedy any such effect through a voluntary reduction in its future catch of SBT. Japan recently reiterated this offer in its note verbale of 9 July 1999:

The Government of Japan has reiterated its position that if the EFP should have a substantially negative impact on the stock, Japan would stop the

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EFP and reduce its future national fishing quota by the amount it has caught for the EFP.

As Dr Butterworth has pointed out in his statement to this Tribunal, under any of the parties' respective assessments of SBT stock, the impact of the Japanese EFP is minimal when one accounts for the possibility of reducing future catch to compensate. Obviously, the effectiveness of this potential future remedy for any negative impact of the EFP demonstrates the lack of irreparable damage that is a prerequisite to the grant of provisional remedies.

The independent scientists confirm that a future reduction in Japan's quota would remedy any significant adverse effect of the EFP, and I quote from the Panel's statement:

Given 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.

Moreover, given the size of Japan's national quota relative to the size of the EFP catch, it would be possible for Japan to remedy any substantial adverse effect of the 3-year EFP by adjusting its quota thereafter. By this time, as noted above, an Annex VII tribunal would have had sufficient time to conclude any proceedings and prescribe any remedies it deemed appropriate, including adjustments to Japan's national quota. The effectiveness of this future remedy to address any adverse effects of the EFP precludes a finding of irreparable damage sufficient to support the grant of provisional measures.

In the negotiations among the parties over the EFP, the head of Australia's delegation has stressed the importance not of compensation in fish, but future monetary compensation to its fishery industry for any effects of the additional catch taken by Japan in the EFP – thereby suggesting that Australia views the issue primarily in terms of income and employment, and conceding that a future cash payment would remedy any adverse effects of the EFP. I quote from the head of the Australian delegation:

Australia notes that we have an important SBT industry in Port Lincoln employing 1,400 people, whose take of SBT is within limits imposed by the Commission. Therefore there is an expectation not only from Australia, but also from its industry, that Japan will provide restitution for the additional catch taken in the course of an EFP.

Even in Australia's most recent press release dated August 11th, Australia frames its argument by stating "the tuna industry is worth about \$170 million to Australia." In short, Australia appears to be concerned not with fish, but primarily with money.

Further still, the decisional rule advocated by Australia and New Zealand in the EFP working group also conceded the effectiveness of future quota adjustments. In the decisional rules context, the dispute between Japan on the one hand and Australia and New Zealand on the other was not whether future quota adjustment was a viable option, but whether schedules for future adjustments needed to be spelled out in advance of commencement of the EFP. Obviously, Australia and New Zealand would not have called for predetermined schedules of future quota adjustments based on EFP results if they did not believe that such adjustments were effective.

Finally, Australia elsewhere has noted that a scenario under which Japan's EFP increased its total catch by 3,000 tonnes per year over three years, followed by a subsequent

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adjustment to its quota by the same amount per year over three years would not substantially reduce the probability of reaching 1980 SBT levels by 2020, and I quote:

Australia also noted that recovery probability of the SBT to the 1980 level by 2020 would be substantially reduced under all projection scenarios except the one involving an increase in 3,000 tons for three years, followed by a decrease for three years of 3,000 tons below the current TAC.

Moreover, Australia and New Zealand's conduct and statements are inconsistent with a good-faith belief that the SBT stock faces an urgent risk of irreparable harm: If stock levels and trends were as alarming as Australia claims, Australia would urge a reduction in national quotas rather than proposing keeping national quotas the same. Australia would convert to longline fishing to alleviate the adverse impact of its purse seine fishing on parental biomass.

The next graph shows that since 1980 the tonnages caught by both Australia and Japan have declined. You see that the Japanese catch, shown in green, has declined from really quite high levels in the late 50s and 60s down to relatively much smaller levels in the 1990s. Australia's catch, on the other hand, has increased from these early periods, reaching a peak in about 1982, and then has declined somewhat since that time. Look at the heading of this chart; this is a historic catch of Japan and Australia in weight, or in tonnage.

However, when you look at the number of fish caught, Australia every year catches a much larger number of SBT than does Japan. That is due to Australia's catching methods which are targeted at juvenile fish. As Dr Butterworth's paper demonstrates, catching juvenile fish has a substantially greater deleterious effect in the medium and long term than does catching older fish.

If we look closely at the chart of the number of fish caught, we see that Australia's purse seine methods netted an extraordinarily large number of fish. Again, Australia's number of fish caught is shown in red. Look at the period say from 1974 right through maybe 1988; an extraordinary number of fish being caught during these periods, and even in later periods you will see that in the number of fish caught by Australia exceeds Japan, and in the most recent years that discrepancy is increasing, not decreasing.

By the way, I had to ask two people to find out, but I understand that purse seine refers to a method of drawing a net closed like snapping a purse shut, thus capturing all the fish inside the net.

Turning back to the chart showing the abundance of 8+ year old fish, Australia's extraordinary catch of juvenile fish in the early 1980s accounts for the continued decline of the parental biomass through about 1994. With the number of fish caught by Australia sharply declining in 1989 and the early 1990s, the parental biomass has been recovering since 1995.

Now we have the charts up. It is the number of fish that matter. If you have got lots of fish, they grow, and you see the extraordinary numbers being caught in this period where my marker is running is followed by, six to eight years later, a continued decline, and when the numbers finally fall off around say 1989, by 1995 let us see: sure enough the parental biomass has bottomed out, and it has started moving back up. I submit, Mr President, Members of the Tribunal, that this is a problem primarily of purse seine fishing, not of Japan's EFP.

Another requirement for the imposition of provisional relief which is lacking in this case is that the measures prescribed be effective to avoid the damage that would otherwise result. The only way to assure effective protection of the stock is to control the catch, which

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has been growing and is now about 17,000 tonnes per year. The provisional measures which Australia request would not control the total catch.

The chart on the screen now is a version of the chart you saw earlier. The only difference is that the yellow encompasses the total of all the fishing of the members of the 1993 Convention, and the purple at the top shows the fishing of the non-members to the 1993 Convention.

As Drs Polacheck and Beddington imply, the principal risk of damage to the SBT stock results from the catch of non-parties to the 1993 Convention. As Dr Polacheck has put it, and I am quoting:

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 was taken on spawning ground as a by-catch of their longline fishery for other tunas. The Australian and Indonesian collaborative port sampling programme has shown a doubling of the Indonesian catch of SBT from 1995 to 1996.

That is a quote from Dr Polacheck.

This non-party catch in the aggregate far exceeds the amount caught in Japan's EFP. Moreover, as the chart confirms, the non-parties have been able to increase their catch despite the dire recovery forecasts of Australia and New Zealand. There is, therefore, no reason to believe that countries such as Indonesia would not continue to increase their catch to more than make up for any tonnage Japan might be proscribed from catching. Australia and New Zealand are seeking an adjudication of their claims and, as such, the Tribunal's decision must be effective to remedy the immediate damage asserted. Since no provisional measures levied exclusively against Japan would be effective in this case, none may be levied at all.

While Australia and New Zealand express alarm about the increasing catches by non-members of the 1993 Convention, they must acknowledge that since 1997, all of the southern bluefin tuna that have been caught have been caught as a result of unilateral decisions. No catch is being made today pursuant to any international agreement. Australia and New Zealand took the lead within the Convention members. Each unilaterally determined its catches for 1998 and 1999. Japan followed this lead, also unilaterally deciding on the amount of its commercial and EFP catches.

It would be arbitrary and capricious to single out and prescribe any particular catch because it was decided upon unilaterally, since all catches have been set unilaterally. It would be perverse to single out and proscribe the EFP, the one catch that is designed to elicit scientific data that might help produce agreement about an overall TAC for southern bluefin tuna.

The provisional measures advocated by Australia and New Zealand would delay for years any resolution of the scientific uncertainty that has paralyzed the Commission for the last three years already.

Although the 1998 EFP results are very encouraging, consistent sets of data over several years are necessary to reduce variations in stock and catch rates based on natural factors. If Japan's EFP were interrupted in the middle, an important scientific need would not be met.

Indeed, suspension of Japan's commercial fishing would have the same type of deleterious effect. Currently it is only Japan, and not Australia or New Zealand, which

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collects and shares CPUE data from their commercial fishery. Applicants claim that the CPUE data are not sufficient, but the result of their preferred remedy would be to deprive the parties of consistent sets of data altogether.

Australia and New Zealand offer no realistic alternatives to experimental fishing. Tagging is not, as Australia argues, a realistic alternative to the EFP. Tagging is not effective in reducing uncertainties in stock assessments and it definitely offers no answers in the short term. Tagging small tuna may be practical, but it takes many years to get results and, even then, the results will be subject to many uncertainties. Tagging large tuna is impractical. No fisherman will tag and release a fish that may be worth as much as 30-50 thousand US dollars.

What do the independent scientists say about tagging? I will quote from the panel report:

Given the geographically widespread nature of the Southern Bluefin Tuna fisheries and the diversity of gear used, a traditional tagging programme relying on voluntary reporting of TAC recoveries would have considerable uncertainties with respect to the reporting rate. We expect that these would be so large that such a conventional tagging programme would achieve little to reduce the uncertainties in stock status exploitation rates.

Again, I am quoting from the panel of independent scientists employed by consensus of the parties before you. Dr Butterworth has specifically addressed the issue of whether tagging offers a feasible alternative to fishing in unfished areas as part of an EFP. His view is that tagging is no such alternative. I quote from his declaration.

Tagging as a substitute for a CPUE-related experiment such as that in the Japanese EFP has very little to offer, particularly in that, unlike the Japanese EFP, tagging holds out no prospect for short term resolution of one of the two current major uncertainties in the Southern Bluefin Tuna stock assessment.

This discussion of tag-and-release as compared to Japan's EFP serves powerfully to illustrate what we have been saying from the beginning. This is a dispute over scientific uncertainty – uncertainty that is hindering the parties from reaching a consensus on the appropriate TAC for southern bluefin tuna under the 1993 Convention going forward.

As the undisputed record reveals, Japan has dedicated itself to working through the scientific dispute that arises solely under the 1993 Convention. Australia and New Zealand characterized the party's discussions as consultations under article 16(1) of the 1993 Convention. Australia and New Zealand only belatedly invoked the Law of the Sea Convention. Australia and New Zealand stymied Japan's efforts to cooperatively resolve the present dispute under article 16(1) of the 1993 Convention. We heard them yesterday take the position that negotiations under the Law of the Sea Convention would for some reason be futile.

Australia and New Zealand rejected independent scientists' proposed rules for decision. They refused Japan's offer of mediation under the 1993 Convention and they refused Japan's offer of arbitration under the 1993 Convention. As the undisputed record reveals, Japan has dedicated itself to working through the scientific disagreements and has been willing to defer to the guidance of neutral experts better able to separate fishery science from national policy.

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In light of Japan's commitment to conservation and active participation in all facets of that endeavour, there is no basis in fact for Australia and New Zealand to accuse Japan of violating any obligation.

Indeed, we are here today not because of any act of Japan, but because of unilateral decisions made by Australia. Not merely is the fact that the parties are expending enormous human and financial resources litigating rather than negotiating, but the source of the underlying problems can also be attributed to the choices Australia alone has made.

- Australia unilaterally refuses to provide catch data.
- Australia complains about the use of CPUE as a component of the abundance index, but provides no data of its own.
- Australia unilaterally elects to use purse seine fishing over long line method.
- Australia unilaterally commenced commercial fishing before TAC and national quotas were established in the 1995-96 and 1996-97 seasons.
- Australia unilaterally excludes Japan from Australia's EEZ and from Australian ports.
- Australia unilaterally determined its own commercial catch levels for 1998 and 1999.
- Australia unilaterally rejected independent scientists' suggestion for the resolution of EFP issues.
- Australia unilaterally refused to allow independent scientists that they themselves helped select to arbitrate the scientific disputes, despite the parties' previous agreement that they should do so.
- Australia unilaterally terminated negotiations under the 1993 Convention.

There is a question of which party has been negotiating in good faith in this matter. My learned opponent invited this Tribunal to consider the record and decide that question for itself, and I join him in this invitation.

The fact of overriding importance in this matter is that in 1998, when faced with an impasse at the Commission level, the parties agreed to and did retain a panel of independent scientists to resolve the matter. When the panel of independent scientists refused to accept Dr Polacheck's extreme brand of science, Applicants reneged on their agreement.

As the Tribunal has seen, these independent scientists and their reports and conclusions were never mentioned in the Application to this court, were never mentioned in Dr Polacheck's declaration. Indeed, they were never mentioned in yesterday's session, with two highly revealing exceptions. First, was on cross-examination of Dr Beddington, who acknowledged their expertise, the scope of their work and their critical role in this dispute.

The second was the devastating admission of Counsel at the very end of the day. In opposing Japan's alternative request for provisional measures, Counsel objected to any reference of this dispute to the panel of independent scientists on the grounds that it would predetermine the outcome, thus admitting that the independent scientists have rejected the views Applicants put forth to this Tribunal. It is no wonder that when we showed the panel of scientists the Australian and New Zealand application, they felt as they put it "morally obligated" to make their views known to this Tribunal.

The strength of this young yet esteemed Tribunal lies in the collective wisdom and experience of its individual judges. You were elected to your posts, not only for the breadth of your learning, but for your first-hand experience with the struggles and compromises that led to the adoption of the Law of the Sea Convention and to the many regional covenants that render concrete that document's lofty objections.

So it is perhaps natural that a party might look to you when confronted with difficult questions concerning the management of the oceans' renewable resources. Yet wisdom often counsels restraint, and this is a case where some measure of restraint is warranted. By necessity, the Law of the Sea Convention is in most cases not a blueprint for specific conduct but a broad covenant calling for mutual cooperation to properly manage the oceans' vast

treasures. By necessity, the Law of the Sea Convention relies for realization of its broad goals upon international cooperation to solve concrete problems that arise on a region-by-region and a species-by-species basis. You, as the Tribunal, strengthen the Law of the Sea Convention when you affirm, first, that the growing pains of regional cooperation as the solution to specific problems cannot be avoided by invocation of the Convention itself, and, second, that regional cooperation cannot be bypassed by appeals to this Tribunal for micro-management of scientific disputes. The parties to this dispute entered into the 1993 Convention with the understanding that decisions would be reached by consensus, not judicial decision. Yet the relief sought here by Australia and New Zealand subverts that very framework.

