

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



1999

Public sitting

held on Wednesday, 18 August 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

Southern Bluefin Tuna Cases

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

(Requests for provisional measures)

Verbatim Record

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

Australia represented by:

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

as Agent and Counsel;

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

as Counsel;

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

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

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

Mr Paul Bolster, Adviser to the Attorney-General,

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

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

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

as Advisers.

New Zealand represented by:

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

as Agent and Counsel;

Mr Bill Mansfield,

as Counsel and Advocate;

Ms Elana Geddis,

as Counsel;

and

Mr Talbot Murray,

as Adviser.

Japan represented by:

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

as Agent;

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

as Co-Agents;

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

as Counsel;

and

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

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

as Advocates.

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

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

11
12 The Requests for the prescription of provisional measures are made under
13 article 290, paragraph 5, of the United Nations Convention on the Law of the Sea,
14 which provides for the prescription of provisional measures by the International
15 Tribunal for the Law of the Sea pending the constitution of an arbitral tribunal in
16 accordance with Annex VII to the Convention to which the merits of the dispute have
17 been submitted. The Tribunal was informed that the notification concerning the
18 arbitral proceedings was conveyed to Japan on 15 July 1999.

19
20 **THE PRESIDENT:** This public sitting is being held, pursuant to article 26 of the
21 Statute of the Tribunal and article 90, paragraph 2, of the Rules of the Tribunal, for
22 the oral proceedings in the *Southern Bluefin Tuna* (provisional measures) *Cases*
23 submitted to the Tribunal by New Zealand and Australia against Japan.

24
25 The Requests for provisional measures were filed on 30 July 1999. The Requests
26 are in identical terms.

27
28 I call on the Registrar to read out the provisional measures which New Zealand and
29 Australia request the Tribunal to prescribe.

30
31 **THE REGISTRAR:** The Applicants request that the Tribunal prescribe the following
32 provisional measures:

- 33
34 (1) that Japan immediately cease unilateral experimental fishing
35 for SBT;
36 (2) that Japan restrict its catch in any given fishing year to its
37 national allocation as last agreed in the Commission for the
38 Conservation of Southern Bluefin Tuna, subject to the
39 reduction of such catch by the amount of SBT taken by
40 Japan in the course of its unilateral experimental fishing in
41 1998 and 1999;
42 (3) that the parties act consistently with the precautionary
43 principle in fishing for SBT pending a final settlement of the
44 dispute;
45 (4) that the parties ensure that no action of any kind is taken
46 which might aggravate, extend or render more difficult of
47 solution the dispute submitted to the Annex VII Arbitral
48 Tribunal; and
49 (5) that the parties ensure that no action is taken which might
50 prejudice their respective rights in respect of the carrying out

1 of any decision on the merits that the Annex VII Arbitral
2 Tribunal may render.

3
4 **THE PRESIDENT:** Upon the filing of the Requests for the prescription of provisional
5 measures, signed copies thereof were transmitted to the Government of Japan, in
6 accordance with article 89, paragraph 4, of the Rules of the Tribunal.

7
8 By Order of 3 August 1999, the President fixed the date for the opening of the oral
9 proceedings for 18 August 1999.

10
11 On 9 August 1999, Japan filed a single Statement in Response to the Requests by
12 New Zealand and Australia. In its Response, Japan submits that the requests for
13 provisional measures by New Zealand and Australia should be denied. Japan
14 submitted a "conditional counter-request" for provisional measures against New
15 Zealand and Australia.

16
17 I call on the Registrar to read out the measures that Japan requests the Tribunal to
18 prescribe.

