INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 1999

27 August 1999

List of cases:
Nos. 3 and 4

SOUTHERN BLUEFIN TUNA CASES

(NEW ZEALAND *v.* JAPAN;
AUSTRALIA *v.* JAPAN)

Requests for provisional measures

ORDER

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

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 287, paragraph 5, and article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or “the Convention on the Law of the Sea”) and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the facts that Australia became a State Party to the Convention on 16 November 1994, that Japan became a State Party to the Convention on 20 July 1996 and that New Zealand became a State Party to the Convention on 18 August 1996,

Having regard to the fact that Australia, Japan and New Zealand have not chosen a means for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification submitted by New Zealand to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Notification submitted by Australia to Japan on 15 July 1999 instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning southern bluefin tuna,

Having regard to the Request submitted by New Zealand to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the Request submitted by Australia to the Tribunal on 30 July 1999 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the fact that the Request of New Zealand was entered in the List of cases under No. 3 and named Southern Bluefin Tuna Case (New Zealand *v.* Japan), Request for provisional measures,

Having regard to the fact that the Request of Australia was entered in the List of cases under No. 4 and named Southern Bluefin Tuna Case (Australia *v.* Japan), Request for provisional measures,

Having regard to the Order of 16 August 1999 by which the Tribunal joined the proceedings in the cases concerning the Requests for the prescription of provisional measures,

Makes the following Order:

1. *Whereas* Australia, Japan and New Zealand are States Parties to the Convention;

2. *Whereas*, on 30 July 1999 at 8:38 a.m., New Zealand filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph

5, of the Convention in the dispute between New Zealand and Japan concerning southern bluefin tuna;

3. *Whereas* a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

4. *Whereas* the original of the Request and documents in support were filed on 4 August 1999;

5. *Whereas*, on 30 July 1999 at 2:30 p.m., Australia filed with the Registry by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between Australia and Japan concerning southern bluefin tuna;

6. *Whereas* a certified copy of the Request was sent the same day by the Registrar to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;

7. *Whereas* the original of the Request and documents in support were filed on 5 August 1999;

8. *Whereas*, on 30 July 1999, the Registrar was informed of the appointment of Mr. Timothy Bruce Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, as Agent for New Zealand, and Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia; and of the appointment of Mr. Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan, as Agent for Japan on 2 August 1999;

9. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Australia or of New Zealand;

10. *Whereas,* pursuant to article 17 of the Statute, Australia and New Zealand are each entitled to choose a judge *ad hoc* to participate as a member of the Tribunal in the proceedings in the respective cases;

11. *Whereas* Australia and New Zealand in their Requests informed the Tribunal that, as parties in the same interest, they had jointly nominated Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, as judge *ad hoc*;

12. *Whereas*, by a letter dated 6 August 1999, the Agent for Japan was informed, in accordance with article 19 of the Rules, of the intention of Australia and New Zealand to choose Mr. Shearer as judge *ad hoc* and was invited to furnish any observations by 10 August 1999;

13. *Whereas*, since no objection to the choice of Mr. Shearer as judge *ad hoc* was raised by Japan and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the

proceedings after having made the solemn declaration required under article 9 of the Rules in relation to each of the two cases at a public sitting of the Tribunal held on 16 August 1999;

14. *Whereas*, after having ascertained the views of the parties, the President of the Tribunal, by separate Orders of 3 August 1999 with respect to each Request, fixed 18 August 1999 as the date for the opening of the hearing, notice of which was communicated forthwith to the parties;

15. *Whereas* the Secretary-General of the United Nations was notified of the Requests by a letter dated 30 July 1999, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 4 August 1999;

16. *Whereas* additional documents were submitted on 5, 12 and 17 August 1999 by Australia, copies of which were transmitted in each case to the other parties;

17. *Whereas*, by a letter dated 6 August 1999, the parties were informed that the President, acting in accordance with article 47 of the Rules and with the consent of Australia and New Zealand, had directed that Japan might file a single Statement in Response by 9 August 1999;

18. *Whereas*, on 9 August 1999, Japan filed with the Registry its Statement in Response, which was transmitted via electronic mail to the Agent for Australia on the same date and on 10 August 1999 to the Agent for New Zealand; certified copies of the Statement in Response were transmitted by courier to the Agents for Australia and New Zealand on 10 August 1999;

19. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 16 and 17 August 1999 and noted the points and issues it wished the parties specially to address;