While all the parties seek the best means to achieve optimum utilization and conservation of SBT stock, they must strike that balance through consensus achieved by negotiation, and, where necessary, with guidance from neutral scientists. So, while this Tribunal no doubt has wisdom to impart, it can confer the benefits of that wisdom while nonetheless exercising restraint. It can promote its critical institutional mission under the Law of the Sea Convention, first and foremost, by declining to exercise jurisdiction over this dispute and by declaring that, were it inclined to act, the relief Australia and New Zealand seek is inappropriate and unwise. In doing so, it could nonetheless exercise its great moral authority by exhorting the parties to work to resolve their differences in light of neutral scientific principles rather than narrow, short-term national interests. If the Tribunal is inclined to do more than exhort – to prescribe some form of relief – it should order, as Japan has conditionally requested, that the parties negotiate in good faith to reach a settlement. If such negotiation fails, the parties should refer their dispute, which is – and always has been – scientific in nature, to the group of independent scientists for resolution, as the parties previously agreed.

The President:

Thank you, Mr Greig. We are close to our normal closing time. The rest of the time is at your disposal.

Mr Grieg:

May I suggest this. We are not going to be short of time. We will probably finish slightly early within our time this afternoon. I would propose, with your indulgence, to introduce Professor Ando very briefly but then defer his remarks so that they can be given as one presentation in the afternoon session.

The President:

That is agreeable to the Tribunal.

Mr Greig:

As you all know, Professor Ando will present Japan's legal arguments. Professor Ando is a very famous Professor Emeritus of the University of Kyoto, Faculty of Law. He is also Professor of International Law at Doshisha University in Kyoto. He is the President of the Japanese Association of International Law. He is a member and former Chairman of the Human Rights Committee under the International Covenant on Civil and Political Rights. Finally, I note that Professor Ando is a judge on the Administrative Tribunal of the International Monetary Fund.

With that, I thank you, Mr President and honourable Members of the court.

STATEMENT OF MR GREIG

The President:

As agreed, the sitting will be resumed at 3 o'clock this afternoon, at which point Professor Ando will complete the submissions on behalf of Japan.

The Tribunal rose at 12.52 p.m.

REPRESENTATION

PUBLIC SITTING HELD ON 19 AUGUST 1999, 3.00 P.M.

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge ad hoc* SHEARER; *Registrar* CHITTY.

For Australia: [See sitting of 18 August 1999, 10 a.m.]

For New Zealand: [See sitting of 18 August 1999, 10 a.m.]

For Japan: [See sitting of 18 August 1999, 10 a.m.]

AUDIENCE PUBLIQUE DU 19 AOUT 1999, 15 H 00

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. SHEARER, *juge ad hoc*; M. CHITTY, *Greffier*.

Pour l'Australie : [Voir l'audience du 18 août 1999, 10 h 00]

Pour la Nouvelle-Zélande : [Voir l'audience du 18 août 1999, 10 h 00]

Pour le Japon : [Voir l'audience du 18 août 1999, 10 h 00]

The President:

Professor Ando, you may proceed.

Argument of Japan (continued)

STATEMENT OF MR ANDO
COUNSEL OF JAPAN

Mr Ando:

Mr President, honourable Judges, ladies and gentlemen, it is indeed a great honour for me to be given this opportunity to address various legal issues concerning the dispute brought before this august Tribunal: the dispute between Australia and New Zealand and Japan over fishing of southern bluefin tuna (SBT).

As Mr Greig, the previous speaker, clearly demonstrated this morning, the dispute concerns differences in evaluating scientific data for the purpose of determining the total allowable catch (TAC) of southern bluefin tuna and its allocation among the three States.

A brief history leading to the dispute is as follows: in the face of projection of SBT stock decline, the three States entered into an agreement in 1989. The agreement established annual TAC of 11,750 tonnes, allocating 6,065 tonnes, 5,265 tonnes and 420 tonnes to Japan, Australia and New Zealand, respectively. In 1993 the tripartite Convention for the Conservation of SBT (the 1993 Convention or CCSBT as referred to in the written submission) was drafted in order to achieve optimum sustainable yield of southern bluefin tuna. The Convention also established the Commission for the Conservation of SBT which should decide on TAC and its allocation among the three States with the advice of a subsidiary body called the Scientific Committee. In 1994 the Commission set a TAC and its allocation as stated above, which remained the same until 1997. There was no agreement, however, in 1998 and 1999.

For the past several years, however, the Commission has discussed the concept of an experimental fishing programme (EFP) in order to enhance the understanding of the SBT stock and to reduce uncertainties of the state of that stock. Various Japanese proposals on EFP were frustrated by Australian and New Zealand technical opposition and, as a result, Japan, on its own, conducted a pilot EFP in 1998. On the basis of the results of the pilot EFP, Japan commenced in 1999 a three-year EFP involving an additional catch of approximately 2,000 tonnes. Australia and New Zealand were against the Japanese EFP and, following unsuccessful negotiations among the three States, Australia and New Zealand brought Japan before this Tribunal, the International Tribunal for the Law of the Sea (ITLOS).

Australia and New Zealand argue that the dispute comes under the United Nations Convention on the Law of the Sea (the Law of the Sea Convention or UNCLOS), requesting that the Tribunal grant the provisional measures ordering Japan to cease EFP pending the constitution of an arbitral tribunal under Annex VII of the Law of the Sea Convention (Annex VII tribunal). Japan contends that the dispute comes under the 1993 Convention and asserts that the Annex VII tribunal lacks jurisdiction over this dispute and, consequently, ITLOS is without authority to grant the provisional measures. Alternatively, Japan requests that ITLOS grant Japan's provisional relief prescribing Australia and New Zealand to recommence negotiations.

My role today is to present Japan's legal case against Applicants' claims. For that purpose, I would first like to argue that the dispute does not arise under the Law of the Sea Convention and is not within the jurisdiction of an Annex VII tribunal. Secondly, I would like to argue that, even if the dispute comes under the Law of the Sea Convention, this Tribunal should abstain from proceeding because Australia and New Zealand have not exhausted procedural requirements under UNCLOS. In addition, they have not met the other conditions for the granting of provisional measures. In that connection, I would also like to

address the issue of a precautionary approach. Finally, I would like to argue that the Tribunal grant our counter-request.

Before elaborating my argument, I would like to draw your attention to the following facts. As Mr Togo, the Japanese Agent, pointed out in his presentation this morning, Japan is a narrow island State, heavily populated, and yet 85 per cent of its land consists of hilly mountains. This prevents the development of large scale agriculture and domestic animal raising. As a result, Japanese people must rely on fish as a main source of protein. Thus, fishing as well as fish eating has come to form an integral part of Japanese culture. Unfortunately, we do not have the luxury of raising and perhaps eating cows and sheep, as Australians and New Zealanders can.

Mr President, honourable Judges, I now come to my first point and argue that the dispute does not arise under UNCLOS and is not within the jurisdiction of an Annex VII tribunal.

The afore-mentioned history leading to the dispute makes it clear that the core of the dispute lies in the difference between Australia and New Zealand on the one hand and Japan on the other hand, in their evaluation of scientific data for the purpose of determining total allowable catch of southern bluefin tuna under the 1993 Convention. However, Australia and New Zealand cite articles 64 and 116 to 119 of the Law of the Sea Convention and allege that Japan's unilateral EFP increases the threat to SBT stock and contravenes Japan's obligation under the Law of the Sea Convention to cooperate in the conservation of a highly migratory species – in this case southern bluefin tuna.

Nevertheless, it must be kept in mind that all these articles contain obligations of a general nature for States to cooperate. It must also be kept in mind that they do not prescribe any specific principles of conservation or concrete conservation measures nor list principal factors to be considered in deciding on such matters. On the contrary, article 64, for example, encourages coastal States and fishing States to cooperate directly or through appropriate international organizations to ensure conservation and promote optimum utilization of a highly migratory species. I am certain that you are aware that this is a kind of compromise reached through the Law of the Sea Convention in relation to the very severe difference of opinion between the long distance fishing States and the coastal States. Thus, as far as the issue of conservation and optimum utilization of a particular fish stock is concerned, the Law of the Sea Convention may be regarded as a framework convention, leaving the specific content of cooperation to be regulated by international agreements on a region-by-region or species-by-species basis. In fact, the 1993 Convention is nothing but the result of such cooperation in which Japan, together with Australia and New Zealand, has sincerely and earnestly participated.

Besides the 1993 tripartite Convention for the Conservation of SBT, there are a number of similar treaties to which Japan is a party. To name a few: the 1950 Convention for the Establishment of an Inter-American Tropical Tuna Commission; the 1952 Agreement of the General Fisheries Commission for the Mediterranean; the 1969 International Convention for the Conservation of Atlantic Tunas; the 1982 Convention on the Conservation of Antarctic Marine Living Resources; and the 1996 Agreement for the Establishment of the Indian Ocean Tuna Commission. Some of them pre-date and others follow the adoption of the Law of the Sea Convention, but each of them regulates fishing of a particular species of fish in a particular region. Thus, some provide for a mechanism to decide on total allowable catch and national allocation; others prescribe seasons for fishing; still others regulate fishing methods as well as the weight and size of catchable fish. All in all, while these treaties concern regulation on the conservation or optimum utilization (or both) of fish stock, each differs in the content of regulation and the accompanying rights and obligations of the States concerned.

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Distinguished Judges, as to Australia's and New Zealand's allegation that Japan contravenes its obligation of cooperation in the conservation of SBT, it must be pointed out that the allegation is based on Japan's obligations under the 1993 Convention. However, such an allegation *per se* does not transform Japan's obligation under the 1993 Convention into those of the Law of the Sea Convention. It might be added that a State does not breach its obligation to cooperate merely because a *bona fide* difference over scientific uncertainties precludes the parties from reaching a consensus. When the three States met in December 1998 to try to resolve their differences, the official record of the proceedings was clear as to what the parties understood the dispute to be about:

Negotiations under article 16, paragraph 1, of the Convention for the Conservation of Southern Bluefin Tuna in relation to the dispute among the parties relating to Japan's experimental fishing programme.

Indeed, were this truly a dispute under the Law of the Sea Convention, the Applicants would surely have named as Respondents the other States that are both parties to UNCLOS and catch SBT. Each of Australia's and New Zealand's scientific experts identify the unregulated catch of non-parties to the 1993 Convention as a source of potential damage to the SBT stock. That catch, as demonstrated this morning, far exceeds the tonnage involved in Japan's EFP. Thus, if the Applicants in fact believed that this dispute arose under the Law of the Sea Convention, under their own theory, Japan could not be the only necessary party to a resolution of this matter. The Applicants' failure to join the Republic of Korea and Indonesia, for example, demonstrates the Applicants' lack of consistency in their approach to this issue.

In Japan's view, as the dispute is under the 1993 Convention and not under the Law of the Sea Convention, this Tribunal has no basis on which to hear the application for provisional measures, because an Annex VII arbitral tribunal has no *prima facie* jurisdiction over this case. Article 288, paragraph 1, of the Law of the Sea Convention limits the jurisdiction of an Annex VII arbitral tribunal, and that of ITLOS, to only those disputes "concerning the interpretation or application" of the Law of the Sea Convention. As this dispute concerns the interpretation or implementation of the 1993 Convention, to use the terms of the Convention itself, there can be no jurisdiction under article 288, paragraph 1 – the only basis for jurisdiction invoked by Australia and New Zealand.

In this connection, I would like to note that, although the Applicants have not raised this point, there would similarly be no jurisdiction under article 288, paragraph 2, concerning disputes under international agreements relating to the Law of the Sea Convention. The 1993 Convention, drafted after the Law of the Sea Convention, reflects the conscious choice of the parties not to submit disputes under it for resolution under the Law of the Sea Convention, unless otherwise agreed. This is what article 288, paragraph 2, requires as a precondition to jurisdiction. Since Japan has not agreed otherwise, the precondition required under article 288, paragraph 2, is not met. Consequently, an Annex VII tribunal has no jurisdiction in the instant case.

In any event, it must be emphasized that the request for provisional measures can be accepted only when a relevant court or tribunal has jurisdiction on the merits. In the instant case, Japan has already argued that an Annex VII tribunal has no jurisdiction because Japan has not given its consent to its jurisdiction. In elaborating the majority view of the International Court of Justice concerning the case on the *Legality of Use of Force* – a case between Yugoslavia and Belgium – a member of the court clearly stated as follows:

It should not be thought that mere invocation of a jurisdictional clause, with nothing more, suffices to establish a *prima facie* basis of the Court's

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jurisdiction. It cannot be otherwise, because the jurisdiction of the Court ... is based on consent, and consent to jurisdiction cannot be established, even *prima facie*, when it is clear from the terms of the declaration under article 36 of the Statute of the International Court of Justice themselves that the necessary content is not *prima facie* present, or simply is not present ... The restraint upon the liberty of action of a State that necessarily follows from the indication of provisional measures will not be countenanced unless, *prima facie*, there is jurisdiction.

Moreover, article 290, paragraph 5, of UNCLOS provides:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe ... provisional measures in accordance with this Article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction

However, since Japan denies the jurisdiction of an Annex VII tribunal, ITLOS consequently is not entitled to grant the request for provisional measures.

I now turn to the next point: even assuming that this dispute arises under UNCLOS, the application does not satisfy procedural requirements to exhaust amicable dispute settlement measures.

In addition to the subject matter requirements of jurisdiction under the Law of the Sea Convention which I just touched on, Australia and New Zealand have not satisfied the procedural requirements that are also preconditions to jurisdiction under article 286. Article 286 requires the exhaustion of amicable means of dispute resolution under the procedures prescribed by Section 1 of Part XV. 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.

First, Australia and New Zealand have not let negotiations, which they themselves initiated under article 16, paragraph 1, of the 1993 Convention, proceed. Indeed, they unilaterally decided to terminate those negotiations when Japan refused to submit to their will by suspending EFP. That conduct violates Australia's and New Zealand's obligation under Section 1 of Part XV of UNCLOS. According to the International Court of Justice in its judgment on the *North Sea Continental Shelf* cases, which delineates the obligations on parties when they are required under international law to negotiate:

the parties are under an obligation to enter into negotiations with a view to arriving at an 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.

By refusing to continue with negotiations unless Japan agreed to suspend its EFP, Australia and New Zealand breached their obligations under this standard to negotiate with a willingness to compromise.

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Second, Australia and New Zealand have failed to discharge their obligation to exchange views under article 283 of UNCLOS with respect to any dispute arising under that Convention. The simple reason Applicants have failed to discharge that duty is because the dispute does not arise under the Law of the Sea Convention, and they acknowledged that by seeking negotiations solely under the 1993 Convention. Australia and New Zealand recharacterized their negotiations as consultations required under article 283 of UNCLOS and asserted jurisdiction under the Law of the Sea Convention. Such recharacterization should never be permitted.