19
20 **THE REGISTRAR:** Japan in its Response asks that

21
22 in the event that the Tribunal determines that this matter is properly
23 before it and an Annex VII tribunal would have *prima facie*
24 jurisdiction, then, pursuant to article 89, paragraph 5, of the Rules
25 of the Tribunal, Japan respectfully requests that the Tribunal grant
26 Japan provisional relief in the form of prescribing that New Zealand
27 and Australia urgently and in good faith recommence negotiations
28 with Japan for a period of six months to reach a consensus on the
29 outstanding issues between them, including a protocol for a
30 continued Experimental Fishing Programme and the determination
31 of a total allowable catch and national allocations for the year 2000.
32 Should the parties not reach a consensus within six months
33 following the resumption of these negotiations, the Tribunal should
34 prescribe that any remaining disagreements would be, consistent
35 with the parties' 1998 agreement and subsequent Terms of
36 Reference of the Experimental Fishing Program Working Group ...,
37 referred to the panel of independent scientists for their resolution,

38
39 and that the

40
41 Tribunal should require Australia and New Zealand to fulfil their
42 obligations to continue negotiations over this scientific dispute.

43
44 After consultations with the parties the Tribunal decided, by Order dated 17 August
45 1999, to join the proceedings in the two cases.

46
47 In conformity with article 67, paragraph 2, of the Rules of the Tribunal, copies of
48 pleadings filed in the cases and documents annexed thereto are being made
49 accessible to the public as of today.

50

1 **THE PRESIDENT:** I note the presence in court of His Excellency, Mr Tim Caughley,
2 Agent for New Zealand. I note the presence in court of His Excellency, Mr William
3 McFadyen Campbell, Agent for Australia. I also note the presence of His Excellency,
4 Mr Kazuhiko Togo, Agent for Japan.
5

6 I now call on His Excellency, Mr Tim Caughley, Agent of New Zealand, to note and
7 introduce the representation of New Zealand.
8

9 **MR CAUGHLEY:** Mr President, Mr Vice-President and distinguished Members of the
10 Tribunal, it is my privilege as the New Zealand Agent to open this joint presentation
11 by introducing those representing Australia and New Zealand (the Applicants acting
12 in the same interest). Before I do so, I also wish to acknowledge our counterparts
13 representing the Government of Japan.
14

15 First, the Attorney-General of Australia, the Honourable Daryl Williams QC, will
16 speak. As you will know, Mr President, the Attorney-General is the pre-eminent legal
17 officer in the Australian Federal Government and is a member of Cabinet. He will
18 provide an overview of the joint case and set out the reasons why Australia attaches
19 so much importance to the proper management and conservation of high seas
20 fisheries. He will also outline the importance for UNCLOS and this Tribunal in
21 securing that objective. In addition, the Attorney-General will address the applicability
22 of the precautionary principle, given the issues of scientific uncertainty in this case.
23

24 May I say in advance that the Government of New Zealand fully shares the
25 perspective which will be presented by the Attorney-General. New Zealand's concern
26 to ensure the proper management and conservation of southern bluefin tuna is
27 deeply held for a range of reasons, including its intrinsic worth, its ecosystem
28 significance and its economic value, notwithstanding in the latter cases that our
29 share of the catch is a comparatively small one. In that regard, Mr President, I must
30 note that the amount intended to be caught by Japan in its current experimental
31 fishing programme is five times New Zealand's most recent total allocation of
32 southern bluefin tuna.
33

34 After the Honourable Attorney-General has addressed the Tribunal, the Australian
35 Agent, Mr Bill Campbell, will provide a brief review of the dispute, the fishery to which
36 it relates, the scope of the 1993 Convention for the Conservation of Southern Bluefin
37 Tuna, and the practice of the parties pursuant to it. This presentation sets out the
38 essential factual background for the dispute before the Tribunal. The aim of
39 Mr Campbell's presentation will be to demonstrate that the pattern of conduct of
40 Japan which gave rise to this application – a pattern of seeking unsustainable
41 increases in the catch of southern bluefin tuna in the face of serious biological
42 concerns – is contrary to its obligations under UNCLOS.
43

44 Mr Bill Mansfield will then address the Tribunal. Like myself, Mr Mansfield was a
45 New Zealand delegate to the Law of the Sea Conference throughout its work. He will
46 develop the argument about the scope of the 1993 Convention, asserting in
47 particular the primacy of UNCLOS and refuting the arguments on jurisdiction
48 contained in Japan's Response.
49

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

7
8 Then will follow the Chief General Counsel in the Australian Government,
9 Mr Henry Burmester QC, who will cover the provisional measures being sought by
10 Australia and New Zealand and the justifications for them.

