

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



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Public sitting
held on Friday, 20 August 1999, at 9.30 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Thomas A. Mensah presiding

Southern Bluefin Tuna Cases

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

(Requests for provisional measures)

Verbatim Record

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

Australia represented by:

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

as Agent and Counsel;

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

as Counsel;

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

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

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

Mr Paul Bolster, Adviser to the Attorney-General,

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

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

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

as Advisers.

New Zealand represented by:

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Division of the Ministry of Foreign Affairs and Trade,

as Agent and Counsel;

Mr Bill Mansfield,

as Counsel and Advocate;

Ms Elana Geddis,

as Counsel;

and

Mr Talbot Murray,

as Adviser.

Japan represented by:

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

as Agent;

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

as Co-Agents;

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

as Counsel;

and

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

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

as Advocates.

1 **THE PRESIDENT:** This is the last of the sittings for the hearings in the request for
2 provisional measures. The parties and the Tribunal have agreed that this session will
3 be devoted to the last submissions by both parties, beginning with New Zealand and
4 Australia. In accordance with the Rules, each party will, at the end of the
5 submissions, present to the Tribunal its final submissions. It is requested that these
6 submissions should be handed to the Registrar in writing at the end of the
7 presentations.

8
9 Before inviting the Agents of New Zealand and Australia to commence their
10 submissions, I would like to state to the parties that the Tribunal would be very
11 grateful if they could elaborate further on the schedule and duration of their annual
12 fishing for SBT in the framework of the 1993 CCSBT. In particular, the Tribunal
13 would like the parties to provide information on the time of the year when the fishing
14 for SBT commences, whether this time is the same for all parties or whether it varies
15 from individual party to party.

16
17 In addition, we would like some information on the length of the period in months
18 over which the parties fish for their allocated quotas. Finally, we would like to be
19 informed of the expected commencement date for the next fishing season for each of
20 the parties. We hope this information is available. We would be very pleased to have
21 it. Having said that, it is now my pleasure to invite Mr Campbell to commence the
22 submission on behalf of New Zealand and Australia.

23
24 **MR CAMPBELL:** Mr President and Members of the Tribunal, before I start,
25 Mr President, could I say that we will provide the answers from the Australia and
26 New Zealand perspective anyway for the questions you have just asked by the end
27 of today, if that is acceptable.

28
29 In this reply the Applicants will deal with a number of matters raised by Japan
30 yesterday. I will address issues related to the scope and nature of the dispute and
31 the conduct of the parties. Professor Crawford will discuss Japan's view of the
32 science, and Mr Burmester will respond briefly on the requirements for provisional
33 measures. Mr Caughley will conclude.

34
35 I will briefly mention five issues. The first is the scope of the dispute. Yesterday,
36 Japan concentrated its attention on the 1998 and 1999 EFPs as if they constituted
37 the beginning and end of the dispute. They did not. Let me make three points in
38 relation to this matter. The initial point is that the dispute over the EFP properly
39 considered is but a manifestation of more fundamental issues relating to
40 non-compliance by Japan with its UNCLOS obligations to conserve SBT as a highly
41 migratory species and to cooperate in that conservation. It is because the EFP
42 involves the taking of significant additional catch on a unilateral basis that those
43 issues of compliance with UNCLOS are brought to the fore.

44
45 Secondly, while many of the negotiations and exchanges of views were identified as
46 occurring under the 1993 Convention, that Convention merely provided a forum. It
47 did not define the nature and content of the dispute. Thirdly, from the very beginning
48 the Applicants made clear that this was a dispute with UNCLOS and customary law
49 obligations at the core. For example, in the Report of the Resumed Meeting of the
50 Commission in February 1998 "Australia noted that the CCSBT Convention,

1 UNCLOS and UNIA all demand that Commission members work together to set
2 catch levels that are sustainable”. While the 1993 Convention does provide a
3 mechanism in the form of TAC for implementing certain parts of the 1982
4 Convention, it does not seek to define or replace the fundamental principles set out
5 in UNCLOS. Those principles remain in the form of actual obligations under
6 UNCLOS with which Japan must comply.

7
8 I will now move on to EEZ jurisdiction. A number of points made by Japan yesterday,
9 either directly or indirectly, raised the fact that SBT is found within the EEZs over
10 which the Applicants exercise sovereign rights.

11
12 At the bottom of page 16 of yesterday's transcript, Mr Greig stated that before 1997
13 Australia achieved its alleged goal of maintaining the TAC at existing levels, not on
14 the basis of scientific assessments but on the basis that “it threatened to exclude
15 Japan's vessels from Australia's EEZ and from its ports unless Japan first agreed to
16 Australia's proposal for the annual TAC”. He describes this as coercion and, at page
17 31, as an example of Australian unilateralism. Again, let me make three points in
18 response to that comment.

19
20 First, the sovereign rights of Australia within its EEZ belong to Australia alone. There
21 is no right of Japan or any other country to take fish within our zone without our
22 permission. There being no right, there is no unilateralism.

23
24 Secondly, I ask the Tribunal what is the most sensible sequence. Should one
25 determine the global catch and allocations first and then decide issues of bilateral
26 access for taking all or part of an allocation? Or, should one negotiate bilateral
27 access for an amount of fish first – a process in which New Zealand would not have
28 been involved – and then decide the global TAC and quota. Clearly the latter course
29 of action puts the cart before the horse and would pre-empt a global determination of
30 the quota. Australia insisted on negotiating the global TAC first. This course of action
31 followed by Australia is neither coercion nor unilateralism – it is simple common
32 sense.

33
34 Thirdly, good science formed the basis of Australia's TAC and allocation positions –
35 not science tailored to demonstrate unsustainable increases in catches at a time
36 when all parties agreed that the “continued low abundance of SBT parental biomass
37 is cause for serious biological concern”.

38
39 Professor Ando, in his speech yesterday, referred to the well-known passage from
40 the *North Sea Continental Shelf* cases in which the International Court elaborated
41 upon the obligation on parties to engage in meaningful negotiations with a view to
42 reaching agreement. The Court held that meaningful negotiations would not take
43 place where a party “insisted upon its own position without contemplating any
44 modification of it”. It is puzzling why Japan should seek to rely upon this quote as it
45 describes perfectly its own conduct in consultations and negotiations. In particular,
46 Japan insisted on its own version of an EFP without any significant modifications.

47
48 Moreover, contrary to the facts, Japan has sought to lay the blame for the
49 supposedly dysfunctional Commission at the Applicants' feet. We are accused of

1 having driven Japan to its unilateral action by the use of what Mr Greig called a
2 "veto". Let me make one point on that matter.
3
4 If any country is exercising a veto on achieving consensus, it is Japan. When it came
5 to proposals to increase the TAC, or to the question of an experimental fishing
6 programme, it is Japan that has stood alone. Year after year it has been Australia
7 and New Zealand who, in line with the overwhelming and agreed scientific evidence
8 of the precarious state of the SBT stock, have urged the Commission to leave the
9 TAC unchanged. And it is Japan that has said "no" unilaterally, in order to leave itself
10 room to conduct its EFP above its previous quota. To speak of the Applicants as
11 having "vetoed" an increase or "vetoed" an EFP would require one to say that any
12 proposal made by one party in any consensus-based organization that is not
13 accepted has been "vetoed". That would certainly be a novel use of the word "veto".
14
15 Japan has asserted that the Applicants, in the course of the EFP Working Group
16 meetings, had considered an EFP in the range of 1,200-1,500 tonnes over and
17 above the total allowable catch.
18
19 Again, I will make three points. First, there is a vast difference between 1,200-
20 1,500 tonnes and a possible 2,400 tonnes with no cap, this being the basis of
21 Japan's current unilateral programme. Now Japan says that to have a cap on the
22 EFP would be unscientific.
23
24 Secondly, the EFP is not simply an issue of tonnage. The Applicants do not oppose
25 an EFP which is well designed, and which does not itself have the potential to cause
26 serious damage to the stock. By contrast, the current EFP is unilateral, it does not
27 meet the Commission's 1996 Objectives and Principles, it is based on a
28 fundamentally flawed experimental design and it will not provide useful information to
29 resolve uncertainties in relation to the stock assessment or projections of recovery.
30 Also, it does have the potential to cause serious damage to the stock.
31
32 Finally, the fact that the Applicants during the EFP Working Groups were willing to
33 consider a joint and properly designed EFP is indeed evidence of their good faith
34 and flexibility in the negotiating process. That was a concession by the Applicants. It
35 was Japan that was inflexible.
36
37 It is often said that the best form of defence is offence. This maxim is most suited to
38 Mr Greig's attempt to try and turn the tables on Japan's blatant unilateralism. He
39 gives nine alleged examples of Australian unilateralism in an attempt to mask
40 Japan's own unilateral conduct which is at the heart of this dispute. I have dealt with
41 some of these already – for example, that relating to the EEZ. However, let me
42 answer those which have not been dealt with already.
43
44 He asserts that Australia refuses to provide catch data; it does provide catch data.
45 Secondly, he says that Australia elects to use purse seining over long lining.
46 Australia uses both methods, including purse seining within its own EEZ. That is our
47 legitimate choice to do so.
48
49 Mr Greig also asserts unilateralism on the part of Australia because it allegedly
50 commenced fishing before quotas were set in the 1995-96 and 1996-97 seasons. He

1 also asserts that Australia set its own catch levels in 1998 and 1999. I established in
2 the first round of arguments that the inability of the Commission to establish TACs on
3 a timely basis in the seasons just mentioned was due solely to Japan's unrealistic
4 proposals to increase the TAC by as much as 6,000 tonnes and to then ask for the
5 same amount in the guise of experimental fishing. Moreover, it is not Australia or
6 New Zealand that have exceeded their previously agreed allocations. But Japan has,
7 at the very least over the past two years through its unilateral experimental fishing.
8 What the Applicants did was to say that, despite Japan's veto, they would stay within
9 TAC and national allocations in relation to fishing within their own EEZs, but this is
10 described as unilateral by Japan.

11
12 Both Mr Greig and Professor Ando referred to the Applicants unilaterally terminating
13 proceedings under the 1993 Convention. I will not repeat all that happened on
14 26 May meeting in Canberra; it was an ultimatum that was put to the Applicants. Put
15 simply, Japan said, "accept our proposal by 31 May or we will conduct a unilateral
16 EFP at an even higher level on 1 June". Yet it is now the Applicants who are
17 accused of unilateralism. The facts speak for themselves. Japan's pre-emptive
18 actions clearly terminated the dispute settlement discussions. Japan was forewarned
19 of the consequences of those pre-emptive actions but went ahead nonetheless. In
20 fact, "pre-emptive" is probably not the right word; "pre-determined" is better. Japan
21 clearly had the programme in place and the boats on the water ready and waiting to
22 commence the unilateral experimental fishing at the same time as the discussions
23 were proceeding.