Honourable Judges, now I come to the issue of lack of urgency. Australia and New Zealand want to invoke article 290 as the basis of their request for provisional measures. Article 290, paragraph 1, provides:

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part..., the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances

However, as pointed out already, Japan argues an Annex VII tribunal has no jurisdiction, let alone *prima facie* jurisdiction, because the requirements of article 288, paragraph 1, and paragraph 2, are not met.

In addition, Australia and New Zealand fail to establish that there is "urgency" which should justify their request for provisional measures in the instant case. Mr Greig has amply demonstrated how Australia and New Zealand have failed to establish "urgency", and in order to save time, I would limit my statement strictly on legal issues. In this connection Mr Burmester stated yesterday as follows:

Article 290 was drafted, of course, in the light of the experience of interim measures of protection in the International Court. The drafters of UNCLOS deliberately chose to give this Tribunal a broader as well as a more effective provisional measures jurisdiction than that which the International Court has. For this reason, the Tribunal should be slow to circumscribe the discretion with unstated preconditions, such as "irreparable harm" or "irreparable prejudice", terms which have been used in the past in International Court decisions.

He further stated that:

In the present case, we are dealing with the conservation of living resources. Scientific evidence in relation to resources such as SBT does not have, and can rarely be expected to have, the exactness that will necessarily enable actual irreparable harm to be shown at the time. ... even if there was an actual recruitment collapse of SBT, it would take at least two years for that to become known, because of the time that it takes from spawning to recruitment of fish into the juvenile fishery. This demonstrates the inappropriateness of requiring irreparable harm or prejudice to be shown.

I wish to emphasize, however, that the requirement of irreparable harm or damage is inseparably linked to the very purpose of the institution of provisional measures. Its purpose is to avoid creating a situation which would nullify or virtually destroy the effect of final

decision. Also, the "urgency" requires that irreparable damage must be imminent. According to the *Encyclopedia of Public International Law* published under the auspices of the Max Planck Institute for Comparative Public Law and International Law: "Unanimity exists for the view that interim protection can only be awarded if irreparable damage is imminent."

This view is reflected in the jurisprudence of the International Court of Justice, including the cases of *Nuclear Tests* (Australia/New Zealand v. France), *Fisheries Jurisdiction* (United Kingdom/Germany v. Iceland) and *Passage Through the Great Belt* (Finland v. Denmark), all of which were quoted by Mr Burmester himself. Honourable Judges, it is submitted that urgency is the essential precondition for the request for provisional measures and Australia and New Zealand fail to establish that there is such urgency.

In the case concerning *Trial of Pakistani Prisoners of War* (Pakistan v. India), the International Court of Justice refused to indicate provisional measures. In that case, Pakistan asked the Court, in the course of proceedings on provisional measures, to postpone, for an unlimited period of time, further consideration of its request for interim measures. The Court 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."

Honourable Judges, as in the *Pakistani Prisoners* case, Australia and New Zealand have taken actions which clearly indicate that they do not believe there is any imminent threat to the recovery of the SBT stock. The absence of any immediate and irreparable risk to the SBT stock from the EFP catch is evidenced by the fact that Australia and New Zealand are seeking, among forms of relief, a reduction of Japan's future catch allocations by the amounts caught under the EFP. If Australia and New Zealand believe that the additional tonnage caught in Japan's EFP is the decisive factor in causing irreparable damage to the SBT stock, the "payback" – their expression – they seek would be entirely nugatory. Again, there is no urgency established.

Honourable Judges, Mr Burmester further stated:

The use of the phrase 'appropriate under the circumstances' in article 290 means that award of provisional measures is a matter within the discretion of this Tribunal. The wording differs from that in article 41 of the Statute of the International Court of Justice, which uses the expression 'if it considers that circumstances so require'. It is submitted that this Tribunal has a broader discretion.

Mr President, honourable Judges, the use of the phrase "appropriate under the circumstances" in article 290 should not be construed as depriving provisional measures of their essential requirements as stated above. In addition, the right for which provisional measures are requested must be connected to the right to be adjudicated on the merits, although the decision thereon should not prejudice the final judgment on the merits. Such "a broader discretion" – I am quoting "a broader discretion" from Mr Burmester's expression – if any, still must satisfy these conditions.

At this point I would like to touch on the issue of the precautionary approach. Australia and New Zealand refer to and rely on the precautionary principle to justify their claims, but they intentionally use the term "principle" in place of "approach" in their initial statement. I believe that the only global convention in the field of fisheries which refers to "precautionary" approach is the Agreement for the Implementation of the UNCLOS Provisions Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted in 1995 by the conference convened under

the United Nations auspices. That Agreement speaks about the precautionary approach. It must be pointed out, however, that document has not come into force yet, and this is a clear indication that the precautionary approach is irrelevant as a legal concept capable of serving as a binding norm or rule of international law in this particular case.

The precautionary approach may in fact be relevant and offer guidance with respect to imminent irreparable damage such as the case of damage caused by the construction of a dam. However, with respect to renewable living resources such as southern bluefin tuna, different considerations need to be applied. In any event, and in particular with respect to the dispute over southern bluefin tuna stock assessment, scientific research can and should play a decisive role, particularly where such research is designed to reduce uncertainties presently hindering agreement. In this sense it is my humble view that the current EFP activities of Japan do not raise any problems in relation to the precautionary approach.

Honourable Judges, I might add that the improper use of the precautionary approach concept is likely to deny the benefit of knowledge which scientific research could secure in furtherance of conservation and optimum utilization of the SBT stock. In this connection, I would like to emphasize that granting the relief Australia and New Zealand seek works to consolidate the interest of those who profit most from the maintenance of the status quo at the sacrifice of those who might benefit from new scientific knowledge. Granting of such relief may in certain cases be detrimental to the overall interests of the world at large and of developing countries in particular. Indeed, I am afraid that the provisional measures as requested by Applicants, if granted, might defeat the very objective they seek; that is, the conservation of SBT which should, I repeat, be based on well-defined scientific research.

In this connection article 119 of the Law of the Sea Convention, which Applicants claim Japan violates and Japan refutes such claim, is to be noted. Paragraph 2 of that article provides as follows:

Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate, and with participation by all States concerned.

Mr President, honourable Judges, now I turn to draw your attention to the relationship between the requested provisional measures and final remedies. In Japan's view, the provisional measures as requested by Australia and New Zealand are inappropriate, because Applicants are in effect seeking final relief for damage that they claim has already occurred, and not provisional relief to prevent injury pending the resolution of the case. Alternatively, the relief sought as a provisional measure is similarly sought as final relief, and yet Applicants ask this Tribunal to award such relief now before Japan has had an opportunity for a full and fair hearing on the merits of Applicants' claims.

For all these reasons relating to the true nature of the dispute, the truncation of negotiations by Australia and New Zealand and the impropriety and lack of need for any restrictions on Japan's conduct, this Tribunal should deny Applicants' request and grant Japan's counter-request for provisional measures.

Permit me to explore here Japan's counter-request for provisional measures. The request of Australia and New Zealand aims to interrupt Japan's EFP at all costs, and to justify the maintenance of the status quo, the 1997 total allowable catch. However, this request does not provide a lasting solution which will achieve the aim of conservation and optimum utilization of the SBT stock. Such a lasting solution could be reached only through objective scientific research.

STATEMENT OF MR ANDO

The 1997 total allowable catch was agreed upon more than two years ago as a limit applicable only in 1997, not as an everlasting, absolute criterion. Rather, the annual TAC should be constantly re-examined on the basis of data obtained through regularized scientific research and agreed upon year by year. Australia and New Zealand have frustrated attempts to establish a TAC for 1998 and 1999.

Mr President, honourable Judges, Japan is prepared to accept any result that is the product of such regularized scientific research, including where necessary the participation of neutral independent scientists.

This will enable Australia, New Zealand and Japan to speak to States and areas now non-party to the 1993 Convention, and maximally to facilitate the achievement of the aim of conservation and optimum utilization of the SBT stock. Thus, the experimental fishing programme is essential to that aim, and that aim in the end is the very objective that the Law of the Sea Convention exhorts States to accomplish through regional or species-specific agreements.

Mr President, honourable Judges, I would like now to conclude by pleading this august Tribunal to assist Australia, New Zealand and Japan not to prolong the current lack of consensus and not to accelerate confrontation under the 1993 Convention. Rather I implore the Tribunal to assist the three parties in facilitating cooperation among them and in renewing a constructive dialogue over a lasting solution. Such negotiations will best promote the objectives of the Law of the Sea Convention itself and certainly enhance the prestige and vital role this august Tribunal could and should deserve. Past is the prologue to future. Let the past difficulties turn to future happiness!

Mr President, honourable Judges, this concludes my presentation and that of Japan. Thank you very much.

The President:

I thank Professor Ando and the rest of the Japanese representation for the submissions.

That brings us to the end of the business for today. As agreed, the second round of submissions will be held tomorrow morning. The session will start at 9.30, and each party will have one and a half hours for its summing up and final submissions.

The sitting is closed.

The Tribunal rose at 3.55 p.m.

PUBLIC SITTING HELD ON 20 AUGUST 1999, 9.30 A.M.

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Judge ad hoc SHEARER; Registrar CHITTY.

For Australia: [See sitting of 18 August 1999, 10 a.m.]

For New Zealand: [See sitting of 18 August 1999, 10 a.m.]

For Japan: [See sitting of 18 August 1999, 10 a.m.]

AUDIENCE PUBLIQUE DU 20 AOUT 1999, 9 H 30

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. SHEARER, *juge ad hoc*; M. CHITTY, *Greffier*.

Pour l'Australie : [Voir l'audience du 18 août 1999, 10 h 00]

Pour la Nouvelle-Zélande : [Voir l'audience du 18 août 1999, 10 h 00]

Pour le Japon : [Voir l'audience du 18 août 1999, 10 h 00]

The President:

This is the last of the sittings for the hearings in the request for provisional measures. The parties and the Tribunal have agreed that this session will be devoted to the last submissions by both parties, beginning with New Zealand and Australia. In accordance with the Rules, each party will, at the end of the submissions, present to the Tribunal its final submissions. It is requested that these submissions should be handed to the Registrar in writing at the end of the presentations.

Before inviting the Agents of New Zealand and Australia to commence their submissions, I would like to state to the parties that the Tribunal would be very grateful if they could elaborate further on the schedule and duration of their annual fishing for SBT in the framework of the 1993 CCSBT. In particular, the Tribunal would like the parties to provide information on the time of the year when the fishing for SBT commences, whether this time is the same for all parties or whether it varies from individual party to party.

In addition, we would like some information on the length of the period in months over which the parties fish for their allocated quotas. Finally, we would like to be informed of the expected commencement date for the next fishing season for each of the parties. We hope this information is available. We would be very pleased to have it. Having said that, it is now my pleasure to invite Mr Campbell to commence the submission on behalf of New Zealand and Australia.

Reply of Australia and New Zealand

STATEMENT OF MR CAMPBELL
AGENT OF AUSTRALIA

Mr Campbell:

Mr President and Members of the Tribunal, before I start, Mr President, could I say that we will provide the answers from the Australia and New Zealand perspective anyway for the questions you have just asked by the end of today, if that is acceptable.

In this reply the Applicants will deal with a number of matters raised by Japan yesterday. I will address issues related to the scope and nature of the dispute and the conduct of the parties. Professor Crawford will discuss Japan's view of the science, and Mr Burmester will respond briefly on the requirements for provisional measures. Mr Caughley will conclude.

I will briefly mention five issues. The first is the scope of the dispute. Yesterday, Japan concentrated its attention on the 1998 and 1999 EFPs as if they constituted the beginning and end of the dispute. They did not. Let me make three points in relation to this matter. The initial point is that the dispute over the EFP properly considered is but a manifestation of more fundamental issues relating to non-compliance by Japan with its UNCLOS obligations to conserve SBT as a highly migratory species and to cooperate in that conservation. It is because the EFP involves the taking of significant additional catch on a unilateral basis that those issues of compliance with UNCLOS are brought to the fore.

Secondly, while many of the negotiations and exchanges of views were identified as occurring under the 1993 Convention, that Convention merely provided a forum. It did not define the nature and content of the dispute. Thirdly, from the very beginning the Applicants made clear that this was a dispute with UNCLOS and customary law obligations at the core. For example, in the Report of the Resumed Meeting of the Commission in February 1998 "Australia noted that the CCSBT Convention, UNCLOS and UNIA all demand that Commission members work together to set catch levels that are sustainable". While the 1993 Convention does provide a mechanism in the form of TAC for implementing certain parts of the 1982 Convention, it does not seek to define or replace the fundamental principles set out in UNCLOS. Those principles remain in the form of actual obligations under UNCLOS with which Japan must comply.

I will now move on to EEZ jurisdiction. A number of points made by Japan yesterday, either directly or indirectly, raised the fact that SBT is found within the EEZs over which the Applicants exercise sovereign rights.

At the bottom of page 16 of yesterday's transcript, Mr Greig stated that before 1997 Australia achieved its alleged goal of maintaining the TAC at existing levels, not on the basis of scientific assessments but on the basis that "it threatened to exclude Japan's vessels from Australia's EEZ and from its ports unless Japan first agreed to Australia's proposal for the annual TAC". He describes this as coercion and, at page 31, as an example of Australian unilateralism. Again, let me make three points in response to that comment.

First, the sovereign rights of Australia within its EEZ belong to Australia alone. There is no right of Japan or any other country to take fish within our zone without our permission. There being no right, there is no unilateralism.

Secondly, I ask the Tribunal what is the most sensible sequence. Should one determine the global catch and allocations first and then decide issues of bilateral access for taking all or part of an allocation? Or, should one negotiate bilateral access for an amount of fish first – a process in which New Zealand would not have been involved – and then decide the global TAC and quota. Clearly the latter course of action puts the cart before the horse

and would pre-empt a global determination of the quota. Australia insisted on negotiating the global TAC first. This course of action followed by Australia is neither coercion nor unilateralism – it is simple common sense.

Thirdly, good science formed the basis of Australia's TAC and allocation positions – not science tailored to demonstrate unsustainable increases in catches at a time when all parties agreed that the “continued low abundance of SBT parental biomass is cause for serious biological concern”.

Professor Ando, in his speech yesterday, referred to the well-known passage from the *North Sea Continental Shelf* cases in which the International Court elaborated upon the obligation on parties to engage in meaningful negotiations with a view to reaching agreement. The Court held that meaningful negotiations would not take place where a party “insisted upon its own position without contemplating any modification of it”. It is puzzling why Japan should seek to rely upon this quote as it describes perfectly its own conduct in consultations and negotiations. In particular, Japan insisted on its own version of an EFP without any significant modifications.