11
12 Mr President, Members of the Tribunal, before these substantive presentations begin
13 there are three preliminary points I should mention.

14
15 The first of these concerns the position where two States Parties to UNCLOS have
16 brought claims in the same interest. I refer, Mr President, to the Tribunal's decision
17 of 16 August that the cases of Australia and New Zealand have been joined.
18 Throughout the presentations this week we will refer to the Applicants collectively
19 and only refer to Australia or New Zealand separately where the context so requires.

20
21 A second point, Mr President, relates to your task in assimilating a considerable
22 body of material which has been put before you, especially the voluminous Japanese
23 Response. We have tried to confine the material we have tabled to what we believe
24 is necessary in an application for provisional measures. In that respect we have
25 sought to assist the Tribunal without flooding it with paper. Mr President, if the
26 Tribunal wishes further information from us we will be pleased to provide it. In that
27 regard I would note that we will respond to the questions which you informally raised
28 with the parties yesterday in the course of our presentations today. In the case of
29 those questions which simply required a brief factual answer we will provide that
30 separately in writing.

31
32 Finally, may I just mention that to facilitate the flow of our presentations we will not
33 repeat references to cases and materials; these are set out in the written version of
34 our statements, which we have made available to the Registry.

35
36 Mr President, Members, I would now ask you to call on the Honourable Attorney-
37 General of Australia, Mr Williams QC. Thank you, Mr President.

38
39 **THE PRESIDENT:** Thank you, Mr Caughley. I would like to invite the Agent of
40 Japan to make the presentation. Do not introduce the evidence but just make the
41 presentation for the Tribunal.

42
43 **MR TOGO:** Mr President, honourable Judges, it is indeed a great honour for me to
44 be at this historic occasion at this Tribunal. Our detailed representations will be done
45 tomorrow, but might I just introduce those who are going to intervene tomorrow.
46 Myself, Kazuhiko Togo, Agent of Japan and Mr Robert Greig, Counsel to the
47 Japanese Delegation, and Professor Nisuke Ando, who is President of the Japanese
48 Association of International Law. Thank you very much.

49
50 **THE PRESIDENT:** I thank His Excellency the Agent for Japan.

1
2 The Tribunal will hear the submissions of the Applicants New Zealand and Australia
3 at today's sittings. This morning's sitting will be interrupted at 11.30 and resume at
4 12 noon until 13.00 hours. The hearing will continue from 15.00 hours to 16.30 hours
5 this afternoon.

6
7 The Tribunal will hear the submissions of Japan tomorrow. The parties will have the
8 opportunity to respond to each other's submissions at the sitting on Friday,
9 20 August 1999.

10
11 In accordance with article 80 of the Rules of the Tribunal, any witnesses and experts
12 to be called by the parties shall remain out of court until they are requested to testify.
13 At the request of the parties the Tribunal has decided to suspend the application of
14 this provision in respect of experts in these proceedings. Accordingly experts called
15 by the parties may remain in court before and after their testimony. I emphasize,
16 however, that this applies only to experts. All witnesses must remain out of court until
17 they are called upon to testify.

18
19 I now invite the Honourable Attorney-General of Australia, Mr Williams, to commence
20 the presentation on behalf of New Zealand and Australia.