24
25 Mr Greig's assertion about Australia's approach to the "independent scientists" is
26 wrong. In this respect, I ask the Tribunal to examine the record of the December
27 1998 negotiations. It makes it clear that there was no agreement on the part of the
28 Applicants to use the independent scientists in an adjudicative role. Rather, it was
29 stated that in the absence of consensus, "the parties may invite the independent
30 scientists to play an adjudicating role in contemplating the Working Group's advice to
31 the Commission", that is, the possibility of the use of independent scientists in an
32 adjudicative role was contemplated but not agreed. Furthermore, the role
33 contemplated was in finalizing advice from the Working Group to the Commission
34 and not one of deciding issues in a manner binding on the countries. There are good
35 reasons for this. You do not ask scientists to make the ultimate decisions on
36 management and resource allocation. No country does that, but Japan accuses the
37 Applicants of not doing it.

38
39 On that issue related to science, I ask you, Mr President, to call on
40 Professor Crawford, who will address the scientific issues in more detail. Thank you,
41 Mr President.

42
43 **THE PRESIDENT:** Thank you, Mr Campbell. I now call on Professor Crawford.

44
45 **MR CRAWFORD:** Mr President, Members of the Tribunal, I will be responding to
46 some of the assertions made by Mr Greig in his presentation yesterday. In the time
47 available, it is not possible to respond to them all, and we are not at the stage of the
48 merits, but I do need to show that the situation is nothing like as rosy as that which
49 he projected.

50

1 Let us recall what Mr Greig showed us yesterday: recovery to 1980 levels, in one of
2 the two bands to the left of the screen, in 2001, or at worst in 2004, with the stock
3 then leaping up to new and unrecorded heights. Does it not remind you of the series
4 of optimistic projections made for the recovery of northern cod which I showed you
5 on Wednesday? Does it not remind you of Japan's 1995 projection for SBT, which
6 predicted recovery by this year? That never happened. Now, in 1999, they predict
7 recovery for 2001, again four years in advance. We have heard that story before. Did
8 they put that projection to Professor Beddington and ask him about it? They did not.

9
10 In the graphics that Mr Greig showed you, there were those which showed Japanese
11 projections and there were those which he attributed to the Applicants. We have
12 never seen these before. They are said to use, if you see the figure in the left-hand
13 side, the C1 model. Past experience with that model tells us that it produces results
14 which are seriously at variance with the data. They are entirely different from the
15 results which we presented to the Tribunal on Wednesday. There is something about
16 the Japanese model which causes it to shoot up from a base point already higher
17 than we believe to be justified at this moment, and to shoot up in a remarkable and
18 unlikely way.

19
20 At the same time, Japan said a great deal about independent scientists, and they
21 relied on Professor Butterworth. Let us see what Professor Butterworth thinks is the
22 position. You will remember the graph that I showed from Professor Butterworth's
23 report and you will remember that the points on that graph go backwards in time, as
24 it were, from the right to the left. There is a similar graph in the Peer Review Report.
25 What does this graph show if you plot it in the same way that Japan does, that is the
26 other way round, in the normal way in which non-scientists think of graphs going
27 from the left to the right? This is that data replotted –

28
29 **THE PRESIDENT:** Professor Crawford, may I interrupt you? I am told that the
30 interpreters are finding it difficult to keep up with you.

31
32 **MR CRAWFORD:** I will slow down, sir. That graph, as well as the one that I showed
33 you a moment ago, comes from a paper written by Professor Butterworth with two
34 other scientists, Hilborn and Ianelli. You will see that it shows no upturn in parental
35 biomass, such as was indicated in Mr Greig's slides. Rather, it shows a continual
36 decline in parental biomass until 1997. Professor Butterworth says that he is
37 assuming an age of maturity of eight, so his stock curve ought to be similar to
38 Japan's, which assumes an age of maturity of eight. The two of them are quite
39 different.

40
41 In fact, the Scientific Committee has pointed out every year for the past eight years
42 that there is cause for serious biological concern as to the size of the parental stock.
43 Now Mr Greig assures us, without the benefit of new scientific assessments, that it
44 has been recovering strongly since 1995. Perhaps Mr Greig purports to be a
45 scientist?

46
47 One of the characteristics of a scientist is being fair and accurate in citing from
48 documents and sources. Mr Greig repeatedly misrepresented the position and
49 misquoted from documents. For example, he said "Australia unilaterally" – a word
50 that he seems to have got into the habit of using – "refused to provide catch data".

1 That is simply untrue. Australia has provided very complete and detailed data on its
2 catches and the size composition of those catches going back to 1951, both for the
3 long-line and surface fishery. You may have noted that Mr Greig seemed to know
4 exactly how many fish we had caught. Where did he get that information from?
5 There are many other examples, Mr President, but there is no time for them.

6
7 More significantly, let me contrast the status of the scientific advice that has been
8 presented to you. The Applicants, in addition to presenting a scientific overview by
9 Polacheck and Preece and a comment by Talbot Murray, also commissioned an
10 independent expert scientific review by Professor Beddington. I remind you that not
11 only is Professor Beddington an eminent fisheries scientist, but he is entirely
12 independent of the Applicants. He has never worked for either of them before.
13 Professor Beddington not only prepared his report, he also had to endure a peculiar
14 and wholly ineffective *voir dire*, he gave oral testimony before you in relation to his
15 report and he was cross-examined on it. Despite this cross-examination, you will
16 recall that his report was unchallenged.

17
18 In contrast, while Japan commissioned and submitted a scientific report from
19 Professor Butterworth, unfortunately we were not able to hear his oral testimony or to
20 cross-examine him on his report. That is a pity, for while we have no qualms about
21 his status as an expert, we would have liked to have asked him some questions.

22
23 I know that cross-examination of witnesses does not exist in every legal system.
24 Failure to produce a witness for cross-examination or to put your case to a witness is
25 not very significant in those systems. In common-law systems, on the other hand,
26 such as those in England, the United States and Australia and New Zealand, this is
27 very important. If you present a report from someone and then fail to call him as a
28 witness, there is a serious problem. If you get to cross-examine someone and you
29 fail to question him on your case, there is a problem. You had the opportunity to ask
30 and you did not ask. These are things which are well understood in the legal cultures
31 from which Mr Greig and I come. So we cannot plead that our legal cultures are
32 different; they are not.

33
34 Actually, Mr Greig's legal culture is more aggressive even than mine, as he showed
35 with his *voir dire*. More time was spent on the *voir dire* than was spent on the cross-
36 examination of Professor Beddington. The substance of what Professor Beddington
37 has written and said went unchallenged. We invite the Tribunal to accept the
38 evidence of Professor Beddington and the conclusions set out in his report for the
39 purpose of the present proceedings – not, of course, as a final decision on the facts
40 but as showing a sufficient basis of serious concern about the stock.

41
42 Turning now to Professor Butterworth, something that Mr Greig did not let me do, we
43 would have liked to have asked him about the unfished areas diagram, which you
44 can again see now. We would have liked to have asked him whether the vessels
45 fished "in a substantial proportion of the unfished area", as he suggested, but we
46 could not. Mr Greig would not let Professor Butterworth speak to you. Nor, for that
47 matter, could we ask Japan's other witness, Mr Komatsu. We would have liked to
48 have asked what modifications he made to the EFP in the five days between
49 receiving Dr Garcia's letter and the beginning of the EFP. And when, in 1999, did

1 Mr Komatsu allocate to Japanese boats the quotas for this year's EFP? Was it
2 before or after the Japanese ultimatum of 26 May 1999?

3
4 Turning to the unfished areas themselves, Mr Greig tried to explain this away by
5 making a distinction between the areas and the months fished. It is, however,
6 inescapable that vast areas of ocean were not covered. In fact, Japan's EFP
7 operated at the edges of unfished areas, both in space and in time.

8
9 Although Japan relies heavily on the opinion of Professor Butterworth, it makes no
10 mention of the stock assessment he did with Drs Hilborn and Ianelli.
11 Professor Butterworth refers to that assessment to support his view that Polacheck
12 and Preece substantially overstate the risks. You will recall this figure from
13 Wednesday that Professor Beddington testified about; this is Figure 6 from the
14 Butterworth report.

15
16 The last point on the curve at the bottom left hand side is the estimate for 1996.
17 What is clear is that the parental stock has continued to decline since the last point
18 on the curve in the Butterworth report and with that further decreases in recruitment
19 would be expected. Moreover, it is very worrying how low that stock is getting and
20 how far the stock has been allowed to fall below the Commission's agreed recovery
21 level.

22
23 Professor Butterworth failed to produce any longer-term projections from this stock
24 recruitment curve, even though he did use it to criticize the projections of Polacheck
25 and Preece. In fact, such projections are straightforward to produce and the results
26 of that projection are reported by Polacheck and Preece in their report. This is the
27 result of the projection. As you can see, the implication of the analysis by
28 Professor Butterworth and his co-authors is that the SBT stock will continue steadily
29 to decline under 1996 catch levels; in other words, those catch levels are not
30 sustainable. This is without taking into account the increased catches in 1998 and
31 1999 and also, apparently, in 2000 and 2001 due to the potential continuation of the
32 Japanese unilateral EFP in those years. Thus, the assessment provided by
33 Professor Butterworth is in sharp contrast to those presented by Japan yesterday.

34
35 Finally, Professor Butterworth says that we should seek comfort in his
36 stock/recruitment curve for SBT since its low "steepness" means that we do not have
37 to worry about a collapse for SBT. I would like you to look briefly at this other
38 stock/recruitment curve. It looks remarkably similar to SBT. In fact, when you overlay
39 the two, they are almost identical. That, of course, is the curve for northern cod and I
40 do not need to remind the Tribunal what happened to that stock or of the cost to
41 Canada when it did collapse.

42
43 Let me now turn to the Peer Review Report of August 1998 mentioned by Mr Greig
44 yesterday in the context of the EFT. Mr Greig systematically confused three different
45 things: first, the Peer Review report; second, the EFP Working Group; and third, the
46 statement his law firm solicited from Mr Maguire and three others and which Japan
47 had sent to the Tribunal. I will call this the Maguire statement.

48
49 The Peer Review Panel, the first of the three, was composed of Mr Maguire,
50 Dr Sullivan and Professor Tanaka, and it was appointed by the CCSBT following an

1 Australian proposal. The Peer Review Panel was constituted to undertake a review
2 for the Commission on the quality of the scientific analyses and methods being used
3 by the Scientific Committee. It was an attempt to assist in seeking a greater level of
4 consensus. Its report was submitted in August 1998, two months after the EFP
5 began. In December 1998, the Parties agreed to discuss and implement appropriate
6 recommendations from the Peer Review Group report. At that time Japan agreed to
7 convene a working group to consider those recommendations. It has not yet done
8 so. So the report is still under consideration by the Commission.
9 The report contains a variety of conclusions; the Applicants agree with some and not
10 others, and no doubt Japan would say the same. For example, the report notes:

11
12 The combined catch of member and non-member countries is
13 currently not sustainable under some model formulations
14 considered. Effective means of monitoring and controlling all
15 catches should be sought. In the meantime, a precautionary
16 approach would be for member countries to set aside a portion of
17 the TAC to account for the catches by non-member countries.

18
19 Professor Beddington agrees with that, as you heard on Wednesday.

20
21 In fact, the Peer Review Panel extensively used figures from Australian scientists to
22 illustrate their points about stock assessment and status without mentioning any
23 particular "agenda" or political bias and without describing the Australian scientists
24 as pseudo-scientists. For example, they say that "standard goodness of fit criteria
25 should be used in model selection": Goodness of fit has been a preoccupation of
26 Australian scientists and for good and fitting reasons.