Moreover, contrary to the facts, Japan has sought to lay the blame for the supposedly dysfunctional Commission at the Applicants' feet. We are accused of having driven Japan to its unilateral action by the use of what Mr Greig called a “veto”. Let me make one point on that matter.

If any country is exercising a veto on achieving consensus, it is Japan. When it came to proposals to increase the TAC, or to the question of an experimental fishing programme, it is Japan that has stood alone. Year after year it has been Australia and New Zealand who, in line with the overwhelming and agreed scientific evidence of the precarious state of the SBT stock, have urged the Commission to leave the TAC unchanged. And it is Japan that has said “no” unilaterally, in order to leave itself room to conduct its EFP above its previous quota. To speak of the Applicants as having “vetoed” an increase or “vetoed” an EFP would require one to say that any proposal made by one party in any consensus-based organization that is not accepted has been “vetoed”. That would certainly be a novel use of the word “veto”.

Japan has asserted that the Applicants, in the course of the EFP Working Group meetings, had considered an EFP in the range of 1,200-1,500 tonnes over and above the total allowable catch.

Again, I will make three points. First, there is a vast difference between 1,200-1,500 tonnes and a possible 2,400 tonnes with no cap, this being the basis of Japan's current unilateral programme. Now Japan says that to have a cap on the EFP would be unscientific.

Secondly, the EFP is not simply an issue of tonnage. The Applicants do not oppose an EFP which is well designed, and which does not itself have the potential to cause serious damage to the stock. By contrast, the current EFP is unilateral, it does not meet the Commission's 1996 Objectives and Principles, it is based on a fundamentally flawed experimental design and it will not provide useful information to resolve uncertainties in relation to the stock assessment or projections of recovery. Also, it does have the potential to cause serious damage to the stock.

Finally, the fact that the Applicants during the EFP Working Groups were willing to consider a joint and properly designed EFP is indeed evidence of their good faith and flexibility in the negotiating process. That was a concession by the Applicants. It was Japan that was inflexible.

It is often said that the best form of defence is offence. This maxim is most suited to Mr Greig's attempt to try and turn the tables on Japan's blatant unilateralism. He gives nine alleged examples of Australian unilateralism in an attempt to mask Japan's own unilateral conduct which is at the heart of this dispute. I have dealt with some of these already – for

STATEMENT OF MR CAMPBELL

example, that relating to the EEZ. However, let me answer those which have not been dealt with already.

He asserts that Australia refuses to provide catch data; it does provide catch data. Secondly, he says that Australia elects to use purse seining over long lining. Australia uses both methods, including purse seining within its own EEZ. That is our legitimate choice to do so.

Mr Greig also asserts unilateralism on the part of Australia because it allegedly commenced fishing before quotas were set in the 1995-96 and 1996-97 seasons. He also asserts that Australia set its own catch levels in 1998 and 1999. I established in the first round of arguments that the inability of the Commission to establish TACs on a timely basis in the seasons just mentioned was due solely to Japan's unrealistic proposals to increase the TAC by as much as 6,000 tonnes and to then ask for the same amount in the guise of experimental fishing. Moreover, it is not Australia or New Zealand that have exceeded their previously agreed allocations. But Japan has, at the very least over the past two years through its unilateral experimental fishing. What the Applicants did was to say that, despite Japan's veto, they would stay within TAC and national allocations in relation to fishing within their own EEZs, but this is described as unilateral by Japan.

Both Mr Greig and Professor Ando referred to the Applicants unilaterally terminating proceedings under the 1993 Convention. I will not repeat all that happened on 26 May meeting in Canberra; it was an ultimatum that was put to the Applicants. Put simply, Japan said, "accept our proposal by 31 May or we will conduct a unilateral EFP at an even higher level on 1 June". Yet it is now the Applicants who are accused of unilateralism. The facts speak for themselves. Japan's pre-emptive actions clearly terminated the dispute settlement discussions. Japan was forewarned of the consequences of those pre-emptive actions but went ahead nonetheless. In fact, "pre-emptive" is probably not the right word; "pre-determined" is better. Japan clearly had the programme in place and the boats on the water ready and waiting to commence the unilateral experimental fishing at the same time as the discussions were proceeding.

Mr Greig's assertion about Australia's approach to the "independent scientists" is wrong. In this respect, I ask the Tribunal to examine the record of the December 1998 negotiations. It makes it clear that there was no agreement on the part of the Applicants to use the independent scientists in an adjudicative role. Rather, it was stated that in the absence of consensus, "the parties may invite the independent scientists to play an adjudicating role in contemplating the Working Group's advice to the Commission", that is, the possibility of the use of independent scientists in an adjudicative role was contemplated but not agreed. Furthermore, the role contemplated was in finalizing advice from the Working Group to the Commission and not one of deciding issues in a manner binding on the countries. There are good reasons for this. You do not ask scientists to make the ultimate decisions on management and resource allocation. No country does that, but Japan accuses the Applicants of not doing it.

On that issue related to science, I ask you, Mr President, to call on Professor Crawford, who will address the scientific issues in more detail. Thank you, Mr President.

The President:

Thank you, Mr Campbell. I now call on Professor Crawford.

STATEMENT OF MR CRAWFORD
COUNSEL OF AUSTRALIA

Mr Crawford:

Mr President, Members of the Tribunal, I will be responding to some of the assertions made by Mr Greig in his presentation yesterday. In the time available, it is not possible to respond to them all, and we are not at the stage of the merits, but I do need to show that the situation is nothing like as rosy as that which he projected.

Let us recall what Mr Greig showed us yesterday: recovery to 1980 levels, in one of the two bands to the left of the screen, in 2001, or at worst in 2004, with the stock then leaping up to new and unrecorded heights. Does it not remind you of the series of optimistic projections made for the recovery of northern cod which I showed you on Wednesday? Does it not remind you of Japan's 1995 projection for SBT, which predicted recovery by this year? That never happened. Now, in 1999, they predict recovery for 2001, again four years in advance. We have heard that story before. Did they put that projection to Professor Beddington and ask him about it? They did not.

In the graphics that Mr Greig showed you, there were those which showed Japanese projections and there were those which he attributed to the Applicants. We have never seen these before. They are said to use, if you see the figure in the left-hand side, the C1 model. Past experience with that model tells us that it produces results which are seriously at variance with the data. They are entirely different from the results which we presented to the Tribunal on Wednesday. There is something about the Japanese model which causes it to shoot up from a base point already higher than we believe to be justified at this moment, and to shoot up in a remarkable and unlikely way.

At the same time, Japan said a great deal about independent scientists, and they relied on Professor Butterworth. Let us see what Professor Butterworth thinks is the position. You will remember the graph that I showed from Professor Butterworth's report and you will remember that the points on that graph go backwards in time, as it were, from the right to the left. There is a similar graph in the Peer Review Report. What does this graph show if you plot it in the same way that Japan does, that is the other way round, in the normal way in which non-scientists think of graphs going from the left to the right? This is that data replotted –

The President:

Professor Crawford, may I interrupt you? I am told that the interpreters are finding it difficult to keep up with you.

Mr Crawford:

I will slow down, sir. That graph, as well as the one that I showed you a moment ago, comes from a paper written by Professor Butterworth with two other scientists, Hilborn and Ianelli. You will see that it shows no upturn in parental biomass, such as was indicated in Mr Greig's slides. Rather, it shows a continual decline in parental biomass until 1997. Professor Butterworth says that he is assuming an age of maturity of eight, so his stock curve ought to be similar to Japan's, which assumes an age of maturity of eight. The two of them are quite different.

In fact, the Scientific Committee has pointed out every year for the past eight years that there is cause for serious biological concern as to the size of the parental stock. Now Mr Greig assures us, without the benefit of new scientific assessments, that it has been recovering strongly since 1995. Perhaps Mr Greig purports to be a scientist?

STATEMENT OF MR CRAWFORD

One of the characteristics of a scientist is being fair and accurate in citing from documents and sources. Mr Greig repeatedly misrepresented the position and misquoted from documents. For example, he said "Australia unilaterally" – a word that he seems to have got into the habit of using – "refused to provide catch data". That is simply untrue. Australia has provided very complete and detailed data on its catches and the size composition of those catches going back to 1951, both for the long-line and surface fishery. You may have noted that Mr Greig seemed to know exactly how many fish we had caught. Where did he get that information from? There are many other examples, Mr President, but there is no time for them.

More significantly, let me contrast the status of the scientific advice that has been presented to you. The Applicants, in addition to presenting a scientific overview by Polacheck and Preece and a comment by Talbot Murray, also commissioned an independent expert scientific review by Professor Beddington. I remind you that not only is Professor Beddington an eminent fisheries scientist, but he is entirely independent of the Applicants. He has never worked for either of them before. Professor Beddington not only prepared his report, he also had to endure a peculiar and wholly ineffective *voir dire*, he gave oral testimony before you in relation to his report and he was cross-examined on it. Despite this cross-examination, you will recall that his report was unchallenged.

In contrast, while Japan commissioned and submitted a scientific report from Professor Butterworth, unfortunately we were not able to hear his oral testimony or to cross-examine him on his report. That is a pity, for while we have no qualms about his status as an expert, we would have liked to have asked him some questions.

I know that cross-examination of witnesses does not exist in every legal system. Failure to produce a witness for cross-examination or to put your case to a witness is not very significant in those systems. In common-law systems, on the other hand, such as those in England, the United States and Australia and New Zealand, this is very important. If you present a report from someone and then fail to call him as a witness, there is a serious problem. If you get to cross-examine someone and you fail to question him on your case, there is a problem. You had the opportunity to ask and you did not ask. These are things which are well understood in the legal cultures from which Mr Greig and I come. So we cannot plead that our legal cultures are different; they are not.

Actually, Mr Greig's legal culture is more aggressive even than mine, as he showed with his *voir dire*. More time was spent on the *voir dire* than was spent on the cross-examination of Professor Beddington. The substance of what Professor Beddington has written and said went unchallenged. We invite the Tribunal to accept the evidence of Professor Beddington and the conclusions set out in his report for the purpose of the present proceedings – not, of course, as a final decision on the facts but as showing a sufficient basis of serious concern about the stock.

Turning now to Professor Butterworth, something that Mr Greig did not let me do, we would have liked to have asked him about the unfished areas diagram, which you can again see now. We would have liked to have asked him whether the vessels fished "in a substantial proportion of the unfished area", as he suggested, but we could not. Mr Greig would not let Professor Butterworth speak to you. Nor, for that matter, could we ask Japan's other witness, Mr Komatsu. We would have liked to have asked what modifications he made to the EFP in the five days between receiving Dr Garcia's letter and the beginning of the EFP. And when, in 1999, did Mr Komatsu allocate to Japanese boats the quotas for this year's EFP? Was it before or after the Japanese ultimatum of 26 May 1999?

Turning to the unfished areas themselves, Mr Greig tried to explain this away by making a distinction between the areas and the months fished. It is, however, inescapable that

vast areas of ocean were not covered. In fact, Japan's EFP operated at the edges of unfished areas, both in space and in time.

Although Japan relies heavily on the opinion of Professor Butterworth, it makes no mention of the stock assessment he did with Drs Hilborn and Ianelli. Professor Butterworth refers to that assessment to support his view that Polacheck and Preece substantially overstate the risks. You will recall this figure from Wednesday that Professor Beddington testified about; this is Figure 6 from the Butterworth report.

The last point on the curve at the bottom left hand side is the estimate for 1996. What is clear is that the parental stock has continued to decline since the last point on the curve in the Butterworth report and with that further decreases in recruitment would be expected. Moreover, it is very worrying how low that stock is getting and how far the stock has been allowed to fall below the Commission's agreed recovery level.

Professor Butterworth failed to produce any longer-term projections from this stock recruitment curve, even though he did use it to criticize the projections of Polacheck and Preece. In fact, such projections are straightforward to produce and the results of that projection are reported by Polacheck and Preece in their report. This is the result of the projection. As you can see, the implication of the analysis by Professor Butterworth and his co-authors is that the SBT stock will continue steadily to decline under 1996 catch levels; in other words, those catch levels are not sustainable. This is without taking into account the increased catches in 1998 and 1999 and also, apparently, in 2000 and 2001 due to the potential continuation of the Japanese unilateral EFP in those years. Thus, the assessment provided by Professor Butterworth is in sharp contrast to those presented by Japan yesterday.

Finally, Professor Butterworth says that we should seek comfort in his stock/recruitment curve for SBT since its low "steepness" means that we do not have to worry about a collapse for SBT. I would like you to look briefly at this other stock/recruitment curve. It looks remarkably similar to SBT. In fact, when you overlay the two, they are almost identical. That, of course, is the curve for northern cod and I do not need to remind the Tribunal what happened to that stock or of the cost to Canada when it did collapse.

Let me now turn to the Peer Review Report of August 1998 mentioned by Mr Greig yesterday in the context of the EFT. Mr Greig systematically confused three different things: first, the Peer Review report; second, the EFP Working Group; and third, the statement his law firm solicited from Mr Maguire and three others and which Japan had sent to the Tribunal. I will call this the Maguire statement.

The Peer Review Panel, the first of the three, was composed of Mr Maguire, Dr Sullivan and Professor Tanaka, and it was appointed by the CCSBT following an Australian proposal. The Peer Review Panel was constituted to undertake a review for the Commission on the quality of the scientific analyses and methods being used by the Scientific Committee. It was an attempt to assist in seeking a greater level of consensus. Its report was submitted in August 1998, two months after the EFP began. In December 1998, the Parties agreed to discuss and implement appropriate recommendations from the Peer Review Group report. At that time Japan agreed to convene a working group to consider those recommendations. It has not yet done so. So the report is still under consideration by the Commission.

The report contains a variety of conclusions; the Applicants agree with some and not others, and no doubt Japan would say the same. For example, the report notes:

The combined catch of member and non-member countries is currently not sustainable under some model formulations considered. Effective means of monitoring and controlling all catches should be sought. In the meantime, a precautionary approach would be for member countries to set

STATEMENT OF MR CRAWFORD

aside a portion of the TAC to account for the catches by non-member countries.

Professor Beddington agrees with that, as you heard on Wednesday.

In fact, the Peer Review Panel extensively used figures from Australian scientists to illustrate their points about stock assessment and status without mentioning any particular "agenda" or political bias and without describing the Australian scientists as pseudo-scientists. For example, they say that "standard goodness of fit criteria should be used in model selection": Goodness of fit has been a preoccupation of Australian scientists and for good and fitting reasons.

The Peer Review Panel did not, I emphasize not, comment on the 1998 unilateral EFP, nor were they asked to do so: they did make some general comments on experimental fishing programmes and we have no difficulties with those general comments.