21
22 **MR WILLIAMS:** Mr President, Members of the Tribunal. As the Attorney-General of
23 Australia, it is an honour to appear before this Tribunal and to do so at a time when
24 the effectiveness of the new law of the sea is being put to the test. It is also an
25 honour to appear in this case since it concerns a central issue of that new law, the
26 conservation of the living resources of the high seas. Nobody can doubt the
27 importance of that issue today. It is well known that there are major problems with
28 the management of high seas fisheries. These have been summarized in a recent
29 FAO report in the following terms:

30
31 At present, a large proportion of the world's exploited fish stocks
32 are fully exploited, over-exploited, depleted or in need of
33 recovery ... Major ecological damage, which may or may not
34 always be reversible, and economic waste are already evident in
35 many cases. New technological developments, such as GPS,
36 radar, echo-sounders, more powerful vessels and improved
37 processing methods ... continue to enhance the ability of fishers to
38 exploit more living resources more intensively, potentially
39 increasing the severity of the problem.

40
41 The existing status of the world's living aquatic resources is largely
42 a result of a failure of the present process of fisheries governance
43 to achieve responsible and effective management of fisheries ...

44
45 Those remarks are not limited to coastal fisheries, and they certainly apply to the
46 state of Southern Bluefin Tuna stock at present.

47
48 But this Tribunal and UNCLOS more generally have important roles to play in
49 addressing some of the problems identified by FAO in the passage I have just read,

1 and in ensuring that States fulfil their express obligations to conserve marine
2 resources, especially high seas resources.

3
4 In this case, Japan effectively calls on you to abdicate any such role in advance and
5 for the future.

6
7 If the Tribunal were to accede to the Japanese arguments, it would put the future
8 conservation of high seas resources including SBT, in jeopardy. Accordingly, the
9 Applicants invite you to reject the Japanese arguments.

10
11 Mr President and Members of the Tribunal, you have a clear and express mandate in
12 relation to these issues in UNCLOS itself. In introducing the Applicants' case I seek
13 to set out that mandate, to place our case in its proper perspective, legally and
14 practically, and to outline the role of this Tribunal at this stage of the proceedings.

15
16 Before I turn to these issues, however, I observe on behalf of Australia in respect of
17 our opponent today, the Government of Japan, that the relationship with Japan is
18 one of Australia's most important international relationships. It is multifaceted and
19 strong. Because of that strength and the many aspects of our relationship, it can
20 survive disagreements on particular questions, such as the conservation of southern
21 bluefin tuna.

22
23 In fact the early record on that front was promising. After initial over-exploitation of
24 the stock, Australia, New Zealand and Japan agreed to take measures initially
25 informal, and then under the auspices of the Commission for the Conservation of
26 Southern Bluefin Tuna. For a time it appeared that those measures might be
27 beginning to reverse the downward trend of the stock.

28
29 The Applicants believe that these earlier and tentative gains are now seriously at
30 risk. My colleagues will explain in more detail the grounds on which we hold this
31 view.

32
33 We hold it strongly, to the point of bringing these proceedings to press our concerns,
34 and to try to break the cycle of unilateral over-quota fishing by Japan. In this respect
35 I am disappointed that Japan has, only now, in its Response alleged that my
36 Government is acting in bad faith in bringing this claim. Mr President, this is an
37 unworthy accusation.

38
39 There are grounds for serious concern as to the state of the SBT stock, and recent
40 events have made these concerns even more pressing and grave. In that context to
41 talk about bad faith is unhelpful. I hope that it was a pleading extravagance; it
42 certainly does not reflect the normal tone of the relations between our two countries.

43
44 As I am providing the overview in the joint action I should note that the New Zealand
45 Agent has asked me to record that New Zealand joins Australia in repudiating the
46 allegation of bad faith made in the pleadings.

47
48 Mr President, Members of the Tribunal, the Applicants attach great importance to the
49 new law of the sea, as set out in the 1982 Convention.

50

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

4
5 Australia and New Zealand attach great importance to the system of dispute
6 resolution contained in Part XV of the Convention, of which this Tribunal forms an
7 important part.

8
9 Binding and compulsory dispute settlement procedures were seen as critical to the
10 acceptance of the new and important obligations the Convention established.

11
12 It is clear from the text as well as from the preparatory works that Part XV was
13 intended to provide effective mechanisms for resolution of disputes concerning the
14 interpretation and application of the Convention as a whole. An indication of the
15 principle of effectiveness in relation to Part XV is to be seen in article 287, which
16 gives parties a choice of means in relation to dispute settlement, but nonetheless
17 deems them to have chosen arbitration unless some other permissible forum is
18 selected.