27
28 The Peer Review Panel did not, I emphasize not, comment on the 1998 unilateral
29 EFP, nor were they asked to do so: they did make some general comments on
30 experimental fishing programmes and we have no difficulties with those general
31 comments.

32
33 Now let me turn to the Experimental Fishing Programme Working Group and the
34 reports that it produced. The Working Group invited several independent scientists
35 and an independent chairman to its meetings to assist with the deliberations and with
36 technical discussion. In December 1998 the parties agreed:

37
38 If a consensus between the Parties cannot be reached in the
39 Working Group in the course of the development of the future joint
40 EFP, the Parties may invite the independent scientists to play an
41 adjudicating role in completing the Working Group's advice to the
42 Commission.

43
44 This is the so-called agreement Japan now accuses the Applicants of violating.
45 Apparently they cannot violate the clear provisions of the United Nations Convention
46 on the Law of the Sea but they can read an agreement into the words that I have just
47 read you. You can see that it is not an agreement at all: the independent scientists
48 were to provide advice to the Commission at the request of the parties, not to
49 arbitrate between them, as Mr Greig claimed.

50

1 The independent scientists engaged within the Working Group process included
2 Drs Mohn, Sullivan and Tanaka. The independent chairman of those meetings was
3 Dr Annala, a New Zealand scientist. The Working Group agreed on the broad
4 elements of a possible joint EFP, including a fishery independent survey -- that is to
5 say, not based upon CPUE – as well as tagging proposals. It did not, however, agree
6 on the vital details of scientific design, analysis or decision rules. At no point did the
7 parties invite the independents to adjudicate on any point of disagreement.

8
9 In contrast to these two groups, which were Commission groups certainly, the
10 Maguire statement was not requested by the parties and it is not a Commission
11 document. It was produced by Mr Maguire, apparently on behalf of four of the
12 scientists I have mentioned, though only he signed it. He did not contact Dr Annala.
13 He does not say why not. That document is a Japanese report and that is all. Japan
14 has not called Mr Maguire or anyone else to give advice about it or about the
15 circumstances in which it was produced. I emphasize again that Japan has not been
16 prepared to call any scientific witness and have them questioned. Yet it asks you to
17 reject scientific evidence produced by the Applicant which counsel for Japan could
18 have tested but did not.

19
20 To the extent that the Maguire statement quotes from the Peer Review report, we
21 have no difficulties with it. We note also that it does not affirm that Japan's two EFPs
22 are a scientifically valid programme which satisfies the 1996 Principles and
23 Objectives. The report does say: "Given the diverging views on stock status, it is not
24 possible to confidently quantify the risks to the stocks posed by the EFP."

25
26 Professor Beddington in substance agreed with that: there were and are risks but
27 they are difficult to quantify. The Maguire paper in the same paragraph talks about
28 payback, about which we disagree because there is no proper mechanism for
29 payback and this makes the payback system illusory.

30
31 On the other hand, quite apart from the circumstances in which it was produced,
32 which we have not been able to test, the Maguire statement contains other remarks
33 with which we most certainly disagree. In particular, it says:

34
35 Recent catches in the order of 13,000 to 16,000 t have not resulted
36 in clear changes in CPUE, with some assessment hypothesis
37 (variable square) suggesting stable or decreasing stock sizes while
38 others (constant square) suggest stability or increases.

39
40 I note that recent catches are in the 16,000 to 18,000 tonne range, including the
41 EFP. In any event, Professor Butterworth's own graphs show clear decreases in
42 CPUE, for example.

43
44 Let me turn to the problem of the young fish and the old fish. Japan made a great
45 deal yesterday about the harmful effects of the size of fish taken by Australia. It
46 seems actually that everyone's fishery is harmful except Japan's – Australia's,
47 Korea's, Indonesia's, but not Japan's. But let us put it into perspective. What matters
48 in the sustainability of a fishery is spawning stock biomass because recruitment is
49 produced by the spawning stock and the size of the biomass is the key figure.

1 This graphic shows the tonnage taken by the various parties over the life of the
2 fishery. Japan has taken by far the most. It is true that Australia accepted in the early
3 1980s that it should alter the approach in its juvenile EEZ fishery and it did so. You
4 saw from Mr Greig's chart yesterday how in recent years the number of fish taken by
5 Japan and Australia (excluding the EFP and he never showed you that) was roughly
6 equal, even though Japan takes bigger fish, including fish from the spawning stock.

7
8 In addition, let me make four brief points. First, the graphic I showed you on
9 Wednesday demonstrates that a great deal of the decline in age cohorts occurs after
10 the age of four, as you see on the bottom line. It is also true that natural mortality is
11 higher for younger fish. It is not true to say that Australia's EEZ fishery causes the
12 decline.

13
14 Secondly, Japan is now targeting younger fish as well. In the 1998 EFP 64 per cent
15 of the fish were below the age of 3; 50 per cent were below the age of 2.

16
17 Thirdly, in the context of a declining parental biomass, it is better, for the purposes of
18 producing a recovery, to target younger fish. As the Scientific Committee concluded
19 in 1992,

20
21 varying the age distribution of a fixed global catch indicates that the
22 most rapid recovery would occur if more small fish are taken in the
23 short-term and larger fish are taken in the long-term ...
24 Nevertheless, major adjustments to future age selectivity patterns
25 cause relatively minor small changes in the overall trajectory of
26 parental biomass.

27
28 Finally, in calculating the TAC and national quotas, account was taken of the
29 different modes of fishing. Of course, Japan has vetoed the TAC for the last two
30 years. That is, no doubt, a matter that should be revisited. Japan now targets more
31 younger fish and Australia more older fish than when the TAC was first set.

32
33 I now turn to the question of the basis of the projections, the so-called "constant
34 squares versus variable squares" dichotomy.

35
36 Japan reverted again yesterday to that same old dichotomy of the two extremes; it
37 never once mentioned the geo-statistical CPUE interpretation, which is in effect
38 a compromise between the two, and this despite the fact that, as I showed you on
39 Wednesday, not only Australia but also Japan considers that interpretation the most
40 likely or plausible one.

41
42 Mr Greig says that the Japanese analysis of their 1998 data shows that the variable
43 square model does not fit but he fails to mention that it also shows that the constant
44 squares model does not fit. In the face of that result, did Japan then take the logically
45 consistent alternative of the geo-statistical model? It did not even refer to it. To justify
46 their EFP, Japan has consistently tried to paint the picture that all we need to do is to
47 decide between these two extremes. That is not the case.

48
49 In fact, as Professor Beddington pointed out on Wednesday, you do not need
50 projection results to conclude that catches should not be increased. The information

1 on current trends in recruitment and parental biomass is more than sufficient to
2 conclude that catches should not be increased above the historic TAC. This
3 conclusion has been reached by the Scientific Committee on numerous occasions.
4 In 1993 the Committee agreed that "as in previous years the meeting considered that
5 catch levels should not be increased until such time as the parental biomass returns
6 at least to the 1980 level." They said that this was apparently a case of Australian
7 coercion. In fact, catches have since increased substantially, while in every year
8 since 1993 the Scientific Committee has continued to stress that "the continued low
9 abundance of the SBT parental biomass is cause for serious concern."

10
11 Japan persists in showing that the age of maturity of southern bluefin tuna is 8. That
12 was an earlier view. It is now unsustainable. The Stock Assessment Group in 1998
13 pointed out that in the spawning ground there are very few fish less than 10, and that
14 itself is sufficient to show that 8 is not the average spawning age. It is true that these
15 samples might not be representative, but the 1998 report dealt with that point as
16 well.

17
18 Professor Butterworth described the move from 8 to 12 as a statistical sleight of
19 hand, but that is absurd. They are either spawning or they are not. It is not
20 a question of statistics. It is a question of straightforward biological fact. All
21 projections which use an age of maturity of greater than 8 show a continued decline
22 in spawning stock biomass.

23
24 To conclude these remarks on the state of the southern bluefin tuna stocks, you may
25 recall that I gave five reasons on Wednesday for endorsing the conclusions of the
26 Scientific Committee and for considering that the situation is unlikely to be better and
27 may well be worse. These were: (1) commercial CPUE tends to be strongly biased
28 upwards; (2) the age cohorts of the late 1980s have been fished down and do not
29 provide the basis for a recovery; (3) the age composition of the plus group presents
30 difficulties; (4) third party catch adds significantly to the risk; (5) the projections that
31 show recovery also show pronounced lack of fit, inconsistent with normal statistical
32 procedures. The Peer Review Group actually agreed with that.

33
34 Yesterday the Agent and both counsel for Japan agreed with the third party catch
35 problem. Mr Greig implicitly disagreed with my second point about the fishing down
36 of stocks. I have already dealt with that. The other three points were simply ignored.

37
38 Particularly significant is the fact that Japan ignores the lack of fit problem. Japan
39 recovery predictions continue to be based on models that show not merely maturity
40 at 8, but pronounced lack of fit. If you take the 1998 EFP there would have been no
41 basis for claiming that there were improved estimates for recovery. If lack of fit is
42 considered, the probability of recovery for Japanese scientists decreases to 14 per
43 cent.

44
45 As to the third party catch, we all agree it is a problem, but it is one that cannot be
46 solved until we have a TAC back in place. I note that Japan has in fact been
47 proposing very low quotas for possible entrance, with the idea that the remainder of
48 the existing catch can be shared amongst all members on a formula favourable to
49 Japan.

50

1 Mr President, the whole of Japan's presentation yesterday revolved around the
2 notion of irreparable damage. Mr Burmester will return to this shortly and show that it
3 is not the appropriate test. Even if the test was irreparable damage it would be met
4 here. Mr Burmester has already reviewed the authorities, including *Nuclear Tests*
5 cases, where the probability of irreparable damage was very low indeed and it would
6 have taken a very long time for such damage to occur.

7
8 One of the aspects of the precautionary approach is that if the relevant threshold is
9 crossed there is a reversal of the onus of proof, in the sense that a lack of scientific
10 certainty should not be used as a reason for postponing action. Japan's presentation
11 yesterday took refuge in what can only be described as the reverse of the
12 precautionary approach. We might call it the reactionary approach. Under the
13 reactionary approach no action can be taken until there is scientific certainty that the
14 action is necessary.

15
16 Professor Ando effectively said that the precautionary principle could be applied to
17 dams but not to fish. That is an astonishing proposition in relation to a living natural
18 resource. Even if a catastrophic stock collapse were to occur tomorrow, it would still
19 be at least two years before sufficient evidence that this had happened would
20 accumulate to meet Japan's standard of proof and that would be far too late.

21
22 Then again it was suggested that the TAC should be delayed until the scientific
23 uncertainties had been resolved by apparently four years of EFP catch. First catch
24 your fish, and then set your TAC. Again, this is entirely contrary to the precautionary
25 principle or approach in any of its formulations.