Now let me turn to the Experimental Fishing Programme Working Group and the reports that it produced. The Working Group invited several independent scientists and an independent chairman to its meetings to assist with the deliberations and with technical discussion. In December 1998 the parties agreed:

If a consensus between the Parties cannot be reached in the Working Group in the course of the development of the future joint EFP, the Parties may invite the independent scientists to play an adjudicating role in completing the Working Group's advice to the Commission.

This is the so-called agreement Japan now accuses the Applicants of violating. Apparently they cannot violate the clear provisions of the United Nations Convention on the Law of the Sea but they can read an agreement into the words that I have just read you. You can see that it is not an agreement at all: the independent scientists were to provide advice to the Commission at the request of the parties, not to arbitrate between them, as Mr Greig claimed.

The independent scientists engaged within the Working Group process included Drs Mohn, Sullivan and Tanaka. The independent chairman of those meetings was Dr Annala, a New Zealand scientist. The Working Group agreed on the broad elements of a possible joint EFP, including a fishery independent survey – that is to say, not based upon CPUE – as well as tagging proposals. It did not, however, agree on the vital details of scientific design, analysis or decision rules. At no point did the parties invite the independents to adjudicate on any point of disagreement.

In contrast to these two groups, which were Commission groups certainly, the Maguire statement was not requested by the parties and it is not a Commission document. It was produced by Mr Maguire, apparently on behalf of four of the scientists I have mentioned, though only he signed it. He did not contact Dr Annala. He does not say why not. That document is a Japanese report and that is all. Japan has not called Mr Maguire or anyone else to give advice about it or about the circumstances in which it was produced. I emphasize again that Japan has not been prepared to call any scientific witness and have them questioned. Yet it asks you to reject scientific evidence produced by the Applicant which counsel for Japan could have tested but did not.

To the extent that the Maguire statement quotes from the Peer Review report, we have no difficulties with it. We note also that it does not affirm that Japan's two EFPs are a scientifically valid programme which satisfies the 1996 Principles and Objectives. The report does say: "Given the diverging views on stock status, it is not possible to confidently quantify the risks to the stocks posed by the EFP."

SOUTHERN BLUEFIN TUNA

Professor Beddington in substance agreed with that: there were and are risks but they are difficult to quantify. The Maguire paper in the same paragraph talks about payback, about which we disagree because there is no proper mechanism for payback and this makes the payback system illusory.

On the other hand, quite apart from the circumstances in which it was produced, which we have not been able to test, the Maguire statement contains other remarks with which we most certainly disagree. In particular, it says:

Recent catches in the order of 13,000 to 16,000 t have not resulted in clear changes in CPUE, with some assessment hypothesis (variable square) suggesting stable or decreasing stock sizes while others (constant square) suggest stability or increases.

I note that recent catches are in the 16,000 to 18,000 tonne range, including the EFP. In any event, Professor Butterworth's own graphs show clear decreases in CPUE, for example.

Let me turn to the problem of the young fish and the old fish. Japan made a great deal yesterday about the harmful effects of the size of fish taken by Australia. It seems actually that everyone's fishery is harmful except Japan's – Australia's, Korea's, Indonesia's, but not Japan's. But let us put it into perspective. What matters in the sustainability of a fishery is spawning stock biomass because recruitment is produced by the spawning stock and the size of the biomass is the key figure.

This graphic shows the tonnage taken by the various parties over the life of the fishery. Japan has taken by far the most. It is true that Australia accepted in the early 1980s that it should alter the approach in its juvenile EEZ fishery and it did so. You saw from Mr Greig's chart yesterday how in recent years the number of fish taken by Japan and Australia (excluding the EFP and he never showed you that) was roughly equal, even though Japan takes bigger fish, including fish from the spawning stock.

In addition, let me make four brief points. First, the graphic I showed you on Wednesday demonstrates that a great deal of the decline in age cohorts occurs after the age of four, as you see on the bottom line. It is also true that natural mortality is higher for younger fish. It is not true to say that Australia's EEZ fishery causes the decline.

Secondly, Japan is now targeting younger fish as well. In the 1998 EFP 64 per cent of the fish were below the age of 3; 50 per cent were below the age of 2.

Thirdly, in the context of a declining parental biomass, it is better, for the purposes of producing a recovery, to target younger fish. As the Scientific Committee concluded in 1992,

varying the age distribution of a fixed global catch indicates that the most rapid recovery would occur if more small fish are taken in the short-term and larger fish are taken in the long-term ... Nevertheless, major adjustments to future age selectivity patterns cause relatively minor small changes in the overall trajectory of parental biomass.

Finally, in calculating the TAC and national quotas, account was taken of the different modes of fishing. Of course, Japan has vetoed the TAC for the last two years. That is, no doubt, a matter that should be revisited. Japan now targets more younger fish and Australia more older fish than when the TAC was first set.

I now turn to the question of the basis of the projections, the so-called "constant squares versus variable squares" dichotomy.

Japan reverted again yesterday to that same old dichotomy of the two extremes; it never once mentioned the geo-statistical CPUE interpretation, which is in effect

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a compromise between the two, and this despite the fact that, as I showed you on Wednesday, not only Australia but also Japan considers that interpretation the most likely or plausible one.

Mr Greig says that the Japanese analysis of their 1998 data shows that the variable square model does not fit but he fails to mention that it also shows that the constant squares model does not fit. In the face of that result, did Japan then take the logically consistent alternative of the geo-statistical model? It did not even refer to it. To justify their EFP, Japan has consistently tried to paint the picture that all we need to do is to decide between these two extremes. That is not the case.

In fact, as Professor Beddington pointed out on Wednesday, you do not need projection results to conclude that catches should not be increased. The information on current trends in recruitment and parental biomass is more than sufficient to conclude that catches should not be increased above the historic TAC. This conclusion has been reached by the Scientific Committee on numerous occasions. In 1993 the Committee agreed that "as in previous years the meeting considered that catch levels should not be increased until such time as the parental biomass returns at least to the 1980 level." They said that this was apparently a case of Australian coercion. In fact, catches have since increased substantially, while in every year since 1993 the Scientific Committee has continued to stress that "the continued low abundance of the SBT parental biomass is cause for serious concern."

Japan persists in showing that the age of maturity of southern bluefin tuna is 8. That was an earlier view. It is now unsustainable. The Stock Assessment Group in 1998 pointed out that in the spawning ground there are very few fish less than 10, and that itself is sufficient to show that 8 is not the average spawning age. It is true that these samples might not be representative, but the 1998 report dealt with that point as well.

Professor Butterworth described the move from 8 to 12 as a statistical sleight of hand, but that is absurd. They are either spawning or they are not. It is not a question of statistics. It is a question of straightforward biological fact. All projections which use an age of maturity of greater than 8 show a continued decline in spawning stock biomass.

To conclude these remarks on the state of the southern bluefin tuna stocks, you may recall that I gave five reasons on Wednesday for endorsing the conclusions of the Scientific Committee and for considering that the situation is unlikely to be better and may well be worse. These were: (1) commercial CPUE tends to be strongly biased upwards; (2) the age cohorts of the late 1980s have been fished down and do not provide the basis for a recovery; (3) the age composition of the plus group presents difficulties; (4) third party catch adds significantly to the risk; (5) the projections that show recovery also show pronounced lack of fit, inconsistent with normal statistical procedures. The Peer Review Group actually agreed with that.

Yesterday the Agent and both counsel for Japan agreed with the third party catch problem. Mr Greig implicitly disagreed with my second point about the fishing down of stocks. I have already dealt with that. The other three points were simply ignored.

Particularly significant is the fact that Japan ignores the lack of fit problem. Japan recovery predictions continue to be based on models that show not merely maturity at 8, but pronounced lack of fit. If you take the 1998 EFP there would have been no basis for claiming that there were improved estimates for recovery. If lack of fit is considered, the probability of recovery for Japanese scientists decreases to 14 per cent.

As to the third party catch, we all agree it is a problem, but it is one that cannot be solved until we have a TAC back in place. I note that Japan has in fact been proposing very low quotas for possible entrance, with the idea that the remainder of the existing catch can be shared amongst all members on a formula favourable to Japan.

Mr President, the whole of Japan's presentation yesterday revolved around the notion of irreparable damage. Mr Burmester will return to this shortly and show that it is not the appropriate test. Even if the test was irreparable damage it would be met here. Mr Burmester has already reviewed the authorities, including *Nuclear Tests* cases, where the probability of irreparable damage was very low indeed and it would have taken a very long time for such damage to occur.

One of the aspects of the precautionary approach is that if the relevant threshold is crossed there is a reversal of the onus of proof, in the sense that a lack of scientific certainty should not be used as a reason for postponing action. Japan's presentation yesterday took refuge in what can only be described as the reverse of the precautionary approach. We might call it the reactionary approach. Under the reactionary approach no action can be taken until there is scientific certainty that the action is necessary.

Professor Ando effectively said that the precautionary principle could be applied to dams but not to fish. That is an astonishing proposition in relation to a living natural resource. Even if a catastrophic stock collapse were to occur tomorrow, it would still be at least two years before sufficient evidence that this had happened would accumulate to meet Japan's standard of proof and that would be far too late.

Then again it was suggested that the TAC should be delayed until the scientific uncertainties had been resolved by apparently four years of EFP catch. First catch your fish, and then set your TAC. Again, this is entirely contrary to the precautionary principle or approach in any of its formulations.

Finally, we come to the concept of payback of past EFP catches if it is subsequently found that these have harmed the stock. From Japan's formulation it is absolutely unclear how it would ever be possible to prove that EFP catches were the culprit. But, far more importantly, its proposal represents a blatant reversal of the appropriate burden of proof, as Dr Garcia pointed out.

I turn to Japan's EFPs. Two more of them have been unilaterally spawned during this hearing.

I read you Dr Garcia's letter. Mr Greig described it as tentative. He obviously has a very curious idea about a tentative letter. I hope he never writes me a firm one. But, he said it had been taken into account, which is odd because it was written five days before the EFP started. How it was taken into account is not clear. For example, to take only my twentieth point, Dr Garcia called for 100 per cent observer coverage, not 20 per cent. In fact, there was 18 per cent. So far as we can see, the Garcia criticisms apply equally to the final version in 1998. Perhaps Japan will tell us which of his 20 problems it fixed in that five days, and how.

Mr Greig also asserted that the Japanese EFP complied with six of the seven of the 1996 conditions. In fact, the Working Group did not resolve five of the six matters which were referred to it, and that itself is a symptom that six of the seven were not met.

Mr President, Members of the Tribunal, I have two final points. The first relates to the description which Mr Greig gave of what he described as "purported scientists seeking to manipulate the data to further their political agenda". The manipulation he was talking about actually concerned age at maturity, and it was the stock assessment group which noted that this could not be 8. But, in its context Mr Greig's remarks seemed to be directed at the Applicants' scientists, who he effectively characterized as dishonest and unworthy. He referred elsewhere to Dr Polacheck's extreme brand of science.

Now any scientist who manipulated the data to further a political agenda should be sacked, and immediately. But it is interesting that this is clearly not the assessment of Dr Polacheck which Professor Butterworth has, though we could not ask him that either. Professor Butterworth's paper says that its purpose is simply to illustrate that "... there are defensible alternative interpretations of the data beyond those presented in the Polacheck and

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Preece document". Well, no doubt there are. The Applicants, unlike Mr Greig, have never suggested that the other party's science is trash. Professor Beddington similarly makes no criticism of Dr Polacheck.

Unfortunately, the attitude which is implied in those remarks that Mr Greig saw fit to make, I regret to say, emanates from a certain level of the Japanese official hierarchy responsible for southern bluefin tuna exploitation. At that level there is a tendency to dismiss any view to the contrary. That is a level which produces repeated projections of rapid recovery, which fishes to the very limit of those projections and which is not above issuing ultimata.

Mr President, Members of the Tribunal, let me take you back to the well-known southern bluefin tuna stock recruitment curve produced by Professor Butterworth. There are many similar analyses in the various reports of the Scientific Committee and the Stock Assessment Group. As you will recall, that figure moves right to left in time. The latest and lowest point I showed to you before, so it is probably well in your memory, and here we have it again. The latest and lowest point shown is 1996. What is happening in 1999? The Scientific Committee has reported that there is no sign of increased recruitment. It has reiterated its concern in 1998 over the status of the parental biomass. Professor Butterworth's analysis points to a continued decline in the parental biomass after 1996, but Mr Greig's does not. On the balance of the evidence is it reasonable to conclude that there is no urgency? Can we really wait for a decision on the merits in two years or so from now, if Japan has its way with the timetable? That would be just about the time when Japan's final round of unilateral experimental fishing programmes finish. Can we wait that long? I think not.

Mr President, Members of the Tribunal, thank you for your patience.

The President:

Thank you very much, Mr Crawford. Mr Burmester.

STATEMENT OF MR BURMESTER
COUNSEL OF AUSTRALIA

Mr Burmester:

Mr President, Members of the Tribunal, in this brief reply the Applicants do not intend to say anything more on the issue of jurisdiction. This was dealt with by Mr Mansfield in the first round and there was nothing in the Japanese arguments yesterday that particularly calls for a response.

Mr President, it is necessary for me to respond briefly to the arguments made by Japan on why the provisional measures sought are not appropriate. Professor Crawford has again highlighted this morning the flawed approach put forward by Japan in terms of the precautionary principle and the approach to proof of scientific harm. Two further issues need to be addressed by me in reply. They are the need for irreparable harm and urgency.

Let me elaborate on the relevance of these requirements as a matter of law to the award of provisional measures.

In relation to irreparable harm, it is true that I did make the suggestion, referred to, as I recall, by Professor Ando, as revolutionary, that irreparable harm was not essential. I did not, however, submit that the nature of the possible harm to the rights in question was irrelevant in considering what measures were appropriate. It clearly is a matter linked to the purpose of the institution of provisional measures. Thus, the existence of some form of possible harm is a first critical requirement. If there is no harm there is nothing to protect. The nature of the harm is then one important issue in considering what is required under the circumstances to protect the rights of the parties. But, I repeat, there is no legal requirement that harm be irreparable.

Even if irreparable harm were considered necessary, the risk or possibility of such harm in the future arising from increased southern bluefin tuna catch has been adequately demonstrated by the Applicants and that suffices.

Japan, however, insists on something more. It is only, they say, where irreparable harm is imminent, in the sense of immediate or that there is an urgent threat, that provisional measures are appropriate. The proposition by Japan is not, with respect, a correct statement of international practice. Whether measures are urgently required does not depend on whether the harm in question is itself immediate. The issue is whether the activity that would cause the harm and the nature of the harm makes the immediate award of measures appropriate.