19
20 If the parties have chosen or are deemed to have chosen arbitration, then there will
21 be a gap of some months and maybe longer before the arbitral tribunal is
22 established. Again in such a case Part XV provides an effective mechanism.
23 Article 290 gives this Tribunal a compulsory and binding provisional measures
24 jurisdiction in the period before an arbitral tribunal is established.

25
26 Furthermore the provisional measures jurisdiction is broader in scope than that given
27 to the International Court of Justice by its Statute, as Mr Burmester will elaborate.
28 Under Part XV, provisional measures can be ordered where it is “appropriate” to
29 preserve rights or prevent harm to the marine environment; this is a broad
30 jurisdiction. And under article 290, paragraph 6, provisional measures are expressly
31 binding on the parties.

32
33 Not only is Part XV mandatory; it is also general in its application. It applies unless
34 otherwise stated to the whole range of UNCLOS obligations.

35
36 When the drafters wanted to exclude any provision of UNCLOS from the scope of
37 compulsory dispute settlement under Part XV, they did so expressly, in particular in
38 articles 297 and 298.

39
40 Those exclusions do not apply in this case.

41
42 That in itself goes a long way to refuting Japan’s arguments that the provisions of
43 UNCLOS relating to conservation are vague and effectively non-justiciable.
44 Article 297 even envisages that Part XV will apply to certain cases relating “to the
45 exercise by a coastal State of its sovereign rights or jurisdiction”, and this shows the
46 importance attached to the element of effectiveness in Part XV.

47
48 I refer in particular to article 297, paragraph 3, which states that:
49

1 Disputes concerning the interpretation or application of the
2 provision of this Convention with regard to fisheries shall be settled
3 in accordance with section 2 ...
4

5 Section 2 (articles 286-296), of course, makes provision for compulsory dispute
6 settlement entailing a binding decision. Article 297 provides in paragraph 3 for one,
7 and only one, exception. That concerns the sovereign rights of a coastal State in the
8 exclusive economic zone. That exception, of course, does not apply here. Japan is
9 not a coastal State with respect to southern bluefin tuna, and it has no sovereign
10 rights over that resource, such as a coastal State has over resources in its EEZ.
11

12 The UNCLOS provisions I have referred to go a long way to clarifying the Tribunal's
13 role in the present case. You have an express mandate to order appropriate
14 provisional measures in cases relating to fisheries beyond the EEZ. This in turn
15 implies that the provisions of the Convention relating to conservation and
16 management of high seas fisheries are justiciable, and that they impose real
17 obligations which can be invoked under Part XV and before you. Were it otherwise
18 article 297, paragraph 3, would be meaningless.
19

20 I note the deliberate decision of the drafters of the Convention as to the order of the
21 words "conservation and management". Conservation comes before management,
22 and if necessary it comes before exploitation. Conservation of living marine
23 resources is a priority where stocks are seriously depleted and the Applicants are in
24 no doubt that this is the case for southern bluefin tuna. Nor, I think, will you be in
25 doubt after you have read Professor Beddington's report.
26

27 Part XV applies to high seas fisheries even though UNCLOS also envisages that co-
28 operation in the conservation and management of those fisheries will occur under
29 specific conventions: Indeed, it requires States to cooperate to establish regional
30 fisheries organizations (article 118).
31

32 Despite the existence of specific organizations and conventions, the overarching
33 provisions of UNCLOS apply to fisheries and Part XV applies to disputes concerning
34 fisheries. These obligations arising under UNCLOS provide the essential legal matrix
35 in this case. A dispute concerning the conservation and management of a high seas
36 fishery entails the application and interpretation of the particular articles 116 to 119.
37 In this case article 64 on highly migratory species is also in issue. Such a dispute
38 clearly falls within Part XV, and the jurisdiction of tribunals under Part XV is only
39 excluded if there is, in effect, some other provision under another agreement
40 entailing a binding decision.
41