26
27 Finally, we come to the concept of payback of past EFP catches if it is subsequently
28 found that these have harmed the stock. From Japan's formulation it is absolutely
29 unclear how it would ever be possible to prove that EFP catches were the culprit.
30 But, far more importantly, its proposal represents a blatant reversal of the
31 appropriate burden of proof, as Dr Garcia pointed out.

32
33 I turn to Japan's EFPs. Two more of them have been unilaterally spawned during this
34 hearing.

35
36 I read you Dr Garcia's letter. Mr Greig described it as tentative. He obviously has
37 a very curious idea about a tentative letter. I hope he never writes me a firm one.
38 But, he said it had been taken into account, which is odd because it was written five
39 days before the EFP started. How it was taken into account is not clear. For
40 example, to take only my twentieth point, Dr Garcia called for 100 per cent observer
41 coverage, not 20 per cent. In fact, there was 18 per cent. So far as we can see, the
42 Garcia criticisms apply equally to the final version in 1998. Perhaps Japan will tell us
43 which of his 20 problems it fixed in that five days, and how.

44
45 Mr Greig also asserted that the Japanese EFP complied with six of the seven of the
46 1996 conditions. In fact, the Working Group did not resolve five of the six matters
47 which were referred to it, and that itself is a symptom that six of the seven were not
48 met.

1 Mr President, Members of the Tribunal, I have two final points. The first relates to the
2 description which Mr Greig gave of what he described as "purported scientists
3 seeking to manipulate the data to further their political agenda". The manipulation he
4 was talking about actually concerned age at maturity, and it was the stock
5 assessment group which noted that this could not be 8. But, in its context Mr Greig's
6 remarks seemed to be directed at the Applicants' scientists, who he effectively
7 characterized as dishonest and unworthy. He referred elsewhere to Dr Polacheck's
8 extreme brand of science.

9
10 Now any scientist who manipulated the data to further a political agenda should be
11 sacked, and immediately. But it is interesting that this is clearly not the assessment
12 of Dr Polacheck which Professor Butterworth has, though we could not ask him that
13 either. Professor Butterworth's paper says that its purpose is simply to illustrate that
14 "...there are defensible alternative interpretations of the data beyond those
15 presented in the Polacheck and Preece document". Well, no doubt there are. The
16 Applicants, unlike Mr Greig, have never suggested that the other party's science is
17 trash. Professor Beddington similarly makes no criticism of Dr Polacheck.

18
19 Unfortunately, the attitude which is implied in those remarks that Mr Greig saw fit to
20 make, I regret to say, emanates from a certain level of the Japanese official
21 hierarchy responsible for southern bluefin tuna exploitation. At that level there is a
22 tendency to dismiss any view to the contrary. That is a level which produces
23 repeated projections of rapid recovery, which fishes to the very limit of those
24 projections and which is not above issuing ultimata.

25
26 Mr President, Members of the Tribunal, let me take you back to the well-known
27 southern bluefin tuna stock recruitment curve produced by Professor Butterworth.
28 There are many similar analyses in the various reports of the Scientific Committee
29 and the Stock Assessment Group. As you will recall, that figure moves right to left in
30 time. The latest and lowest point I showed to you before, so it is probably well in your
31 memory, and here we have it again. The latest and lowest point shown is 1996.
32 What is happening in 1999? The Scientific Committee has reported that there is no
33 sign of increased recruitment. It has reiterated its concern in 1998 over the status of
34 the parental biomass. Professor Butterworth's analysis points to a continued decline
35 in the parental biomass after 1996, but Mr Greig's does not. On the balance of the
36 evidence is it reasonable to conclude that there is no urgency? Can we really wait for
37 a decision on the merits in two years or so from now, if Japan has its way with the
38 timetable? That would be just about the time when Japan's final round of unilateral
39 experimental fishing programmes finish. Can we wait that long? I think not.

40
41 Mr President, Members of the Tribunal, thank you for your patience.

42
43 **THE PRESIDENT:** Thank you very much, Mr Crawford. Mr Burmester.

44
45 **MR BURMESTER:** Mr President, Members of the Tribunal, in this brief reply the
46 Applicants do not intend to say anything more on the issue of jurisdiction. This was
47 dealt with by Mr Mansfield in the first round and there was nothing in the Japanese
48 arguments yesterday that particularly calls for a response.
49

1 Mr President, it is necessary for me to respond briefly to the arguments made by
2 Japan on why the provisional measures sought are not appropriate.
3 Professor Crawford has again highlighted this morning the flawed approach put
4 forward by Japan in terms of the precautionary principle and the approach to proof of
5 scientific harm. Two further issues need to be addressed by me in reply. They are
6 the need for irreparable harm and urgency.

7
8 Let me elaborate on the relevance of these requirements as a matter of law to the
9 award of provisional measures.

10
11 In relation to irreparable harm, it is true that I did make the suggestion, referred to, as
12 I recall, by Professor Ando as revolutionary, that irreparable harm was not essential.
13 I did not, however, submit that the nature of the possible harm to the rights in
14 question was irrelevant in considering what measures were appropriate. It clearly is
15 a matter linked to the purpose of the institution of provisional measures. Thus, the
16 existence of some form of possible harm is a first critical requirement. If there is no
17 harm there is nothing to protect. The nature of the harm is then one important issue
18 in considering what is required under the circumstances to protect the rights of the
19 parties. But, I repeat, there is no legal requirement that harm be irreparable.

20
21 Even if irreparable harm were considered necessary, the risk or possibility of such
22 harm in the future arising from increased southern bluefin tuna catch has been
23 adequately demonstrated by the Applicants and that suffices.

24
25 Japan, however, insists on something more. It is only, they say, where irreparable
26 harm is imminent, in the sense of immediate or that there is an urgent threat that
27 provisional measures are appropriate. The proposition by Japan is not, with respect,
28 a correct statement of international practice. Whether measures are urgently
29 required does not depend on whether the harm in question is itself immediate. The
30 issue is whether the activity that would cause the harm and the nature of the harm
31 makes the immediate award of measures appropriate.

32
33 If I can mention the *Nuclear Tests* cases, the possibility of harm, even irreparable
34 harm, was accepted as existing not because the harm in the form of cancer cases
35 already existed and was demonstrated. It was sufficient that there was the possibility
36 of such cases in 30 or 40 years and a recognition that if they did arise then the harm
37 was irreparable. The nature of the harm made it imperative that the risk of future
38 environmental harm should not continue pending a determination of the merits. In
39 the present case, the possible harm arising from the additional fishing is not
40 something with a time frame anything like the impact of atmospheric testing. It is
41 much more immediate and it is clearly, in our submission, the sort of harm that
42 provisional measures can now protect against.

43
44 What Japan asks the Tribunal to do is to read into its broad discretionary charter
45 a combined requirement of "immediate and irreparable" harm. But to insist on the
46 immediacy of the harm is to defeat the purpose of provisional measures which is to
47 preserve for the future and, until the merits, the rights of the parties. There is,
48 therefore, no requirement of immediate short term damage.

1 In the arguments in the first round both Professor Crawford and myself demonstrated
2 the nature of the harm which was possible, even perhaps probable, if increased SBT
3 catch occurred as a result of an EFP. This involved possible stock collapse and at
4 least delayed recovery of the stock to the agreed parental biomass level. If this harm
5 were to occur, the consequence could be devastating biologically quite apart from
6 flow-on consequences, including economic harm. The harm in this sense will have
7 medium and long term consequences. But harm there is. It does not mean the harm
8 is no less real nor sufficient. We are not simply talking about theoretical plausible
9 worst-case scenarios but real possibilities of actual significant harm.

10
11 The suggestion by Mr Greig, based on a statement by an Australian delegation in
12 December 1998, that Japan will need to provide "restitution" for any additional EFP
13 catch was not a reference to financial recompense. Historically in quota allocation
14 parity has been retained between the proportional shares of the parties. If the
15 Japanese EFP action was not unilateral, the Applicants would in normal
16 circumstances have expected pro rata allocation of a revised TAC. That was the
17 purpose behind that reference. That reference and other references in the
18 negotiations to the worth of the tuna industry to Australia do not demonstrate that the
19 issue is money and that financial recompense can therefore remedy any future harm
20 from an increased EFP.

21
22 The basis for the award of provisional measures is thus, in the submission of the
23 Applicants, more than demonstrated.

24
25 I need however Mr President to respond finally to the contention that the provisional
26 measures requested would be ineffective and would result in positive harm. Japan
27 says the few remaining hundred tonnes of 1999 EFP catch cannot be considered to
28 pose an urgent or significant risk. But this, as I said on Wednesday, is to consider
29 one issue in isolation. It is the impact of the EFP on the overall catch which is
30 important. The reason the payback solution argued for consistently by Japan is no
31 answer has already been mentioned by Professor Crawford. So that solution does
32 not provide a reason not to award provisional measures such as sought.

33
34 Nor is there any substance in the suggestion that the provisional measures sought
35 would delay for years any resolution of the scientific uncertainty. If Japan considers
36 the scientific benefits of an EFP are so important it can design future EFPs so they
37 take place within quota or in a way that gets consensus within the Commission.

38
39 The measures sought by the Applicants do not require this Tribunal to engage in
40 micro-management of a fishery. This was not the view of the International Court in
41 the *Fisheries Jurisdiction* cases when it set a particular catch limit pending a
42 determination of the merits. This Tribunal on the basis of the evidence can properly
43 make a broad assessment of the state of the stock and take account of the past
44 practices of the parties, including past tonnages allocated and caught. On the basis
45 of this material it can properly conclude whether the particular restraints sought by
46 the Applicants in their proposed measures are appropriate. This is not to make
47 decisions properly made by scientists. It involves this Tribunal determining what is
48 appropriate to protect the rights of the parties.

49

1 Japan urges consensus through negotiation. But there is no point in negotiation for
2 negotiation's sake. In this regard the measures sought are intended to facilitate
3 resolution of the present impasse and enable the parties to move forward. In this
4 regard, Mr President, I ask you to call on Mr Tim Caughley to bring the Applicants'
5 case to a close with some key final remarks and a summary of the argument. Thank
6 you very much, Mr President.

7
8 **THE PRESIDENT:** Thank you, Mr Burmester. Mr Caughley, please.

9
10 **MR CAUGHLEY:** Thank you very much, Mr President. Mr President, Members of the
11 Tribunal, it falls to me as the Agent for New Zealand to close the case for the
12 Applicants.

13
14 Mr President, the Applicants did not come to this courtroom lightly. As Mr Greig
15 pointed out yesterday, and my Government is acutely aware, such a step absorbs
16 valuable human resources and time. I would also repeat the point made by the
17 Honourable Attorney-General of Australia and endorsed yesterday by the Agent for
18 Japan that the relationships between Australia and New Zealand on the one hand
19 and Japan on the other are strong and multifaceted. They will withstand this dispute.
20 But, Mr President, it is a real dispute. We are here because we believe that your
21 Tribunal has a constructive role to play in resolving it.

22
23 Mr President, the Applicants have made extensive and reasonable efforts to resolve
24 this matter. We have been involved in discussions within the SBT Commission
25 concerning the concept of experimental fishing since 1996. But at the point at which
26 Japan took it upon itself to take a unilateral increase in its quota by commencing
27 experimental fishing in June last year we called for immediate consultations with the
28 Government of Japan. Those consultations led to formal negotiations in December,
29 and subsequently to the EFP Working Group process that extended for the first five
30 months of this year.