If I can mention the *Nuclear Tests* cases, the possibility of harm, even irreparable harm, was accepted as existing not because the harm in the form of cancer cases already existed and was demonstrated. It was sufficient that there was the possibility of such cases in 30 or 40 years and a recognition that if they did arise then the harm was irreparable. The nature of the harm made it imperative that the risk of future environmental harm should not continue pending a determination of the merits. In the present case, the possible harm arising from the additional fishing is not something with a time frame anything like the impact of atmospheric testing. It is much more immediate and it is clearly, in our submission, the sort of harm that provisional measures can now protect against.

What Japan asks the Tribunal to do is to read into its broad discretionary charter a combined requirement of "immediate and irreparable" harm. But to insist on the immediacy of the harm is to defeat the purpose of provisional measures which is to preserve for the future and, until the merits, the rights of the parties. There is, therefore, no requirement of immediate short term damage.

In the arguments in the first round both Professor Crawford and myself demonstrated the nature of the harm which was possible, even perhaps probable, if increased SBT catch occurred as a result of an EFP. This involved possible stock collapse and at least delayed

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recovery of the stock to the agreed parental biomass level. If this harm were to occur, the consequence could be devastating biologically quite apart from flow-on consequences, including economic harm. The harm in this sense will have medium and long term consequences. But harm there is. It does not mean the harm is no less real nor sufficient. We are not simply talking about theoretical plausible worst-case scenarios but real possibilities of actual significant harm.

The suggestion by Mr Greig, based on a statement by an Australian delegation in December 1998, that Japan will need to provide “restitution” for any additional EFP catch was not a reference to financial recompense. Historically in quota allocation parity has been retained between the proportional shares of the parties. If the Japanese EFP action was not unilateral, the Applicants would in normal circumstances have expected pro rata allocation of a revised TAC. That was the purpose behind that reference. That reference and other references in the negotiations to the worth of the tuna industry to Australia do not demonstrate that the issue is money and that financial recompense can therefore remedy any future harm from an increased EFP.

The basis for the award of provisional measures is thus, in the submission of the Applicants, more than demonstrated.

I need, however, Mr President, to respond finally to the contention that the provisional measures requested would be ineffective and would result in positive harm. Japan says the few remaining hundred tonnes of 1999 EFP catch cannot be considered to pose an urgent or significant risk. But this, as I said on Wednesday, is to consider one issue in isolation. It is the impact of the EFP on the overall catch which is important. The reason the payback solution argued for consistently by Japan is no answer has already been mentioned by Professor Crawford. So that solution does not provide a reason not to award provisional measures such as sought.

Nor is there any substance in the suggestion that the provisional measures sought would delay for years any resolution of the scientific uncertainty. If Japan considers the scientific benefits of an EFP are so important it can design future EFPs so they take place within quota or in a way that gets consensus within the Commission.

The measures sought by the Applicants do not require this Tribunal to engage in micro-management of a fishery. This was not the view of the International Court in the *Fisheries Jurisdiction* cases when it set a particular catch limit pending a determination of the merits. This Tribunal on the basis of the evidence can properly make a broad assessment of the state of the stock and take account of the past practices of the parties, including past tonnages allocated and caught. On the basis of this material it can properly conclude whether the particular restraints sought by the Applicants in their proposed measures are appropriate. This is not to make decisions properly made by scientists. It involves this Tribunal determining what is appropriate to protect the rights of the parties.

Japan urges consensus through negotiation. But there is no point in negotiation for negotiation's sake. In this regard the measures sought are intended to facilitate resolution of the present impasse and enable the parties to move forward. In this regard, Mr President, I ask you to call on Mr Tim Caughley to bring the Applicants' case to a close with some key final remarks and a summary of the argument. Thank you very much, Mr President.

The President:

Thank you, Mr Burmester. Mr Caughley, please.

STATEMENT OF MR CAUGHLEY
AGENT OF NEW ZEALAND

Mr Caughley:

Thank you very much, Mr President. Mr President, Members of the Tribunal, it falls to me as the Agent for New Zealand to close the case for the Applicants.

Mr President, the Applicants did not come to this courtroom lightly. As Mr Greig pointed out yesterday, and my Government is acutely aware, such a step absorbs valuable human resources and time. I would also repeat the point made by the Honourable Attorney-General of Australia and endorsed yesterday by the Agent for Japan that the relationships between Australia and New Zealand on the one hand and Japan on the other are strong and multifaceted. They will withstand this dispute. But, Mr President, it is a real dispute. We are here because we believe that your Tribunal has a constructive role to play in resolving it.

Mr President, the Applicants have made extensive and reasonable efforts to resolve this matter. We have been involved in discussions within the SBT Commission concerning the concept of experimental fishing since 1996. But at the point at which Japan took it upon itself to take a unilateral increase in its quota by commencing experimental fishing in June last year we called for immediate consultations with the Government of Japan. Those consultations led to formal negotiations in December, and subsequently to the EFP Working Group process that extended for the first five months of this year.

That process, Mr President, was cut short by Japan's action in recommencing experimental fishing on 1 June. It was Japan that took it upon itself to proceed without compromise or agreement. It was the nature and manner of the ultimatum delivered by Japan only days before it began its programme and its decision to proceed, for the second time, with a unilateral EFP that prompted the Applicants to undertake consultations and subsequently to commence compulsory and binding dispute settlement procedures and to make an application to this Tribunal for measures to preserve our rights. Mr President, the word "ultimatum" is not one that I use lightly, but I was present when it was issued.

Mr President, the step of invoking the jurisdiction of this Tribunal is not one we would take over a minor scientific dispute. It would not have been taken if the Applicants' concern was only over a few hundred tonnes of quota. The real issue that brought the Applicants to this Tribunal was that Japan, as party to a regional management organization that operates on the basis of unanimity, unilaterally took it upon itself to increase its catch – first by 1,400 tonnes, and then by up 2,400 tonnes – representing a 30 per cent increase in the level of catch which was last agreed by the parties. And it proposes to repeat its EFP next year and in 2001, as you have heard.

Mr President, in the light of that action, and after consideration at the highest levels of Government, we have come here reluctantly from the other side of the world seeking an objective, truly independent and timely intervention by this Tribunal. Renewed negotiations, with or without the involvement of independent scientists, cannot be expected to succeed in the shadow of further unilateral action.

Mr President, this case is fundamentally about the way in which States give effect to their UNCLOS obligations of conservation and cooperation through their conduct in regional fisheries management organizations.

UNCLOS sets out an overarching constitution of rights and obligations to properly govern the use of the oceans for the benefit of all States. Those obligations are fundamental. They are not overridden or diluted, let alone removed, by the existence of regional fisheries management organizations. They cannot be hidden from, and indeed they provide the standard by which a party's conduct within such an organization can be held to account.

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Those binding obligations reflect the fact that coastal States such as Australia and New Zealand have a particular interest in the seas that surround them and in the living resources of those seas. That fundamental concept was recognized by the Conference for the Law of the Sea and is enshrined in the Convention it produced. Equally fundamental is the concept that other States seeking to use those resources must cooperate with coastal States in order to achieve the objective of conservation.

Mr President, the case before you today puts those concepts to the test. It is critical for the continuing effectiveness of UNCLOS; it is critical in defining the powers of this Tribunal, and it is critical as a precedent for the management of marine living resources, particularly highly migratory fish stocks.

Japan has tried to divert you, Mr President, from the importance of this case. It has tried to say that the real issue here is not Japan's behaviour, but the behaviour of others. It alleges that the catch of third parties provides a justification for Japan's actions. Mr President, we agree with Japan that the increasing catch of non-parties is of serious concern, and have consistently said so within the SBT Commission. We do not agree that the appropriate response to third party catch is for a member of the SBT Commission to step outside that body and unilaterally take more fish. It is no solution to the increasing catches by non-parties for a member of the Commission to increase its own catch. Indeed, it only aggravates the situation.

Japan has also tried to say that their actions pose no problem because they can pay back their catch in future years. But their concept of payback presupposes that there will be stock to pay back from. The scientific evidence you have heard, Mr President, is that the SBT stock is at historically low levels and there is no clear evidence that it is increasing. By the time that Japan applies its own test to unilaterally determine whether it should reduce its quota through payback, it may well be too late. In such a situation, the need for precaution is self-evident.

The fishing that occurs now carries with it a risk of consequences that may be irreversible. Urgency does not require that we show that those consequences will occur immediately. It is enough to show that the risk is being created now.

Mr President, the essential concern that underlay the Applicants' decision to initiate these proceedings is that the unilateral action Japan is taking is putting in jeopardy a very important highly migratory stock that is already in a seriously depleted state. It is the considered view of the Applicants that the risks and consequences associated with this unilateral action are such that this Tribunal must intervene. To fail to do so would, we believe, have serious implications not only for this species but also for the future effectiveness of the UNCLOS principles relating to the conservation and optimum utilization of high seas fisheries in general. It would send a very bad message to States contemplating unilateral action with respect to a depleted high seas stock.

We consider that it is vital that this Tribunal issues orders stopping the EFP forthwith and preventing any further unilateral experimental fishing above the last agreed TAC until the legality of such a programme has been decided on the merits.

Japan argues that any delay or interruption of the EFP would reduce the usefulness of the data to be derived from it. We have explained why we seriously doubt the scientific value of that data under the EFP as presently designed. What we can agree is that this issue should be resolved as quickly as possible. No purpose is served by prolonging the resolution of this dispute. That is in the interests neither of our respective bilateral relationships with Japan, the effectiveness of the 1993 Convention and its Commission, nor of the SBT stock itself.

Given that Japan has indicated that it will raise a preliminary objection to the jurisdiction of the Annex VII tribunal, it is inevitable that the proceedings will extend well

into next year and beyond the point at which their next experimental fishing programme is planned to begin.

Accordingly, we would be willing to agree to an expedited process to reach a final decision on the case. Certainly an early decision on the merits would be assisted by an agreement to address questions of jurisdiction and merits in a single hearing, with a view to a finding by no later than May of next year.

For our part, we are flexible as to the best means of achieving that outcome. Given its stature, its permanent standing and the fact that it is already apprised of the issues involved, we would, for example, agree that this Tribunal should determine the matters at issue. Whatever procedure is used, time is of the essence. It is important that the dispute is settled authoritatively, but, given the exhaustive efforts made to date, it is even more important that it is settled quickly.

In closing, let me leave the Tribunal with the following points:

1. The Applicants as coastal States have a critical interest in the conservation and optimum utilization of Southern Bluefin Tuna migrating through their exclusive economic zones;
2. We have not come to this Tribunal lightly – far from it;
3. We have made reasonable and indeed exhaustive efforts to resolve this dispute;
4. The questions raised by the dispute are not technical scientific ones – this is not a case of asking this Tribunal to do that which is properly done by scientists;
5. The issue at the heart of this case is the unilateral decision by Japan to increase its catch and its intention to continue to do so next year and the year after;
6. The issue is not third party catch – further unilateral catch by Japan only serves to aggravate the situation;
7. The dispute relates directly to the content and meaning of the UNCLOS obligations of conservation of and cooperation over marine living resources;
8. There is a real urgency which requires immediate action – the fishing which is occurring now has consequences that may be irreversible and that are, in any event, serious;
9. This Tribunal has clear jurisdiction in this case and the circumstances require its exercise.

Mr President, with your permission, I turn now to the formal reading of the provisional measures requested by the Applicants.

On the basis of their written and oral submissions, Australia and New Zealand request that the Tribunal prescribe the following provisional measures:

1. that Japan immediately cease unilateral experimental fishing for SBT;
2. that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna, subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
3. that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
4. that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
5. that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render.

Thank you, Mr President.

The President:

Thank you, Mr Caughley. That brings us to the end of the submissions on behalf of Australia and New Zealand. In accordance with the previous agreement, the sitting will be suspended

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for half an hour. We will perhaps have a little more time. We will resume at 11.30, at which point the submissions of Japan will be made. The sitting is suspended.

The Tribunal adjourned at 10.53 a.m.

The President:

May I now invite Ambassador Togo to commence the submissions on behalf of Japan?

Reply of Japan

STATEMENT OF MR TOGO
AGENT OF JAPAN

Mr Togo:

Mr President, honourable Judges, our delegation would like to proceed this morning in the following order: First, Professor Ando will take the floor and discuss the legal aspects concerning the question of irreparable damage and other issues, developing the points that we advanced yesterday. Mr Greig will then take the floor and deal with the factual aspects, particularly taking into account the points advanced by the Applicants this morning. As for the complete factual data that you have this morning asked us to supply, we will certainly submit them in writing by the end of today. Finally, I would like to come back to the floor to present the concluding remarks and the final submission of my Government.

Before I give the floor to Professor Ando, I would like to touch on one point made by Mr Crawford this morning. If I remember it correctly, he said "Mr Greig refused the Applicants' right to cross-examine witnesses". Certainly I come from a different legal background, but that statement was surprising. It is my clear understanding that nobody in my delegation intended or acted to deprive the Applicants of the opportunity to question Dr Butterworth. Indeed, as Mr Greig will explain, it was the Applicants' own choice not to call Dr Butterworth. Mr President, I would now like to give the floor to Professor Ando.

The President:

Thank you.

STATEMENT OF MR ANDO
COUNSEL OF JAPAN

Mr Ando:

Mr President, honourable Judges, it is a great honour to have a second opportunity to speak to you and try to elaborate the Japanese legal arguments in some respects.

I will limit myself to three points: first, the jurisdictional issue; secondly, some additional remarks on the question of urgency and irreparable damage as a precondition to the granting of provisional measures; and finally, the importance of this particular case before you and your response to it.

Let me begin with the first point. Nowhere in our oral representation nor in our written submissions has Japan said that we are not bound by the provisions of the United Nations Law of the Sea Convention. On the contrary, Japan has observed and will continue to observe its obligations under the Law of the Sea Convention to the maximum extent possible.

In this particular case, the gist of the Japanese argument is as follows: In order for Applicants to address the substantive issue of Japanese rights and obligations under the Law of the Sea Convention, the procedural requirements set out in the same Convention must be fully complied with. I will not repeat it, but in the Japanese eyes, since the preconditions for the constitution of an Annex VII tribunal have not been met, this Tribunal lacks the authority to grant the provisional measures as requested by Applicants. That is a core issue as far as the law is concerned. Of course, our basic stand is that the dispute (if any) is about the difference of appreciation of scientific data, which I hope has been clearly demonstrated by Mr Greig. He will again speak after me.