20. *Whereas*, at a meeting with the representatives of the parties on 17 August 1999, the President ascertained the views of the parties regarding the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;

21. *Whereas*, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal; and information regarding an expert to be called by Australia before the Tribunal pursuant to article 72 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Requests and the Statement in Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas* oral statements were presented at five public sittings held on 18, 19 and 20 August 1999 by the following:

On behalf of Australia and New Zealand: Mr. Timothy Caughley, Agent and
Counsel for New Zealand,

Mr. William Campbell, Agent and Counsel for Australia,
Mr. Daryl Williams AM QC MP, Attorney-General of the Commonwealth of Australia, Counsel for Australia,
Mr. Bill Mansfield, Counsel and Advocate for New Zealand,
Mr. James Crawford SC, Counsel for Australia,
Mr. Henry Burmester QC, Counsel for Australia;

On behalf of Japan:
Mr. Kazuhiko Togo, Agent,
Mr. Robert T. Greig, Counsel,
Mr. Nisuke Ando, Counsel;

24. *Whereas* in the course of the oral statements a number of maps, charts, tables, graphs and extracts from documents were presented, including displays on computer monitors;

25. *Whereas*, on 18 August 1999, Mr. John Beddington BSc (Econ) MSc PhD, Director, T.H. Huxley School of Environment, Earth Sciences and Engineering, Imperial College of Science, Technology and Medicine, London, United Kingdom, was called as expert by New Zealand and Australia (examined on the *voir dire* by Mr. Matthew Slater, Advocate for Japan), examined by Mr. Crawford and cross-examined by Mr. Slater;

26. *Whereas*, on 19 and 20 August 1999, the parties submitted written responses to certain points and issues which the Tribunal wished them specially to address;

27. *Whereas*, during the hearing on 20 August 1999, the Tribunal addressed questions to the parties, responses to which were provided in writing on the same date;

28. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, New Zealand alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the arbitral tribunal") to adjudge and declare:

1. That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS [*United Nations Convention on the Law of the Sea*] in relation to the conservation and management of the SBT [*southern bluefin tuna*] stock, including by:

   (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 and

contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;

(b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission [*Commission for the Conservation of Southern Bluefin Tuna*] national allocations;

(c) taking unilateral action contrary to the rights and interests of New Zealand as a coastal State as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against New Zealand fishermen contrary to Article 119 (3);

(d) failing in good faith to co-operate with New Zealand with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS;

(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

2. That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:

(a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of New Zealand and Australia;

(b) negotiate and co-operate in good faith with New Zealand, including through the Commission, with a view to agreeing future conservation measures and TAC [*total allowable catch*] for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with New Zealand and Australia until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.

3. That Japan pay New Zealand's costs of the proceedings;

29. *Whereas*, in the Notification of 15 July 1999 and the attached Statement of Claim, Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to adjudge and declare:

(1) That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock, including by:

(a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 of UNCLOS and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;

(b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission national allocations;

(c) taking unilateral action contrary to the rights and interests of Australia as a coastal state as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian fishermen contrary to Article 119 (3);

(d) failing in good faith to co-operate with Australia with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS; and

(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

(2) That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:

(a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of Australia and New Zealand;

(b) negotiate and co-operate in good faith with Australia, including through the Commission, with a view to agreeing future conservation measures and TAC for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;

(c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT by Japan above the amount of the previous national allocation for Japan agreed with Australia and New Zealand until such time as agreement is reached with those States on an alternative level of catch; and

(d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch for the current year by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.

(3) That Japan pay Australia's costs of the proceedings;

30. *Whereas*, in their Notifications of 15 July 1999, Australia and New Zealand requested that Japan agree to certain provisional measures with respect to the disputes pending the constitution of the arbitral tribunal or agree that the question of provisional measures be forthwith submitted to the Tribunal and furthermore reserved the right, if Japan did not so agree within two weeks, immediately on the expiry of the two-week period and without further notice to request the Tribunal to prescribe the provisional measures;

31. *Whereas* the provisional measures requested by New Zealand in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

32. *Whereas* the provisional measures requested by Australia in the Request to the Tribunal dated 30 July 1999 are as follows:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

33. *Whereas* submissions and arguments presented by Japan in its Statement in Response include the following:

> Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290(5) of UNCLOS pending constitution of such an Annex VII tribunal. First, the Annex VII tribunal must have *prima facie* jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1. Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have *prima facie* jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures.
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> . . .
>
> In the event that the Tribunal determines that this matter is properly before it and an Annex VII tribunal would have *prima facie* jurisdiction, then, pursuant to ITLOS [*International Tribunal for the Law of the Sea*] Rules Article 89(5), Japan respectfully requests that the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP [*experimental fishing programme*] and the determination of a TAC and national allocations for the year 2000. Should the parties not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be, consistent with Parties' December 1998 agreement and subsequent Terms of Reference to the EFPWG [*experimental fishing programme working group*] …, referred to the panel of independent scientists for their resolution.
>
> The ... Statement of Facts and the history of negotiations between Australia, New Zealand and Japan concerning conservation of SBT, chronicles the bad faith exhibited by Australia and New Zealand in terminating consultations and negotiations over the terms of a joint experimental fishing program and their rash resort to proceedings under UNCLOS despite the absence of any controversy thereunder and the failure to exhaust the amicable provisions for dispute resolution that Part XV mandates be fully utilized. Accordingly, this Tribunal should require Australia and New Zealand to fulfil their obligations to continue negotiations over this scientific dispute.
>
> **... Submissions**
>
> Upon the foregoing Response and the Annexes hereto, the Government of Japan submits that the Request for provisional measures by Australia and New Zealand should be denied and Japan's counter-request for provisional measures should be granted;

34. *Whereas* Australia and New Zealand, in their final submissions at the public sitting held on 20 August 1999, requested the prescription by the Tribunal of the following provisional measures:

(1) that Japan immediately cease unilateral experimental fishing for SBT;

(2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna ("the Commission"), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;

(3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

(4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and

(5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

35. *Whereas*, at the public sitting held on 20 August 1999, Japan presented its final submissions as follows:

> First, the request of Australia and New Zealand for the prescription of provisional measures should be denied.
>
> Second, despite all the submissions made by Japan, in the event that the Tribunal were to determine that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction and that the Tribunal were to determine that it could and should prescribe provisional measures, then, pursuant to ITLOS Rules Article 89(5), the International Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements would be, consistent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their resolution, should the parties not reach consensus within six months following the resumption of these negotiations;

36. *Considering* that, pursuant to articles 286 and 287 of the Convention, Australia and New Zealand have both instituted proceedings before the arbitral tribunal against Japan in their disputes concerning southern bluefin tuna;

37. *Considering* that Australia and New Zealand on 15 July 1999 notified Japan of the submission of the disputes to the arbitral tribunal and of the Requests for provisional measures;

38. *Considering* that on 30 July 1999, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, Australia and New Zealand submitted to the Tribunal Requests for provisional measures;

39. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;

41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*;

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 19 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

88. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

89. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

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

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

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

AGAINST: *Judges* VUKAS, EIRIKSSON.

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Judge* ad hoc SHEARER;

AGAINST: *Judges* ZHAO, YAMAMOTO, VUKAS, WARIOBA.

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna,

except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

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

AGAINST: *Judges* YAMAMOTO, VUKAS.

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

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

AGAINST: *Judge* VUKAS.

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

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

AGAINST: *Judges* VUKAS, WARIOBA.

By 21 votes to 1,

2. *Decides* that each party shall submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 6 October 1999, and *authorizes* the President of the Tribunal to request such further reports and information as he may consider appropriate after that date;

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

AGAINST: *Judge* VUKAS.

By 21 votes to 1,

3. *Decides,* in accordance with article 290, paragraph 4, of the Convention and article 94 of the Rules, that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for southern bluefin tuna;

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

AGAINST: *Judge* VUKAS.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of August, one thousand nine hundred and ninety-nine, in four copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(Signed) Thomas A. MENSAH,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Vice-President WOLFRUM, Judges CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON and EIRIKSSON append a joint declaration to the Order of the Tribunal.

Judge WARIOBA appends a declaration to the Order of the Tribunal.

Judges YAMAMOTO and PARK append a joint separate opinion to the Order of the Tribunal.

Judges LAING and TREVES append separate opinions to the Order of the Tribunal.

Judge *ad hoc* SHEARER appends a separate opinion to the Order of the Tribunal.

Judges VUKAS and EIRIKSSON append dissenting opinions to the Order of the Tribunal.

(Initialled) T.A.M.
(Initialled) G.E.C.