31
32 That process, Mr President, was cut short by Japan's action in recommencing
33 experimental fishing on 1 June. It was Japan that took it upon itself to proceed
34 without compromise or agreement. It was the nature and manner of the ultimatum
35 delivered by Japan only days before it began its programme and its decision to
36 proceed, for the second time, with a unilateral EFP that prompted the Applicants to
37 undertake consultations and subsequently to commence compulsory and binding
38 dispute settlement procedures and to make an application to this Tribunal for
39 measures to preserve our rights. Mr President, the word "ultimatum" is not one that
40 I use lightly, but I was present when it was issued.

41
42 Mr President, the step of invoking the jurisdiction of this Tribunal is not one we would
43 take over a minor scientific dispute. It would not have been taken if the Applicants'
44 concern was only over a few hundred tonnes of quota. The real issue that brought
45 the Applicants to this Tribunal was that Japan, as party to a regional management
46 organization that operates on the basis of unanimity, unilaterally took it upon itself to
47 increase its catch – first by 1,400 tonnes, and then by up 2,400 tonnes –
48 representing a 30 per cent increase in the level of catch which was last agreed by
49 the parties. And it proposes to repeat its EFP next year and in 2001, as you have
50 heard.

1
2 Mr President, in the light of that action, and after consideration at the highest levels
3 of Government, we have come here reluctantly from the other side of the world
4 seeking an objective, truly independent and timely intervention by this Tribunal.
5 Renewed negotiations, with or without the involvement of independent scientists,
6 cannot be expected to succeed in the shadow of further unilateral action.
7
8 Mr President, this case is fundamentally about the way in which States give effect to
9 their UNCLOS obligations of conservation and cooperation through their conduct in
10 regional fisheries management organizations.
11
12 UNCLOS sets out an overarching constitution of rights and obligations to properly
13 govern the use of the oceans for the benefit of all States. Those obligations are
14 fundamental. They are not overridden or diluted, let alone removed, by the existence
15 of regional fisheries management organizations. They cannot be hidden from, and
16 indeed they provide the standard by which a party's conduct within such an
17 organization can be held to account.
18
19 Those binding obligations reflect the fact that coastal States such as Australia and
20 New Zealand have a particular interest in the seas that surround them and in the
21 living resources of those seas. That fundamental concept was recognized by the
22 Conference for the Law of the Sea and is enshrined in the Convention it produced.
23 Equally fundamental is the concept that other States seeking to use those resources
24 must cooperate with coastal States in order to achieve the objective of conservation.
25
26 Mr President, the case before you today puts those concepts to the test. It is critical
27 for the continuing effectiveness of UNCLOS; it is critical in defining the powers of this
28 Tribunal, and it is critical as a precedent for the management of marine living
29 resources, particularly highly migratory fish stocks.
30
31 Japan has tried to divert you, Mr President, from the importance of this case. It has
32 tried to say that the real issue here is not Japan's behaviour, but the behaviour of
33 others. It alleges that the catch of third parties provides a justification for Japan's
34 actions. Mr President, we agree with Japan that the increasing catch of non-parties
35 is of serious concern, and have consistently said so within the SBT Commission. We
36 do not agree that the appropriate response to third party catch is for a member of the
37 SBT Commission to step outside that body and unilaterally take more fish. It is no
38 solution to the increasing catches by non-parties for a member of the Commission to
39 increase its own catch. Indeed, it only aggravates the situation.
40
41 Japan has also tried to say that their actions pose no problem because they can pay
42 back their catch in future years. But their concept of payback presupposes that there
43 will be stock to pay back from. The scientific evidence you have heard, Mr President,
44 is that the SBT stock is at historically low levels and there is no clear evidence that it
45 is increasing. By the time that Japan applies its own test to unilaterally determine
46 whether it should reduce its quota through payback, it may well be too late. In such a
47 situation, the need for precaution is self-evident.
48

1 The fishing that occurs now carries with it a risk of consequences that may be
2 irreversible. Urgency does not require that we show that those consequences will
3 occur immediately. It is enough to show that the risk is being created now.

4
5 Mr President, the essential concern that underlay the Applicants' decision to initiate
6 these proceedings is that the unilateral action Japan is taking is putting in jeopardy
7 a very important highly migratory stock that is already in a seriously depleted state. It
8 is the considered view of the Applicants that the risks and consequences associated
9 with this unilateral action are such that this Tribunal must intervene. To fail to do so
10 would, we believe, have serious implications not only for this species but also for the
11 future effectiveness of the UNCLOS principles relating to the conservation and
12 optimum utilization of high seas fisheries in general. It would send a very bad
13 message to States contemplating unilateral action with respect to a depleted high
14 seas stock.

15
16 We consider that it is vital that this Tribunal issues orders stopping the EFP forthwith
17 and preventing any further unilateral experimental fishing above the last agreed TAC
18 until the legality of such a programme has been decided on the merits.

19
20 Japan argues that any delay or interruption of the EFP would reduce the usefulness
21 of the data to be derived from it. We have explained why we seriously doubt the
22 scientific value of that data under the EFP as presently designed. What we can
23 agree is that this issue should be resolved as quickly as possible. No purpose is
24 served by prolonging the resolution of this dispute. That is in the interests neither of
25 our respective bilateral relationships with Japan, the effectiveness of the 1993
26 Convention and its Commission, nor of the SBT stock itself.

27
28 Given that Japan has indicated that it will raise a preliminary objection to the
29 jurisdiction of the Annex VII tribunal, it is inevitable that the proceedings will extend
30 well into next year and beyond the point at which their next experimental fishing
31 programme is planned to begin.

32
33 Accordingly, we would be willing to agree to an expedited process to reach a final
34 decision on the case. Certainly an early decision on the merits would be assisted by
35 an agreement to address questions of jurisdiction and merits in a single hearing, with
36 a view to a finding by no later than May of next year.

37
38 For our part, we are flexible as to the best means of achieving that outcome. Given
39 its stature, its permanent standing and the fact that it is already apprised of the
40 issues involved, we would, for example, agree that this Tribunal should determine
41 the matters at issue. Whatever procedure is used, time is of the essence. It is
42 important that the dispute is settled authoritatively, but, given the exhaustive efforts
43 made to date, it is even more important that it is settled quickly.

44
45 In closing, let me leave the Tribunal with the following points:

- 46
47 1. The Applicants as coastal States have a critical interest in the conservation and
48 optimum utilization of Southern Bluefin Tuna migrating through their exclusive
49 economic zones;
50 2. We have not come to this Tribunal lightly – far from it;

- 1 3. We have made reasonable and indeed exhaustive efforts to resolve this dispute;
- 2 4. The questions raised by the dispute are not technical scientific ones – this is not
- 3 a case of asking this Tribunal to do that which is properly done by scientists;
- 4 5. The issue at the heart of this case is the unilateral decision by Japan to increase
- 5 its catch and its intention to continue to do so next year and the year after;
- 6 6. The issue is not third party catch – further unilateral catch by Japan only serves
- 7 to aggravate the situation;
- 8 7. The dispute relates directly to the content and meaning of the UNCLOS
- 9 obligations of conservation of and cooperation over marine living resources;
- 10 8. There is a real urgency which requires immediate action – the fishing which is
- 11 occurring now has consequences that may be irreversible and that are, in any
- 12 event, serious;
- 13 9. This Tribunal has clear jurisdiction in this case and the circumstances require its
- 14 exercise.

15

16 Mr President, with your permission, I turn now to the formal reading of the provisional
17 measures requested by the Applicants.

18

19 On the basis of their written and oral submissions, Australia and New Zealand
20 request that the Tribunal prescribe the following provisional measures:

21

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

35

36 Thank you, Mr President.

37

38 **THE PRESIDENT:** Thank you, Mr Caughley. That brings us to the end of the
39 submissions on behalf of Australia and New Zealand. In accordance with the
40 previous agreement, the sitting will be suspended for half an hour. We will perhaps
41 have a little more time. We will resume at 11.30, at which point the submissions of
42 Japan will be made. The sitting is suspended.

43

44 *(The Tribunal adjourned at 10.53 a.m.)*

45

46 **THE PRESIDENT:** May I now invite Ambassador Togo to commence the
47 submissions on behalf of Japan?

48

49 **MR TOGO:** Mr President, honourable Judges, our delegation would like to proceed
50 this morning in the following order: First, Professor Ando will take the floor and

1 discuss the legal aspects concerning the question of irreparable damage and other
2 issues, developing the points that we advanced yesterday. Mr Greig will then take
3 the floor and deal with the factual aspects, particularly taking into account the points
4 advanced by the Applicants this morning. As for the complete factual data that you
5 have this morning asked us to supply, we will certainly submit them in writing by the
6 end of today. Finally, I would like to come back to the floor to present the concluding
7 remarks and the final submission of my Government.

8
9 Before I give the floor to Professor Ando, I would like to touch on one point made by
10 Mr Crawford this morning. If I remember it correctly, he said "Mr Greig refused the
11 Applicants' right to cross-examine witnesses". Certainly I come from a different legal
12 background, but that statement was surprising. It is my clear understanding that
13 nobody in my delegation intended or acted to deprive the Applicants of the
14 opportunity to question Dr Butterworth. Indeed, as Mr Greig will explain, it was the
15 Applicants' own choice not to call Dr Butterworth. Mr President, I would now like to
16 give the floor to Professor Ando.

17
18 **THE PRESIDENT:** Thank you.

19
20 **PROFESSOR ANDO:** Mr President, honourable Judges, it is a great honour to have
21 a second opportunity to speak to you and try to elaborate the Japanese legal
22 arguments in some respects.

23
24 I will limit myself to three points: first, the jurisdictional issue; secondly, some
25 additional remarks on the question of urgency and irreparable damage as a
26 precondition to the granting of provisional measures; and finally, the importance of
27 this particular case before you and your response to it.

28
29 Let me begin with the first point. Nowhere in our oral representation nor in our written
30 submissions has Japan said that we are not bound by the provisions of the United
31 Nations Law of the Sea Convention. On the contrary, Japan has observed and will
32 continue to observe its obligations under the Law of the Sea Convention to the
33 maximum extent possible.

34
35 In this particular case, the gist of the Japanese argument is as follows. In order for
36 Applicants to address the substantive issue of Japanese rights and obligations under
37 the Law of the Sea Convention, the procedural requirements set out in the same
38 Convention must be fully complied with. I will not repeat it, but in the Japanese eyes,
39 since the preconditions for the constitution of an Annex VII tribunal have not been
40 met, this Tribunal lacks the authority to grant the provisional measures as requested
41 by Applicants. That is a core issue as far as the law is concerned. Of course, our
42 basic stand is that the dispute (if any) is about the difference of appreciation of
43 scientific data, which I hope has been clearly demonstrated by Mr Greig. He will
44 again speak after me.

45
46 My last remark about the jurisdictional issue is that I have not heard this morning any
47 refutation from Applicants about the point that I raised yesterday concerning the
48 issue of jurisdiction. There was a general reference to Japanese obligations under
49 the Law of the Sea Convention, articles 64 and 116 to 119, but nothing on

1 jurisdictional issues. Personally, I take it that that is an admission by Applicants of
2 our argument on the jurisdictional points.