My last remark about the jurisdictional issue is that I have not heard this morning any refutation from Applicants about the point that I raised yesterday concerning the issue of jurisdiction. There was a general reference to Japanese obligations under the Law of the Sea Convention, articles 64 and 116 to 119, but nothing on jurisdictional issues. Personally, I take it that that is an admission by Applicants of our argument on the jurisdictional points.

I now come to the second point, that is the issue of irreparability and urgency, provided for under article 290 of UNCLOS, as a precondition for the granting of provisional measures.

Applicants questioned the time span of the urgency; that is, the effect of Japanese EFP on the future status of SBT stock, which, as they pointed out, takes several years, maybe 20 or 30 years. In order to support their argument, they touched on the Order of the International Court of Justice in the case of *Nuclear Tests* in the Pacific.

Mr President and honourable Judges, Japan is a country which experienced the dropping of an atomic bomb at the end of the Second World War. While my relatives suffered no victims from that bombing, a number of Japanese are not in the same position as I am. If it comes to a question of nuclear tests, I know radioactive fallout can cause death or at least irreparable harm to the health of human beings. Applicants are quite right to point out that it is the very nature of the act which causes imminent threat that justifies provisional measures. The fact that the effect comes years later does not matter. I must point out that human beings, their lives and health, are at issue the moment you blast a nuclear bomb.

I remember the case of *Happy Dragon*, which was a fishing vessel – of course, as I have already pointed out, the Japanese have to eat lots of fish – fishing outside the US warning area and yet, when radioactive fallout came down and hit him, the Master of the ship died after a few weeks. This example, therefore, of the atomic test case cannot easily be applied to the case of the status of the SBT stock. I am not a scientist so I cannot tell you for certain, Mr President and honourable Judges, about the effect of Japanese EFP many years later with regard to the situation of SBT stock. That will be covered by Mr Greig. But I must

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point out that the case of the order for a nuclear test ban cannot easily be applied to that of fish stocks.

Yesterday I did not say that precautionary approach has no place at all. I said that that may be relevant in the case of the construction of a dam which may cause irreparable damage in the near future to the lives of human beings or their way of living. I said that when it applied to the question of fish stock different considerations need to be applied. That was my exact statement if my memory is correct. I do hope you will take my stand as I stated it.

Finally, as to the importance of this Tribunal's handling of the instant case. I understand that many of your august Judges participated in the drafting process of the United Nations Convention on the Law of the Sea. Therefore I am certain that you are aware that it is a product of many years – ten years – of negotiations and compromises between “long distance” fishing States and coastal States. As I pointed out yesterday, that is one of the very reasons why those articles cited by the Applicant (article 64 and articles 116 to 119) are general in their content and we must study the UN Convention against that background; that is, as far as the question of conservation and utilization of fish stock is concerned, the Convention should be regarded as the general framework under which many particular region-by-region or species-by-species agreements or treaties regulate and decide the concrete contents of obligations and corresponding rights of the particular State concerned. In interpreting and applying those provisions of UNCLOS, with respect to the issue of conservation and optimal utilization of fish stock, this background has to be taken into account. In other words, were your decision under article 290 to be regarded as a case of loose interpretation and application of the granting of provisional measures, I am afraid that there might be some negative response from the international community. I say this not for the sake of the current interest of the Japanese Government and people in this particular case but for the sake of sound development and rooting down of this particular Convention in the international community which requires your prudent and wise decision. A reasonable balance between substantive provisions and procedural safeguards of UNCLOS should be one of the points to be taken into account in your final decision in the current case.

I repeat my very high esteem for the role and reputation of this Tribunal, which it should deserve for a long time to come. Thank you, Mr President and honourable Judges.

The President:

Thank you very much, Professor Ando.

STATEMENT OF MR GREIG
COUNSEL OF JAPAN

Mr Greig:

Mr President, honourable Judges, thank you for permitting me to offer a few concluding remarks respecting the factual issues that are before you. In doing so, I draw on the remarks of Professor Ando concerning Applicants' legal arguments.

In a telling indication of the weakness of their factual case, Applicants dilute the legal standards for awarding provisional relief so as to make them unrecognizable. Forced to admit that they cannot even come close to satisfying the true requirements for provisional measures, Applicants progressively lower the bar in the vain hope of satisfying even such unprecedented lower standards nowhere recognized in the annals of international jurisprudence.

Applicants argue that all they need to show is that "their claimed rights are not manifestly incapable of existing in law" or "are not manifestly unfounded" (transcript 18 August afternoon, 25/24, 29/21). Under such a standard Applicants can claim whatever they wish and, as long as they are not absolutely wrong, they contend they are entitled to provisional measures. That is not the law.

As to the showing of future damages that they must make to warrant the extraordinary intervention of provisional measures, again Applicants lower the bar. According to Applicants, all that they need show is a non-frivolous legal claim as to which a reasonable and plausible view of the state of affairs does not permit one to exclude all worst case scenarios (18 August afternoon, 19/12).

Contrary to Applicants' assertion, an inability to exclude worst case scenarios does not warrant the extreme remedy of provisional measures. Were Applicants' standards to prevail, provisional measures would become the norm, not the exceptional remedy it is universally understood to be in international law.

In addressing the factual arguments Applicants have put forward, first, we stand behind every aspect of the detailed factual presentation that I made yesterday. Many of the statements relied on in that presentation were direct quotations from the independent scientists, the record in this case or statements made by our esteemed opponents in the course of these proceedings.

In addition, we presented a number of maps, charts, tables and graphs. For those which are not self-authenticating, we submitted earlier this morning an appendix listing the references which provide the data and other bases for the information presented on your screens yesterday.

My learned opponent challenged the statement I made yesterday that Australia unilaterally refuses to provide CPUE data necessary to contribute to scientific stock assessment projections. He made that challenge by saying that Australia provides catch data, i.e. tonnage and number of SBT caught per year. What Australia refuses to provide is the effort and location of their commercial fishing, which is the information necessary to make the catch data scientifically useful.

My opponent also places considerable emphasis on Japan's failure to present the five scientists who have submitted statements in support of Japan's position for cross-examination. If we were in a full arbitral procedure on the merits, of course we would have called Dr Butterworth to testify. He would have explained the right-to-left chart that my opponent has used repeatedly. My opponent has implied that this represents Hilborn, Butterworth and Ianelli's own assessment of the status of the stock. It simply does not. The front page of the document referenced states clearly "draft incomplete" and an associated note on this page makes clear that it was presented primarily to bring certain methodological issues to the

attention of the Peer Review Panel. As Dr Butterworth's declaration makes clear, it is a misuse of this document to treat it as a stock assessment projection at all. Indeed, if this were proceeding on the merits where days or weeks, rather than four hours, of time would be allotted to Japan's presentation, I am sure that the Tribunal itself would want to call one or more of the independent scientists to provide their independent perspective on the scientific issues vital to this matter.

In any event, the decision not to cross-examine Dr Butterworth was the Applicants' and Applicants' alone. Dr Butterworth submitted his direct testimony in this abbreviated procedure by declaration, as the Rules of this Tribunal permit. The Rules, specifically article 78, permitted my opponent to call Dr Butterworth for cross-examination during their direct presentation, if they had so chosen. Australia unilaterally decided not to do so.

Finally, my learned opponent asserted as a matter of scientific fact that southern bluefin tuna do not spawn before the age of 12. I frankly do not know how he collected this information. I rely on the fact that the Scientific Committee has consistently used age 8 as the age of maturity, as New Zealand has acknowledged in its Request. I further rely on Dr Beddington's testimony at page 9, lines 35-36, that southern bluefin tuna become sexually mature at age 8 to 10.

I also continue to rely on the statement of the independent scientists concerning the proper approach to the age of maturity:

For credibility and transparency reasons it is desirable to maintain consistency from one assessment to the other, and that changes are incorporated gradually.

The Applicants have switched from age 8 to age 12 as the age of maturity in preparing stock assessment projections given to the Tribunal for this proceeding. My charge that this constitutes a statistical sleight of hand stands.

To further address the Applicants' factual arguments, it suffices largely to reflect on the agreements reached during the dispute resolution concerning this very dispute, including especially the role of the independent scientists, a subject that the Applicants have studiously ignored until this morning.

In December 1998 the parties met to address the question of experimental fishing. They agreed to establish an Experimental Fishing Working Group to develop a joint experimental programme to be conducted in the summer of 1999. The Working Group was to develop its proposals for the Commission's approval by April 1999. Moreover, they agreed to continue the practice of inviting jointly and by mutual consent independent expert scientists to help the parties reach a consensus and, absent consensus, to play an adjudicating role.

The Applicants have chosen to dispute that role only this morning, although it was spelled out in Japan's written response. Now that the Applicants have raised the issue, please allow me to take the time of this Tribunal, because it is a vital issue, to go through the matter in a bit of detail.

First, I want to quote from the Working Group:

The group of independent scientists, the membership of which will be decided by the parties, will play the same role as the scientists of the parties in the development of a future joint EFP. If a consensus between the parties cannot be reached in the Working Group in the course of development of the future joint EFP the parties may invite the independent scientists to play an adjudicating role in completing the Working Group's advice to the Commission.

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The parties then reaffirmed this role when they prepared the formal terms of reference for the EFP Working Group. Again, I quote:

The group of independent scientists, the membership of which will be decided by the parties, will play the same role as the scientists of the parties in the development of the future joint EFP. If a consensus between the parties cannot be reached in the Working Group in the course of development of the future joint EFP, the parties may invite the independent scientists to play an adjudicating role in completing the Working Group's advice to the Commission.

The Applicants' proffered expert witness, Dr Beddington, conceded the qualifications of the experts selected by the Commission to perform this role, and conceded that he had not been selected for that role. He had done none of the things that the independent experts had done to perform their role, and did none of the things he has done in the past when he has provided expert advice, even to a national delegation. For example, he did not attend any of the Working Group sessions. Indeed, he testified that he had not even read the reports of those sessions well enough to be able to comment knowledgeably on them. He acknowledged that the independent scientists had made efforts to bring the parties to a consensus, and had offered proposed solutions where the parties did not reach their own agreements.

What shall we make of these concessions and of Australia and New Zealand's studied silence until this morning? It is clear that the parties by their own solemn pledges, which I have just quoted, provided the means to solve the problems with which Australia and New Zealand now seek to burden this Tribunal. Instead of accepting the proposed solutions of the independent scientists, as Japan was and is willing to do, Australia and New Zealand ran to this Tribunal, apparently afraid that truly independent and scientific review might reach conclusions different from those that they have advanced here. Rather than accept the possibility of peaceful resolution by scientific means, they resorted to litigation.

The independent scientists have made their own submission to this Tribunal. They did so, in their own words, out of a sense of moral obligation to provide "a nationally unbiased scientific viewpoint". That fact alone speaks volumes. Moreover, while I acknowledge that their submission is written diplomatically, in the context of these proceedings its meaning is patent.

Let us take, for example, the contention from Wednesday by Mr Crawford, who, of course, is not a scientist:

Japan in its EFP focuses on only one matter, that is the density of fish in unfished areas. But that is only one aspect of one uncertainty in stock assessment projections. There are others which are important and which cause much more of the difference between our projections and those of Japan.

Let us see what the Panel statement says on this same subject:

The choice of a catch per unit of effort series to calibrate the VPA is one of the major sources of uncertainty and a main reason for the lack of agreement on recent stock size.

Mr Crawford belittles what the scientists engaged by the Commission, with the consent and approval of his clients, say was the most important source of uncertainty and the main reason for the lack of agreement between the parties.

Next Mr Crawford tried mightily to persuade you that Japan's EFP is not needed and of little scientific merit, on the theory that it is unnecessary to resolve the constant squares versus variable squares issues, and that the 1998 pilot programme did not sufficiently do so. I am leaving out the citations to the transcript.

What does the expert Panel say on this subject?

We therefore see a strong need to gather additional information on the fishing grounds because existing data are insufficient to unambiguously resolve the difference in points of view. If future stock assessments are to use data and methodologies similar to what has been used in the past, i.e. sequential analysis calibrated with indices of stock size, a fishing component has generally outlined in the agreed records of discussions of the Working Group appears satisfactory in terms of statistical design and practical considerations for purposes of reducing the uncertainties with respect to the variable squares versus constant squares hypothesis.

In contrast to Mr Crawford, the experts see a strong need for an EFP directed precisely to resolving the constant squares versus variable squares uncertainty.

Mr Crawford again urged this morning that geo-statistical models be considered, but the Peer Review Panel report, which it accepts as having been commissioned by the Commission, said that:

It is clear that approaches reduce to 2 with habitat and variable squares, on the one hand, producing virtually identical trends and that geo-statistical and constant squares also showing virtually identical relevant trends.

The SAG should therefore reduce to two options, one of them being the variable squares/constant squares. As we have just seen, they agreed that resolving the difference between variable squares and constant squares is a key.

Mr Crawford also attacked the current programme as not satisfying the 1996 criteria for an EFP, simply invited the Tribunal to read the 1996 criteria. I also simply invite the Tribunal to read the 1996 criteria and decide for yourselves. I will agree, as I did yesterday, that one element of the 1996 criteria, that of consensus, has not been met, but I am not aware of any other specific objection levelled by Australia and New Zealand against the 1999 EFP based on the 1996 criteria. Here too Australia and New Zealand seek to fight the last war, rather than forge the peace which the parties have provided for. What relevance do matters years ago have to a request for provisional measures today?

Much ground has been covered since the 1996 criteria were set, most importantly the parties' agreement in connection with this very dispute to engage the independent experts to try to facilitate a consensus and to defer to them should a consensus not emerge. On that score the Panel's reference to "a fishing component as generally outlined in the agreed report of discussions of the Working Group 1 – 4" is significant. The Working Group 1 – 4 refers to the four formal sessions among the parties during February to April of this year, in which there was a substantial consensus on the critical elements of an experimental programme. Australia and New Zealand have made no effort to show that the current EFP is deficient as compared to those agreed criteria. Japan firmly believes that it has satisfied the criteria to which the Panel refers, and we believe that the panel of independent scientists would have

STATEMENT OF MR GREIG

told the Tribunal if they felt otherwise. We are more than satisfied to refer that question to that scientific panel for resolution.

Mr Crawford's last endeavour was an exercise in chasing the proverbial red herring, in which he plumbed the depths of a set of tentative comments of Dr Serge Garcia, based on hand-written notes on an early draft of the plan for the 1998 pilot programme. The significance of the exchange of views with Dr Garcia is that it was in fact an exchange of views. The Garcia letter was received by Japan more than one month before the 1998 pilot programme, not five days before, as he now says.