42 Mr President, Japan has made a lot of these and other jurisdictional points, and they
43 will be dealt with shortly by Mr Mansfield. But the Applicants think the position is
44 quite clear. Under article 290, paragraph 5, you only have to determine whether an
45 arbitral tribunal under Annex VII has *prima facie* jurisdiction. The Applicants submit
46 that there is clear jurisdiction under Part XV and this Tribunal has clear jurisdiction in
47 relation to the provisional measures being sought. Any remaining issues can be dealt
48 with later if Japan presses them.
49

1 Let me turn now to the merits of the case presented before you. It is, at present, a
2 claim for provisional measures which you have express power to order if they are
3 appropriate and if the other conditions laid down in article 290 are met. There is no
4 requirement that you finally determine whether there will be jurisdiction under
5 Part XV. It is, as I have said, sufficient that there is *prima facie* jurisdiction.
6

7 Similarly, you do not determine the merits of the dispute, despite the volume of
8 material relating both to jurisdiction and merits that is put before you. What you do
9 need to do, and are expressly mandated to do, is to order provisional measures if
10 that is appropriate and urgent. If there is *prima facie* jurisdiction, and I have already
11 shown that there is, the parties seem to disagree over what provisional measures
12 should be ordered, rather than over whether they should be ordered. Mr Burmester
13 will deal with these issues later.
14

15 The Applicants accept that, while you certainly do not need to deal with the merits of
16 the case, you do need to know enough about the Applicants' case and Japan's
17 Response to it to form a view on the issues of appropriateness and urgency. In doing
18 so, of course, you also have to interpret and apply the relevant provisions of
19 UNCLOS dealing with conservation and management of high seas resources.
20 Indeed we may find that, as in certain developing areas of domestic or national law,
21 the so-called interim phase becomes important in giving guidance to the parties in
22 the settlement of pressing disputes.
23

24 In the Applicants' submissions the essential principle here is the primacy of
25 conservation over exploitation in respect of a seriously depleted stock. Japan is
26 exploiting the resources in a quite unnecessarily risky way, and is thereby in breach
27 of its express obligations under articles 116 to 119 of UNCLOS. Specifically, the
28 Applicants say the following things:
29

30 One: The stock of southern bluefin tuna is seriously depleted and is at its historically
31 lowest levels. Indeed this is not seriously in dispute, although projections of recovery
32 are in dispute. As Professor Crawford will show, there are many projected stock
33 recoveries for every stock that actually recovers. There is no reliable indication at all
34 of recovery in the present case.
35

36 Two: In the circumstances, States are obliged to take action to conserve the
37 depleted stock. That means, in the present case, not taking any catch over
38 previously determined allowable limits, and in particular not doing so if by doing so
39 there is a significant added risk of non-recovery of the stock.
40

41 Three: In the absence of agreement or of a scientific consensus on the action that
42 should be taken to conserve a seriously depleted stock, States should act in a
43 precautionary manner, emphasizing the sustainability of the resource for future
44 generations.
45

46 Four: Japan is failing to take necessary action to conserve southern bluefin tuna
47 stocks. On the contrary, it is further endangering them by a so-called "experimental"
48 programme which is (a) unilateral; (b) contains a high component of outright
49 commercial fishing; and (c) does not comply with agreed guidelines for experimental
50 fishing. Through this conduct it is setting a terrible example for third States which are

1 themselves increasingly imposing extra stress on the resource. By refusing to agree
2 to a continuation of the previous total allowable catch, Japan has precluded the
3 parties from relying on the total allowable catch as a basis for restraining the action
4 of third States. In all these respects, Japan is in breach of its express obligations with
5 respect to the conservation and management of these resources.