3
4 I now come to the second point, that is the issue of irreparability and urgency,
5 provided for under article 290 of UNCLOS, as a precondition for the granting of
6 provisional measures.

7
8 Applicants questioned the time span of the urgency; that is, the effect of Japanese
9 EFP on the future status of SBT stock, which, as they pointed out, takes several
10 years, maybe 20 or 30 years. In order to support their argument, they touched on the
11 Order of the International Court of Justice in the case of *Nuclear Tests* in the Pacific.

12
13 Mr President and honourable Judges, Japan is a country which experienced the
14 dropping of an atomic bomb at the end of the Second World War. While my relatives
15 suffered no victims from that bombing, a number of Japanese are not in the same
16 position as I am. If it comes to a question of nuclear tests, I know radioactive fallout
17 can cause death or at least irreparable harm to the health of human beings.
18 Applicants are quite right to point out that it is the very nature of the act which causes
19 imminent threat that justifies provisional measures. The fact that the effect comes
20 years later does not matter. I must point out that human beings, their lives and
21 health, are at issue the moment you blast a nuclear bomb.

22
23 I remember the case of *Happy Dragon*, which was a fishing vessel – of course, as
24 I have already pointed out, the Japanese have to eat lots of fish – fishing outside the
25 US warning area and yet, when radioactive fallout came down and hit him, the
26 Master of the ship died after a few weeks. This example, therefore, of the atomic test
27 case cannot easily be applied to the case of the status of the SBT stock. I am not a
28 scientist so I cannot tell you for certain, Mr President and honourable Judges, about
29 the effect of Japanese EFP many years later with regard to the situation of SBT
30 stock. That will be covered by Mr Greig. But I must point out that the case of the
31 order for a nuclear test ban cannot easily be applied to that of fish stocks.

32
33 Yesterday I did not say that precautionary approach has no place at all. I said that
34 that may be relevant in the case of the construction of a dam which may cause
35 irreparable damage in the near future to the lives of human beings or their way of
36 living. I said that when it applied to the question of fish stock different considerations
37 need to be applied. That was my exact statement if my memory is correct. I do hope
38 you will take my stand as I stated it.

39
40 Finally, as to the importance of this Tribunal's handling of the instant case.
41 I understand that many of your august Judges participated in the drafting process of
42 the United Nations Convention on the Law of the Sea. Therefore I am certain that
43 you are aware that it is a product of many years – ten years – of negotiations and
44 compromises between “long distance” fishing States and coastal States. As I pointed
45 out yesterday, that is one of the very reasons why those articles cited by the
46 Applicant (article 64 and articles 116 to 119) are general in their content and we
47 must study the UN Convention against that background; that is, as far as the
48 question of conservation and utilization of fish stock is concerned, the Convention
49 should be regarded as the general framework under which many particular region-
50 by-region or species-by-species agreements or treaties regulate and decide the

1 concrete contents of obligations and corresponding rights of the particular State
2 concerned. In interpreting and applying those provisions of UNCLOS, with respect to
3 the issue of conservation and optimal utilization of fish stock, this background has to
4 be taken into account. In other words, were your decision under article 290 to be
5 regarded as a case of loose interpretation and application of the granting of
6 provisional measures, I am afraid that there might be some negative response from
7 the international community. I say this not for the sake of the current interest of the
8 Japanese Government and people in this particular case but for the sake of sound
9 development and rooting down of this particular Convention in the international
10 community which requires your prudent and wise decision. A reasonable balance
11 between substantive provisions and procedural safeguards of UNCLOS should be
12 one of the points to be taken into account in your final decision in the current case.

13

14 I repeat my very high esteem for the role and reputation of this Tribunal, which it
15 should deserve for a long time to come. Thank you, Mr President and honourable
16 Judges.

17

18 **THE PRESIDENT:** Thank you very much, Professor Ando.

19

20 **MR GREIG:** Mr President, honourable Judges, thank you for permitting me to offer a
21 few concluding remarks respecting the factual issues that are before you. In doing
22 so, I draw on the remarks of Professor Ando concerning Applicants' legal arguments.

23

24 In a telling indication of the weakness of their factual case, Applicants dilute the legal
25 standards for awarding provisional relief so as to make them unrecognizable. Forced
26 to admit that they cannot even come close to satisfying the true requirements for
27 provisional measures, Applicants progressively lower the bar in the vain hope of
28 satisfying even such unprecedented lower standards nowhere recognized in the
29 annals of international jurisprudence.

30

31 Applicants argue that all they need to show is that "their claimed rights are not
32 manifestly incapable of existing in law" or "are not manifestly unfounded"
33 (transcript, 18 August afternoon, 25/24, 29/21). Under such a standard Applicants
34 can claim whatever they wish and, as long as they are not absolutely wrong, they
35 contend they are entitled to provisional measures. That is not the law.

36

37 As to the showing of future damages that they must make to warrant the
38 extraordinary intervention of provisional measures, again Applicants lower the bar.
39 According to Applicants, all that they need show is a non-frivolous legal claim as to
40 which a reasonable and plausible view of the state of affairs does not permit one to
41 exclude all worst case scenarios (18 August afternoon, 19/12).

42

43 Contrary to Applicants' assertion, an inability to exclude worst case scenarios does
44 not warrant the extreme remedy of provisional measures. Were Applicants'
45 standards to prevail, provisional measures would become the norm, not the
46 exceptional remedy it is universally understood to be in international law.

47

48 In addressing the factual arguments Applicants have put forward, first, we stand
49 behind every aspect of the detailed factual presentation that I made yesterday. Many
50 of the statements relied on in that presentation were direct quotations from the

1 independent scientists, the record in this case or statements made by our esteemed
2 opponents in the course of these proceedings.

3
4 In addition, we presented a number of maps, charts, tables and graphs. For those
5 which are not self-authenticating, we submitted earlier this morning an appendix
6 listing the references which provide the data and other bases for the information
7 presented on your screens yesterday.

8
9 My learned opponent challenged the statement I made yesterday that Australia
10 unilaterally refuses to provide CPUE data necessary to contribute to scientific stock
11 assessment projections. He made that challenge by saying that Australia provides
12 catch data, i.e. tonnage and number of SBT caught per year. What Australia refuses
13 to provide is the effort and location of their commercial fishing, which is the
14 information necessary to make the catch data scientifically useful.

15
16 My opponent also places considerable emphasis on Japan's failure to present the
17 five scientists who have submitted statements in support of Japan's position for
18 cross-examination. If we were in a full arbitral procedure on the merits, of course we
19 would have called Dr Butterworth to testify. He would have explained the right-to-left
20 chart that my opponent has used repeatedly. My opponent has implied that this
21 represents Hilborn, Butterworth and Ianelli's own assessment of the status of the
22 stock. It simply does not. The front page of the document referenced states clearly
23 "draft incomplete" and an associated note on this page makes clear that it was
24 presented primarily to bring certain methodological issues to the attention of the Peer
25 Review Panel. As Dr Butterworth's declaration makes clear, it is a misuse of this
26 document to treat it as a stock assessment projection at all. Indeed, if this were
27 proceeding on the merits where days or weeks, rather than four hours, of time would
28 be allotted to Japan's presentation, I am sure that the Tribunal itself would want to
29 call one or more of the independent scientists to provide their independent
30 perspective on the scientific issues vital to this matter.

31
32 In any event, the decision not to cross-examine Dr Butterworth was the Applicants'
33 and Applicants' alone. Dr Butterworth submitted his direct testimony in this
34 abbreviated procedure by declaration, as the Rules of this Tribunal permit. The
35 Rules, specifically article 78, permitted my opponent to call Dr Butterworth for cross-
36 examination during their direct presentation, if they had so chosen. Australia
37 unilaterally decided not to do so.

38
39 Finally, my learned opponent asserted as a matter of scientific fact that southern
40 bluefin tuna do not spawn before the age of 12. I frankly do not know how he
41 collected this information. I rely on the fact that the Scientific Committee has
42 consistently used age 8 as the age of maturity, as New Zealand has acknowledged
43 in its Request. I further rely on Dr Beddington's testimony at page 9, lines 35-36, that
44 southern bluefin tuna become sexually mature at age 8 to 10.

45
46 I also continue to rely on the statement of the independent scientists concerning the
47 proper approach to the age of maturity:

48

1 For credibility and transparency reasons it is desirable to maintain
2 consistency from one assessment to the other, and that changes
3 are incorporated gradually.
4

5 The Applicants have switched from age 8 to age 12 as the age of maturity in
6 preparing stock assessment projections given to the Tribunal for this proceeding. My
7 charge that this constitutes a statistical sleight of hand stands.
8

9 To further address the Applicants' factual arguments, it suffices largely to reflect on
10 the agreements reached during the dispute resolution concerning this very dispute,
11 including especially the role of the independent scientists, a subject that the
12 Applicants have studiously ignored until this morning.
13

14 In December 1998 the parties met to address the question of experimental fishing.
15 They agreed to establish an Experimental Fishing Working Group to develop a joint
16 experimental programme to be conducted in the summer of 1999. The Working
17 Group was to develop its proposals for the Commission's approval by April 1999.
18 Moreover, they agreed to continue the practice of inviting jointly and by mutual
19 consent independent expert scientists to help the parties reach a consensus and,
20 absent consensus, to play an adjudicating role.
21

22 The Applicants have chosen to dispute that role only this morning, although it was
23 spelled out in Japan's written response. Now that the Applicants have raised the
24 issue, please allow me to take the time of this Tribunal, because it is a vital issue, to
25 go through the matter in a bit of detail.
26

27 First, I want to quote from the Working Group:
28

29 The group of independent scientists, the membership of which will
30 be decided by the parties, will play the same role as the scientists
31 of the parties in the development of a future joint EFP. If a
32 consensus between the parties cannot be reached in the Working
33 Group in the course of development of the future joint EFP the
34 parties may invite the independent scientists to play an adjudicating
35 role in completing the Working Group's advice to the Commission.
36

37 The parties then reaffirmed this role when they prepared the formal terms of
38 reference for the EFP Working Group. Again, I quote:
39

40 The group of independent scientists, the membership of which will
41 be decided by the parties, will play the same role as the scientists
42 of the parties in the development of the future joint EFP. If a
43 consensus between the parties cannot be reached in the Working
44 Group in the course of development of the future joint EFP, the
45 parties may invite the independent scientists to play an adjudicating
46 role in completing the Working Group's advice to the Commission.
47

48 The Applicants' proffered expert witness, Dr Beddington, conceded the qualifications
49 of the experts selected by the Commission to perform this role, and conceded that
50 he had not been selected for that role. He had done none of the things that the

1 independent experts had done to perform their role, and did none of the things he
2 has done in the past when he has provided expert advice, even to a national
3 delegation. For example, he did not attend any of the Working Group sessions.
4 Indeed, he testified that he had not even read the reports of those sessions well
5 enough to be able to comment knowledgeably on them. He acknowledged that the
6 independent scientists had made efforts to bring the parties to a consensus, and had
7 offered proposed solutions where the parties did not reach their own agreements.