Japan was more than willing to expose its proposal to scientific criticism. It sought out Dr Garcia's views which were given to them, albeit in highly tentative form.

What our opponents ignore is that in Appendix 16 there is a point by point response to Dr Garcia from one of Japan's senior scientists, Dr Suzuki. In respect of Japan's true motivations in developing the EFP, I would commend to the Tribunal's attention numbered paragraph 4 of Dr Suzuki's response, which is as follows:

Most important aspect is not necessarily the increases in catches, but to know the real trend of future spawning stock. If the programme result shows need to reduce TAC, which we do not think, then it still provides us very important information in management decision making, and we are ready to reduce TAC. Benefit is far bigger than cost if the present stalemate over the stock assessment is resolved through this project, through the EFP.

Dr Garcia was satisfied with this response and did not communicate further.

For reasons that are not clear, Australia and New Zealand's advocates here are not satisfied, and wish to start the debate over a programme that was not actually conducted. The draft to which Dr Garcia made comments was just that – a draft. Significant changes were made thereafter in the pilot programme, some of which were outlined in Dr Suzuki's response. It is also worth noting that 1998 was a pilot programme to work out some of the feasibility and other issues addressed in the exchange of views with Dr Garcia. Thus more changes were made before the full-scale programme was implemented this year, most importantly changes agreed by the parties in the context of the experimental fishing working group. In other words, things agreed upon by all the parties present before you.

What should the Tribunal make of the failure of Australia and New Zealand to deal until today with the Panel's Statement – the Panel of Independent Scientists? It is clear that that is the most important issue in this case. First, the Tribunal should use it to gauge the credibility of every factual assertion that the Applicants have made. Importantly, the Tribunal should use it as a gauge of Applicants' claims of urgency and injury. Even if, as Mr Crawford suggests, the Tribunal need not resolve the scientific issues, it needs to have some view of them, and the view presented by the Panel's Statement, the only completely independent and expert information before the Tribunal, shows that there is no basis for urgent action.

Second, Applicants' omission highlights in several ways the non-justiciable character of this case. The Applicants complain of what they call over-fishing, to the extent that the experimental catch in 1998 and 1999 might exceed Japan's national allocation for 1997, the last which was agreed upon by the parties. As Professor Ando detailed at length yesterday, it is clear that those issues arise under the 1993 Convention, not UNCLOS.

The further point to make here is that the parties have provided for resolution of the issues through the dispute resolution under the 1993 Convention to culminate in referral to the independent scientists. But even assuming that there is a dispute under UNCLOS, the failure of Applicants to complete the dispute resolution mechanism they agreed to, the

referral to independent scientists, deprives this Tribunal of jurisdiction under Part XV, 2. As we discussed in our written submission, and as Professor Ando explored yesterday afternoon, as a condition to invoking the jurisdiction of article 288, paragraph 1, Australia and New Zealand must demonstrate that they have fully exhausted opportunities for amicable dispute resolution procedures under Section 1 of Part XV. The intent of Section 1 is to discourage parties from precipitously invoking the 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.

In this instance, in the very dispute resolution procedures Applicants assert were undertaken under UNCLOS as well as the 1993 Convention, the parties provided for an adjudicative role for the independent scientists, should the parties themselves be unable to reach a consensus under the experimental fishing programme. Although the precise circumstances and procedures under which the panel of independent experts would perform an adjudicative role are not spelt out, it is clear in context that the parties intended to implement the Panel's 1998 recommendation that the scientific process be depoliticized by continuing use of neutral experts, who in the absence of a consensus "would provide the advice to the Commission." Applicants' utter failure to exhaust this procedure precludes the exercise of jurisdiction by the Tribunal under Part XV Section 2.

Now, if the Tribunal follows the reasoning I have just outlined, it need not decide or even predict whether this is a dispute under UNCLOS or whether an arbitral tribunal under Annex VII might eventually take jurisdiction of this matter. It is sufficient that the Tribunal conclude that there are available means for dispute resolution to which Applicants agreed, and which have not been exhausted, so as to preclude the imposition of provisional relief. The Tribunal would then revert the parties to that other agreed means.

Following this course would serve to strengthen and support the purposes and goals of the 1993 Convention. It would lead to scientific resolution of the issues relating to EFP, which in turn should permit more rational determinations of the TAC and country allocations, and restore to the CCSBT the consensual element that is central to its functioning.

This in turn would provide the basis for non-parties to become parties, or to coordinate with parties, which is essential if the long-term management goals of the Convention are to be reached. As Professor Ando eloquently advanced yesterday, this would serve the purposes of UNCLOS as well.

A third point to be made about Applicants' reticence regarding the independent scientists is its bearing on their request for provisional relief, specifically the incredible hypocrisy they displayed to this Tribunal. As everyone well knows, Applicants seek to stop Japan's experimental fishing programme, and indeed to stop commercial fishing by the Japanese fleet for the rest of the year. Notwithstanding the effect their proposal would have on science, Applicants suggest that all they seek to do is to preserve the status quo. They complain, however, that granting Japan's conditional counter-relief, which after all would only require negotiations followed by, if necessary, referral to independent scientists, is devastatingly unfair to them, for in the words of Mr Burmester it would "impose a requirement on Australia and New Zealand in particular to negotiate over the issues in dispute in a rigid, fixed time period with a predetermined outcome if there is no agreement." Notwithstanding that Australia and New Zealand had agreed, not once, but twice, to engage in such negotiations and to the result of referral to independent scientists, Mr Burmester complained "this is not to preserve the rights of the parties, it is to impose a particular course of conduct on two of the three parties, which is inconsistent with good faith negotiations." That is his complaint. From the parties that not only refuse to negotiate, but refuse mediation or even binding arbitration unless Japan agreed in advance to abandon its experimental

STATEMENT OF MR GREIG

fishing programme, and to conclude in the case of mediation by August 31, 1999, this is not worthy of further comment or any consideration by the Tribunal.

I note, moreover, that the result can be considered “predetermined” only if, as we contend, there is no merit to the objections Australia and New Zealand have raised with respect to the operation of the experimental fishing programme.

Mr Burmester's final comment – that the future role of scientists may be one for negotiation but it is not something to be predetermined by this Tribunal – is unfathomable, considering that the Applicants have twice agreed to this future role of scientists.

I turn then to where I started. Applicants' failure to address realistically the independent scientists' views and role, even after we placed their views and their function in front and centre in our written submission, should cause the Tribunal to question the credibility of everything else Applicants have said and done. It should cause the Tribunal to question why this matter is before it at all, and I dare say it should leave the Tribunal to consider further the behaviour of the parties in bringing it here.

Australia has a history of shifting goal posts in the record of this matter. Rather than permit true scientific dialogue to proceed focussing on reasonable alternative assessments, Australia has developed a form of scientific game to see how conservative a hypothesis can be developed, which remains consistent with existing data. Applicants demand that Japanese proposals reflect low risk, even under the most extreme hypothesis imaginable. Any type of EFP which is not ideally suited to address each of these hypotheses is, in Applicants' view, hopelessly flawed. Applicants' approach to science seems to mirror their approach to devising a revolutionary legal standard for provisional relief. Indeed, only with a legal standard turning on an inability to exclude all worst case scenarios does their extreme form of science become relevant. But even they reject, though apparently only in one-sided fashion, their expert Dr Beddington's recommendation that all parties reduce their catch.

This approach has infected their negotiating stance and, unfortunately, their approach to this case. In that regard, I cannot help but observe the following. On Wednesday during the opening portion of the oral proceedings Mr Williams, Australia's Attorney-General, appeared and complained to the Tribunal that Australia's good faith had been called into question. He then deferred to Australia's Agent, Mr Campbell, who proceeded to question Japan's good faith by alleging time and again that Japan's interest in scientific fishing was a disguise for naked commercial gain. I am deeply troubled, however, as I imagine the Tribunal might be, that Mr Williams did not remain here even to listen to Japan's response, not even to the passionate and persuasive opening remarks of its Agent, Mr Togo, but instead left to tell the press of his confidence that the Tribunal will accept that Japan is in breach of its obligations and in doing so should be called to account before the final hearing is conducted.

In measuring the realism, consistency and validity of Australia's approach, a rhetorical question can be posed: What if their extreme legal standards and extreme scientific projections were applied to Australia's domestic fisheries?

Mr Togo will now present the final submissions on behalf of the Government of Japan. Before turning to him, may I simply reiterate how deeply honoured I have been to appear before this august Tribunal, and may I quote the remark made by Mr Togo yesterday – “may justice and wisdom prevail”. Thank you.

The President:

Thank you, Mr Greig.

STATEMENT OF MR TOGO
AGENT OF JAPAN

Mr Togo:

Mr President, honourable Judges, now that we have reached the closing part of the hearing of this historic proceeding, before presenting the final submission of my country as scheduled, I would like to offer my closing remarks.

Honourable Judges, as I mentioned in the concluding part of my statement yesterday, Japan came to this Tribunal with a maximum willingness to cooperate. However, I think there is no secrecy in admitting that the preceding weeks of this Tribunal were not easy ones for us. The time pressure that we had to overcome in preparing detailed submissions on both science and law was quite heavy. It was also such a novelty for us to compose just a few weeks ago a unique team of Government officials, academicians of international law and lawyers from New York and to start tackling those huge mountains of work which then lay ahead of us.

Now that we have gone through these weeks of such challenging work, it is my strong impression that there has been one element which has guided and united us all, until today, to this Tribunal. That element is the determination, shared by us all, that Japan has a clear message to present to this most distinguished Tribunal of the United Nations Convention for the Law on the Sea. Thus, this Tribunal might provide such a unique opportunity for us to elucidate that message.

Mr President, honourable Judges, thanks to your wise guidance you have given to us in the course of the past three days' deliberation now nearing its end. I am gratified to tell you that the fundamental points we absolutely wanted to present are well on the table for your consideration.

The gist of those points is as follows: First, Japan has throughout the course of these decades undertaken most sincere efforts to realize the important objective of conservation and optimum utilization of SBT.

Secondly, it is of paramount importance for the three countries of the 1993 Convention to regain the proper functioning of that Convention and to re-establish total allowable catch of SBT within that Convention, so as to embrace into the cooperative framework of that Convention the non-parties which are rapidly expanding their SBT catch.

Thirdly, the experimental fishing programme proposed by Japan, based on the best possible scientific data available, including those coming from independent scientists as necessary, is the most reliable basis for reaching a consensus towards this end.

Fourthly, Japan is ready to communicate and negotiate in good faith with our Australian and New Zealand colleagues towards that end.

Finally, the 1993 Convention is the sole legal framework within which current differences between our three countries may and should be resolved. By forcing their way and resorting to the Annex VII arbitral tribunal of UNCLOS and applying the case to this Tribunal seeking provisional measures, the Applicants brought the issue to a forum in which, in our respectful submission, it does not belong.

Mr President, in this connection, with your permission, let me address Mr William Campbell, the Agent of Australia, and Mr Timothy Bruce Caughley, the Agent of New Zealand. In the circumstances that have forced all three of us together, acting as Agents of each country, our discussions at times might have sounded a little thorny or polemical. However, I am sure that we are all well aware that lawyers' polemics have much smaller elements of real divergence than they actually seem or sound to have. We are also convinced, as Mr Williams stated and as I echoed wholeheartedly – and as was confirmed by Mr Caughley this morning – that the multifaceted and strong relationships which exist between the three countries constitute the basis of those "lively" discussions.

STATEMENT OF MR TOGO

In shortly parting from you in this Tribunal, I would like to express most sincerely to both of you our hope that, in some way or another, our three countries can find a way to overcome today's difference and that, through dialogue, communication and an improved understanding, we may resume the cooperative relationship which has so powerfully existed in the course of the decades to come, for the important objective of conservation and optimum utilization of SBT.

Mr President, honourable Judges, with this plea, I would like to leave the case to the best and wisest consideration of the court. I would like to express our sincere thanks and appreciation for the attention and care that you have given to us during the course of the past three days and which you will give in the course of the week to come.

Mr President, let me now conclude my statement by presenting the final submission of Japan. In doing so, let me state that all the objections that I have made to the provisional measures, which we dealt with at length yesterday, are still valid. On behalf of the Government of Japan, in accordance with article 75, paragraph 2, of the Rules of the Tribunal, let me present the final submission as follows:

First, the request of Australia and New Zealand for the prescription of provisional measures should be denied.

Secondly, despite all the submissions made by Japan, in the event that the Tribunal were to determine that this matter is properly before it, that an Annex VII tribunal would have *prima facie* jurisdiction and that it could and should prescribe provisional measures, then, pursuant to ITLOS Rules article 89, paragraph 5, the International Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith should recommence negotiations with Japan for a period of six months in order to reach a consensus on the outstanding issues between them, including a protocol for a continued experimental fishing programme and the determination of a total allowable catch and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements should, consistent with the parties' December 1998 and subsequent Terms of Reference to the EFP Working Group, be referred to the panel of independent scientists for their resolution, should the parties not reach a consensus within six months following the resumption of these negotiations.

Mr President, that concludes all the submissions by the Government of Japan in this proceeding. I thank you very much.

Closure of the Oral Proceedings

The President:

I thank the Agent of Japan.

That brings us to the end of the oral proceedings in the *Southern Bluefin Tuna Cases*, Requests for provisional measures.

I should like to take this opportunity to thank the Agents, Counsel and Advisers of both parties for the excellent presentations that they have made to the Tribunal over the past three days. In particular, the Tribunal appreciates the professional competence and personal courtesies that have been exhibited so consistently by Agents and Counsel on both sides. We have greatly benefited from your expertise, and we thank both sides for the very kind words that you have addressed to the Tribunal.

The Registrar will now address questions in relation to documentation.

The Registrar:

Mr President, in conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts of their presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible, but in any case not later than the end of Tuesday, 24 August 1999.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, they will be provided with a list of the documents concerned. Thank you, Mr President.

The President:

The Tribunal will now withdraw to deliberate on the case and make a decision. The Order will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Order. That date is 27 August 1999. I repeat that it is a tentative date. The Agents will be informed reasonably in advance if there is any change to this schedule, either by way of advancing the date or by way of postponement. In accordance with the usual practice, I request the Agents kindly to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberation of the case prior to the delivery of the Order.

The sitting is now closed.

The Tribunal rose at 12.55 p.m.

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques des *Affaires du thon à nageoire bleue (Nouvelle-Zélande c. Japon; Australie c. Japon), mesures conservatoires*.

Le 11 novembre 2004
11 November 2004

Signé/Signed

Le Président
L. Dolliver M. Nelson
President

Signé/Signed

Le Greffier
Philippe Gautier
Registrar