6
7 Five: These breaches are confirmed and aggravated by the fact that they concern a
8 highly migratory species, to which the obligations in article 64 are applicable.
9 Australia and New Zealand are coastal States through whose EEZ the tuna migrate,
10 and this gives each a specific legal interest in the conservation of the stock. As
11 things stand, Japan is expecting Australia and New Zealand to show restraint in
12 fishing of juvenile tuna in their EEZ, but it is showing no restraint itself in the high
13 seas fishery. This makes its conduct even more inequitable and even more clearly in
14 breach of the obligation of conservation.

15
16 Six: Faced with these obligations, Japan seeks to defend its conduct in carrying on
17 unilateral fishing by relying on its “experimental” or “scientific” character. But as our
18 scientific report shows, and as will be further demonstrated by Professor Crawford,
19 that excuse cannot prevail. It certainly does not make it any the less appropriate for
20 you to order provisional measures now. The Applicants accept that a properly
21 controlled and organized EFP could be useful, and the parties actually agreed in
22 1996 on the criteria which such an EFP should meet. The Japanese programme
23 does not fulfil those criteria and, as so far conducted, cannot significantly improve
24 our understanding of the stock. It amounts to commercial fishing in disguise.

25
26 Mr President, Members of the Tribunal, that, in summary, is our case and, to the
27 extent necessary, it will be developed by my colleagues today. In conclusion I offer
28 three remarks about the legal basis for this case.

29
30 The first concerns the nature of the so-called right of high seas fisheries under the
31 modern law of the sea. According to one view, this used to be a traditional high seas
32 right, essentially unfettered; a right to fish to the point of depletion of the stocks,
33 absent agreement to the contrary.

34
35 The International Court has already rejected that view for modern international law in
36 its well known dictum in the *Fisheries Jurisdiction* cases in 1974, and this Tribunal
37 will, I am confident, reject it equally for the 1982 Convention. Indeed, it is clear from
38 article 116 of the Convention that the right of high seas fishery is a qualified one,
39 expressly qualified by the rights, duties and interests of coastal States in respect of
40 highly migratory species under article 64, and expressly qualified also by the
41 obligations of all States in respect of conservation under articles 117 to 119.

42
43 To quote the words of the authoritative Virginia Commentary: “the concept of high
44 seas fishery rights is fundamentally altered in the 1982 Convention”. But this makes
45 it even clearer that the obligations of conservation expressly referred to in article 116
46 are legal obligations: if they were not, the old “free-for-all” basis of high seas freedom
47 would have returned by the back door. Indeed, many of the Japanese arguments,
48 and its underlying attitude to this case, imply precisely that. Those attitudes are not
49 compatible, either with the text or with the purpose of the Convention.

50

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

10
11 The very fact that this case is not about unilateral enforcement on the high seas
12 highlights the role of this Tribunal. Unless there is an appropriate vehicle for
13 authoritatively resolving disputes over the conservation of high seas fisheries and
14 highly migratory species, then the express obligations of the parties to UNCLOS in
15 that regard are undermined and yet again the old anarchical freedom to fish to the
16 point of depletion of stocks will return by the back door.

17
18 So this case presents an important opportunity for the tribunals with jurisdiction
19 under Part XV, and especially this Tribunal, to take a leading role in the resolution of
20 disputes which the parties, despite extended efforts, have been unable to resolve for
21 themselves.

22
23 My third point concerns one of the principles which we believe should be applied in
24 resolving those disputes, the precautionary principle, also referred to as the
25 precautionary approach. Precaution is an essentially common-sense notion
26 associated with conservation and the minimizing of risk in the face of scientific
27 uncertainty. For our purposes, the precautionary approach provides the practical
28 basis for implementation of the general concept of precaution and conservation in
29 fisheries management. In that sense it is already implicit in UNCLOS itself.

30
31 As the Virginia Commentary notes with respect to article 116(b), this language
32 “points to the precautionary principle of fisheries management”. Similarly, Professor
33 Orrego Vicuña, in a leading work entitled *The Changing International Law of High*
34 *Seas Fisheries*, records as one of the achievements of UNCLOS “the introduction of
35 the precautionary principle even if conceived at the time in a different language.”
36

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

43
44 The Appellate Body under the Presidency of Professor Feliciano noted that the
45 concepts in treaties referring to exhaustible natural resources were not static but “by
46 definition, evolutionary”, and that they had to be interpreted to take account of
47 “contemporary concerns of the community of nations about the protection and
48 conservation of the environment”, having regard in particular to “the objective of
49 sustainable development”.