8
9 What shall we make of these concessions and of Australia and New Zealand's
10 studied silence until this morning? It is clear that the parties by their own solemn
11 pledges, which I have just quoted, provided the means to solve the problems with
12 which Australia and New Zealand now seek to burden this Tribunal. Instead of
13 accepting the proposed solutions of the independent scientists, as Japan was and is
14 willing to do, Australia and New Zealand ran to this Tribunal, apparently afraid that
15 truly independent and scientific review might reach conclusions different from those
16 that they have advanced here. Rather than accept the possibility of peaceful
17 resolution by scientific means, they resorted to litigation.

18
19 The independent scientists have made their own submission to this Tribunal. They
20 did so, in their own words, out of a sense of moral obligation to provide "a nationally
21 unbiased scientific viewpoint". That fact alone speaks volumes. Moreover, while I
22 acknowledge that their submission is written diplomatically, in the context of these
23 proceedings its meaning is patent.

24
25 Let us take, for example, the contention from Wednesday by Mr Crawford, who, of
26 course, is not a scientist:

27
28 Japan in its EFP focuses on only one matter, that is the density of
29 fish in unfished areas. But that is only one aspect of one uncertainty
30 in stock assessment projections. There are others which are
31 important and which cause much more of the difference between
32 our projections and those of Japan.

33
34 Let us see what the Panel statement says on this same subject:

35
36 The choice of a catch per unit of effort series to calibrate the VPA is
37 one of the major sources of uncertainty and a main reason for the
38 lack of agreement on recent stock size.

39
40 Mr Crawford belittles what the scientists engaged by the Commission, with the
41 consent and approval of his clients, say was the most important source of
42 uncertainty and the main reason for the lack of agreement between the parties.

43
44 Next Mr Crawford tried mightily to persuade you that Japan's EFP is not needed and
45 of little scientific merit, on the theory that it is unnecessary to resolve the constant
46 squares versus variable squares issues, and that the 1998 pilot programme did not
47 sufficiently do so. I am leaving out the citations to the transcript.

48
49 What does the expert Panel say on this subject?
50

1 We therefore see a strong need to gather additional information on
2 the fishing grounds because existing data are insufficient to
3 unambiguously resolve the difference in points of view. If future
4 stock assessments are to use data and methodologies similar to
5 what has been used in the past, i.e. sequential analysis calibrated
6 with indices of stock size, a fishing component has generally
7 outlined in the agreed records of discussions of the Working Group
8 appears satisfactory in terms of statistical design and practical
9 considerations for purposes of reducing the uncertainties with
10 respect to the variable squares versus constant squares
11 hypothesis.

12
13 In contrast to Mr Crawford, the experts see a strong need for an EFP directed
14 precisely to resolving the constant squares versus variable squares uncertainty.

15
16 Mr Crawford again urged this morning that geo-statistical models be considered, but
17 the Peer Review Panel report, which it accepts as having been commissioned by the
18 Commission, said that:

19
20 It is clear that approaches reduce to 2 with habitat and variable
21 squares, on the one hand, producing virtually identical trends and
22 that geo-statistical and constant squares also showing virtually
23 identical relevant trends.

24
25 The SAG should therefore reduce to two options, one of them being the variable
26 squares/constant squares. As we have just seen, they agreed that resolving the
27 difference between variable squares and constant squares is a key.

28
29 Mr Crawford also attacked the current programme as not satisfying the 1996 criteria
30 for an EFP, simply invited the Tribunal to read the 1996 criteria. I also simply invite
31 the Tribunal to read the 1996 criteria and decide for yourselves. I will agree, as I did
32 yesterday, that one element of the 1996 criteria, that of consensus, has not been
33 met, but I am not aware of any other specific objection levelled by Australia and New
34 Zealand against the 1999 EFP based on the 1996 criteria. Here too Australia and
35 New Zealand seek to fight the last war, rather than forge the peace which the parties
36 have provided for. What relevance do matters years ago have to a request for
37 provisional measures today?

38
39 Much ground has been covered since the 1996 criteria were set, most importantly
40 the parties' agreement in connection with this very dispute to engage the
41 independent experts to try to facilitate a consensus and to defer to them should
42 a consensus not emerge. On that score the Panel's reference to "a fishing
43 component as generally outlined in the agreed report of discussions of the Working
44 Group 1-4" is significant. The Working Group 1-4 refers to the four formal sessions
45 among the parties during February to April of this year, in which there was a
46 substantial consensus on the critical elements of an experimental programme.
47 Australia and New Zealand have made no effort to show that the current EFP is
48 deficient as compared to those agreed criteria. Japan firmly believes that it has
49 satisfied the criteria to which the Panel refers, and we believe that the panel of

1 independent scientists would have told the Tribunal if they felt otherwise. We are
2 more than satisfied to refer that question to that scientific panel for resolution.

3
4 Mr Crawford's last endeavour was an exercise in chasing the proverbial red herring,
5 in which he plumbed the depths of a set of tentative comments of Dr Serge Garcia,
6 based on hand-written notes on an early draft of the plan for the 1998 pilot
7 programme. The significance of the exchange of views with Dr Garcia is that it was
8 in fact an exchange of views. The Garcia letter was received by Japan more than
9 one month before the 1998 pilot programme, not five days before, as he now says.

10
11 Japan was more than willing to expose its proposal to scientific criticism. It sought
12 out Dr Garcia's views which were given to them, albeit in highly tentative form.

13
14 What our opponents ignore is that in Appendix 16 there is a point by point response
15 to Dr Garcia from one of Japan's senior scientists, Dr Suzuki. In respect of Japan's
16 true motivations in developing the EFP, I would commend to the Tribunal's attention
17 numbered paragraph 4 of Dr Suzuki's response, which is as follows:

18
19 Most important aspect is not necessarily the increases in catches,
20 but to know the real trend of future spawning stock. If the
21 programme result shows need to reduce TAC, which we do not
22 think, then it still provides us very important information in
23 management decision making, and we are ready to reduce TAC.
24 Benefit is far bigger than cost if the present stalemate over the
25 stock assessment is resolved through this project, through the EFP.

26
27 Dr Garcia was satisfied with this response and did not communicate further.

28
29 For reasons that are not clear, Australia and New Zealand's advocates here are not
30 satisfied, and wish to start the debate over a programme that was not actually
31 conducted. The draft to which Dr Garcia made comments was just that – a draft.
32 Significant changes were made thereafter in the pilot programme, some of which
33 were outlined in Dr Suzuki's response. It is also worth noting that 1998 was a pilot
34 programme to work out some of the feasibility and other issues addressed in the
35 exchange of views with Dr Garcia. Thus more changes were made before the full-
36 scale programme was implemented this year, most importantly changes agreed by
37 the parties in the context of the experimental fishing working group. In other words,
38 things agreed upon by all the parties present before you.

39
40 What should the Tribunal make of the failure of Australia and New Zealand to deal
41 until today with the Panel's Statement – the Panel of Independent Scientists? It is
42 clear that that is the most important issue in this case. First, the Tribunal should use
43 it to gauge the credibility of every factual assertion that the Applicants have made.
44 Importantly, the Tribunal should use it as a gauge of Applicants' claims of urgency
45 and injury. Even if, as Mr Crawford suggests, the Tribunal need not resolve the
46 scientific issues, it needs to have some view of them, and the view presented by the
47 Panel's Statement, the only completely independent and expert information before
48 the Tribunal, shows that there is no basis for urgent action.

49

1 Second, Applicants' omission highlights in several ways the non-justiciable character
2 of this case. The Applicants complain of what they call over-fishing, to the extent that
3 the experimental catch in 1998 and 1999 might exceed Japan's national allocation
4 for 1997, the last which was agreed upon by the parties. As Professor Ando detailed
5 at length yesterday, it is clear that those issues arise under the 1993 Convention, not
6 UNCLOS.

7
8 The further point to make here is that the parties have provided for resolution of the
9 issues through the dispute resolution under the 1993 Convention to culminate in
10 referral to the independent scientists. But even assuming that there is a dispute
11 under UNCLOS, the failure of Applicants to complete the dispute resolution
12 mechanism they agreed to, the referral to independent scientists, deprives this
13 Tribunal of jurisdiction under Part XV 2. As we discussed in our written submission,
14 and as Professor Ando explored yesterday afternoon, as a condition to invoking the
15 jurisdiction of article 288, paragraph 1, Australia and New Zealand must demonstrate
16 that they have fully exhausted opportunities for amicable dispute resolution
17 procedures under Section 1 of Part XV. The intent of Section 1 is to discourage
18 parties from precipitously invoking the procedures under Section 2, and to require
19 them first to make their best efforts to resolve the dispute through negotiation or
20 other agreed peaceful means.

21
22 In this instance, in the very dispute resolution procedures Applicants assert were
23 undertaken under UNCLOS as well as the 1993 Convention, the parties provided for
24 an adjudicative role for the independent scientists, should the parties themselves be
25 unable to reach a consensus under the experimental fishing programme. Although
26 the precise circumstances and procedures under which the panel of independent
27 experts would perform an adjudicative role are not spelt out, it is clear in context that
28 the parties intended to implement the Panel's 1998 recommendation that the
29 scientific process be depoliticized by continuing use of neutral experts, who in the
30 absence of a consensus "would provide the advice to the Commission." Applicants'
31 utter failure to exhaust this procedure precludes the exercise of jurisdiction by the
32 Tribunal under Part XV Section 2.

33
34 Now, if the Tribunal follows the reasoning I have just outlined, it need not decide or
35 even predict whether this is a dispute under UNCLOS or whether an arbitral tribunal
36 under Annex VII might eventually take jurisdiction of this matter. It is sufficient that
37 the Tribunal conclude that there are available means for dispute resolution to which
38 Applicants agreed, and which have not been exhausted, so as to preclude the
39 imposition of provisional relief. The Tribunal would then revert the parties to that
40 other agreed means.

41
42 Following this course would serve to strengthen and support the purposes and goals
43 of the 1993 Convention. It would lead to scientific resolution of the issues relating to
44 EFP, which in turn should permit more rational determinations of the TAC and
45 country allocations, and restore to the CCSBT the consensual element that is central
46 to its functioning.

47
48 This in turn would provide the basis for non-parties to become parties, or to
49 coordinate with parties, which is essential if the long-term management goals of the

1 Convention are to be reached. As Professor Ando eloquently advanced yesterday,
2 this would serve the purposes of UNCLOS as well.

3
4 A third point to be made about Applicants' reticence regarding the independent
5 scientists is its bearing on their request for provisional relief, specifically the
6 incredible hypocrisy they displayed to this Tribunal. As everyone well knows,
7 Applicants seek to stop Japan's experimental fishing programme, and indeed to stop
8 commercial fishing by the Japanese fleet for the rest of the year. Notwithstanding the
9 effect their proposal would have on science, Applicants suggest that all they seek to
10 do is to preserve the status quo. They complain, however, that granting Japan's
11 conditional counter-relief, which after all would only require negotiations followed by,
12 if necessary, referral to independent scientists, is devastatingly unfair to them, for in
13 the words of Mr Burmester it would "impose a requirement on Australia and New
14 Zealand in particular to negotiate over the issues in dispute in a rigid, fixed time
15 period with a predetermined outcome if there is no agreement." Notwithstanding that
16 Australia and New Zealand had agreed, not once, but twice, to engage in such
17 negotiations and to the result of referral to independent scientists, Mr Burmester
18 complained "this is not to preserve the rights of the parties, it is to impose a particular
19 course of conduct on two of the three parties, which is inconsistent with good faith
20 negotiations." That is his complaint. From the parties that not only refuse to
21 negotiate, but refuse mediation or even binding arbitration unless Japan agreed in
22 advance to abandon its experimental fishing programme, and to conclude in the
23 case of mediation by August 31, 1999, this is not worthy of further comment or any
24 consideration by the Tribunal.

25
26 I note, moreover, that the result can be considered "predetermined" only if, as we
27 contend, there is no merit to the objections Australia and New Zealand have raised
28 with respect to the operation of the experimental fishing programme.

29
30 Mr Burmester's final comment - that the future role of scientists may be one for
31 negotiation but it is not something to be predetermined by this Tribunal - is
32 unfathomable, considering that the Applicants have twice agreed to this future role of
33 scientists.

34
35 I turn then to where I started. Applicants' failure to address realistically the
36 independent scientists' views and role, even after we placed their views and their
37 function in front and centre in our written submission, should cause the Tribunal to
38 question the credibility of everything else Applicants have said and done. It should
39 cause the Tribunal to question why this matter is before it at all, and I dare say it
40 should leave the Tribunal to consider further the behaviour of the parties in bringing it
41 here.

42
43 Australia has a history of shifting goal posts in the record of this matter. Rather than
44 permit true scientific dialogue to proceed focussing on reasonable alternative
45 assessments, Australia has developed a form of scientific game to see how
46 conservative a hypothesis can be developed, which remains consistent with existing
47 data. Applicants demand that Japanese proposals reflect low risk, even under the
48 most extreme hypothesis imaginable. Any type of EFP which is not ideally suited to
49 address each of these hypotheses is, in Applicants' view, hopelessly flawed.
50 Applicants' approach to science seems to mirror their approach to devising a

1 revolutionary legal standard for provisional relief. Indeed, only with a legal standard
2 turning on an inability to exclude all worst case scenarios does their extreme form of
3 science become relevant. But even they reject, though apparently only in one-sided
4 fashion, their expert Dr Beddington's recommendation that all parties reduce their
5 catch.

6
7 This approach has infected their negotiating stance and, unfortunately, their
8 approach to this case. In that regard, I cannot help but observe the following. On
9 Wednesday during the opening portion of the oral proceedings Mr Williams,
10 Australia's Attorney General, appeared and complained to the Tribunal that
11 Australia's good faith had been called into question. He then deferred to Australia's
12 Agent, Mr Campbell, who proceeded to question Japan's good faith by alleging time
13 and again that Japan's interest in scientific fishing was a disguise for naked
14 commercial gain. I am deeply troubled, however, as I imagine the Tribunal might be,
15 that Mr Williams did not remain here even to listen to Japan's response, not even to
16 the passionate and persuasive opening remarks of its Agent, Mr Togo, but instead
17 left to tell the press of his confidence that the Tribunal will accept that Japan is in
18 breach of its obligations and in doing so should be called to account before the final
19 hearing is conducted.

20
21 In measuring the realism, consistency and validity of Australia's approach, a
22 rhetorical question can be posed: What if their extreme legal standards and extreme
23 scientific projections were applied to Australia's domestic fisheries?

24
25 Mr Togo will now present the final submissions on behalf of the Government of
26 Japan. Before turning to him, may I simply reiterate how deeply honoured I have
27 been to appear before this august Tribunal, and may I quote the remark made by
28 Mr Togo yesterday – "may justice and wisdom prevail". Thank you.

29
30 **THE PRESIDENT:** Thank you, Mr Greig.

31
32 **MR TOGO:** Mr President, honourable Judges, now that we have reached the closing
33 part of the hearing of this historic proceeding, before presenting the final submission
34 of my country as scheduled, I would like to offer my closing remarks.

35
36 Honourable Judges, as I mentioned in the concluding part of my statement
37 yesterday, Japan came to this Tribunal with a maximum willingness to cooperate.
38 However, I think there is no secrecy in admitting that the preceding weeks of this
39 Tribunal were not easy ones for us. The time pressure that we had to overcome in
40 preparing detailed submissions on both science and law was quite heavy. It was also
41 such a novelty for us to compose just a few weeks ago a unique team of
42 Government officials, academicians of international law and lawyers from New York
43 and to start tackling those huge mountains of work which then lay ahead of us.

44
45 Now that we have gone through these weeks of such challenging work, it is my
46 strong impression that there has been one element which has guided and united us
47 all, until today, to this Tribunal. That element is the determination, shared by us all,
48 that Japan has a clear message to present to this most distinguished Tribunal of the
49 United Nations Convention for the Law on the Sea. Thus, this Tribunal might provide
50 such a unique opportunity for us to elucidate that message.

1
2 Mr President, honourable Judges, thanks to your wise guidance you have given to
3 us in the course of the past three days' deliberation now nearing its end. I am
4 gratified to tell you that the fundamental points we absolutely wanted to present are
5 well on the table for your consideration.
6
7 The gist of those points is as follows: First, Japan has throughout the course of these
8 decades undertaken most sincere efforts to realize the important objective of
9 conservation and optimum utilization of SBT.
10
11 Secondly, it is of paramount importance for the three countries of the 1993
12 Convention to regain the proper functioning of that Convention and to re-establish
13 total allowable catch of SBT within that Convention, so as to embrace into the
14 cooperative framework of that Convention the non-parties which are rapidly
15 expanding their SBT catch.
16
17 Thirdly, the experimental fishing programme proposed by Japan, based on the best
18 possible scientific data available, including those coming from independent scientists
19 as necessary, is the most reliable basis for reaching a consensus towards this end.
20
21 Fourthly, Japan is ready to communicate and negotiate in good faith with our
22 Australian and New Zealand colleagues towards that end.
23
24 Finally, the 1993 Convention is the sole legal framework within which current
25 differences between our three countries may and should be resolved. By forcing their
26 way and resorting to the Annex VII arbitral tribunal of UNCLOS and applying the
27 case to this Tribunal seeking provisional measures, the Applicants brought the issue
28 to a forum in which, in our respectful submission, it does not belong.
29
30 Mr President, in this connection, with your permission, let me address
31 Mr William Campbell, the Agent of Australia, and Mr Timothy Bruce Caughley, the
32 Agent of New Zealand. In the circumstances that have forced all three of us together,
33 acting as Agents of each country, our discussions at times might have sounded a
34 little thorny or polemical. However, I am sure that we are all well aware that lawyers'
35 polemics have much smaller elements of real divergence than they actually seem or
36 sound to have. We are also convinced, as Mr Williams stated and as I echoed
37 wholeheartedly – and as was confirmed by Mr Caughley this morning – that the
38 multifaceted and strong relationships which exist between the three countries
39 constitute the basis of those "lively" discussions.
40
41 In shortly parting from you in this Tribunal, I would like to express most sincerely to
42 both of you our hope that, in some way or another, our three countries can find a
43 way to overcome today's difference and that, through dialogue, communication and
44 an improved understanding, we may resume the cooperative relationship which has
45 so powerfully existed in the course of the decades to come, for the important
46 objective of conservation and optimum utilization of SBT.
47
48 Mr President, honourable Judges, with this plea, I would like to leave the case to the
49 best and wisest consideration of the court. I would like to express our sincere thanks
50 and appreciation for the attention and care that you have given to us during the

1 course of the past three days and which you will give in the course of the week to
2 come.

3

4 Mr President, let me now conclude my statement by presenting the final submission
5 of Japan. In doing so, let me state that all the objections that I have made to the
6 provisional measures, which we dealt with at length yesterday, are still valid. On
7 behalf of the Government of Japan, in accordance with article 75, paragraph 2, of the
8 Rules of the Tribunal, let me present the final submission as follows:

9

10 First, the request of Australia and New Zealand for the prescription of provisional
11 measures should be denied.

12

13 Secondly, despite all the submissions made by Japan, in the event that the Tribunal
14 were to determine that this matter is properly before it, that an Annex VII tribunal
15 would have *prima facie* jurisdiction and that it could and should prescribe provisional
16 measures, then, pursuant to ITLOS Rules article 89, paragraph 5, the International
17 Tribunal should grant provisional measures in the form of prescribing that Australia
18 and New Zealand urgently and in good faith should recommence negotiations with
19 Japan for a period of six months in order to reach a consensus on the outstanding
20 issues between them, including a protocol for a continued experimental fishing
21 programme and the determination of a total allowable catch and national allocations
22 for the year 2000. The Tribunal should prescribe that any remaining disagreements
23 should, consistent with the parties' December 1998 and subsequent Terms of
24 Reference to the EFP Working Group, be referred to the panel of independent
25 scientists for their resolution, should the parties not reach a consensus within six
26 months following the resumption of these negotiations.

27

28 Mr President, that concludes all the submissions by the Government of Japan in this
29 proceeding. I thank you very much.

30

31 **THE PRESIDENT:** I thank the Agent of Japan.

32

33 That brings us to the end of the oral proceedings in the *Southern Bluefin Tuna*
34 *Cases*, Requests for provisional measures.

35

36 I should like to take this opportunity to thank the Agents, Counsel and Advisers of
37 both parties for the excellent presentations that they have made to the Tribunal over
38 the past three days. In particular, the Tribunal appreciates the professional
39 competence and personal courtesies that have been exhibited so consistently by
40 Agents and Counsel on both sides. We have greatly benefited from your expertise,
41 and we thank both sides for the very kind words that you have addressed to the
42 Tribunal.

43

44 The Registrar will now address questions in relation to documentation.

45

46 **THE REGISTRAR:** Mr President, in conformity with article 86, paragraph 4, of the
47 Rules of the Tribunal, the parties have the right to correct the transcripts of their
48 presentations and statements made by them in the oral proceedings. Any such
49 corrections should be submitted as soon as possible, but in any case not later than
50 the end of Tuesday, 24 August 1999.

1
2 In addition, the parties are requested to certify that all the documents that have been
3 submitted and which are not originals are true and accurate copies of the originals of
4 those documents. For that purpose, they will be provided with a list of the documents
5 concerned. Thank you, Mr President.

6
7 **THE PRESIDENT:** The Tribunal will now withdraw to deliberate on the case and
8 make a decision. The Order will be read on a date to be notified to the Agents. The
9 Tribunal has tentatively set a date for the delivery of the Order. That date is
10 27 August 1999. I repeat that it is a tentative date. The Agents will be informed
11 reasonably in advance if there is any change to this schedule, either by way of
12 advancing the date or by way of postponement. In accordance with the usual
13 practice, I request the Agents kindly to remain at the disposal of the Tribunal in order
14 to provide any further assistance and information that it may need in its deliberation
15 of the case prior to the delivery of the Order.

16
17 The sitting is now closed.

18
19 (*The Tribunal rose at 12.55 p.m.*)
20