50

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

4
5 But I should add that, for our purposes, we do not need to rely on those formulations
6 of the precautionary principle or approach which are specifically designed for cases
7 where information is lacking or highly uncertain.

8
9 In such circumstances the effect of the precautionary approach can be summarized
10 very simply: to err is human, but the law now says that, faced with serious risk and
11 real uncertainty, if at all possible you must err on the side of caution. This Japan has
12 failed to do, prompting the Applicants to seek a specific measure referring to the
13 principle.

14
15 But in our submission the Applicants' case does not depend simply on the notion of
16 scientific uncertainty.

17
18 As Professor Crawford will show, there is quite enough scientific information
19 available to take us well within the bounds of the obligation of conservation without
20 the aid of the precautionary principle.

21
22 Nonetheless, the conditions for the application of that principle are met; they
23 reinforce the Applicants' case for provisional measures.

24
25 And they enjoin this Tribunal, as well as the parties, to do whatever is reasonably
26 possible to conserve and not further endanger the depleted southern bluefin tuna
27 stock.

28
29 Mr President, Members of the Tribunal, this concludes my introductory statement,
30 and I invite you to call on the Australian Agent, Mr Campbell, to continue our joint
31 presentation,

32
33 **THE PRESIDENT:** I thank the Honourable Attorney-General of Australia. I now invite
34 Mr Campbell, the Agent of Australia, to continue the submissions.

35
36 **MR CAMPBELL:** Mr President and Members of the Tribunal, it is an honour to
37 appear before you as the Agent for the Government of Australia in this pivotal case
38 relating to the conservation and management of fisheries resources. As Mr Caughley
39 has noted, I will establish that Japan has made a practice of seeking large and
40 unsustainable increases in the catch of southern bluefin tuna in the face of serious
41 biological concerns. This culminated in its two EFPs which were carried out despite
42 its obligations under UNCLOS and despite the clear and express invocation of those
43 UNCLOS obligations by the Applicants.

44
45 The relevant provisions of UNCLOS and, in particular, articles 64, 87 and 116 to 119,
46 provide a careful balance between conservation and exploitation. Those provisions
47 require also management by cooperation between interested States and
48 recognize that fishing on the high seas should not prejudice the rights and interests
49 of the relevant coastal States such as Australia and New Zealand.

50

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

8
9 Mr President, my submissions are divided into three parts. First, I will describe the
10 southern bluefin tuna fishery and status. Secondly, I will outline the development of
11 management practices relating to the fishery with particular reference to UNCLOS
12 and the 1993 Convention. Thirdly, I will relate various steps in the development of
13 the present dispute. It seems that Japan accepts there is a legal dispute – albeit it
14 seeks to confine the dispute to one arising under the 1993 Convention.

15
16 First, SBT is one of the highly migratory species of pelagic fish expressly referred to
17 in Annex 1 to UNCLOS. It can grow up to 2 metres and 200 kilograms and can live
18 for up to 40 years or more. Also, it is highly valuable. One fish can sell for tens of
19 thousands of dollars. Assuming 2,000 tonnes of SBT were to be taken by Japan in
20 its current unilateral programme, it would be worth about US\$ 30-50 million on the
21 Japanese market.

22
23 It is a single stock with a single spawning ground south of the Indonesian island of
24 Java. As illustrated on the screen (Figure 1), the juveniles migrate along the west
25 coast of Australia and tend to spend their summers in the southern and eastern
26 coastal waters of Australia. During winter they migrate to deeper oceanic waters
27 where they are harvested by the long-line fisheries. Upon reaching maturity,
28 individuals return to the spawning grounds south of Java, a trip they make a number
29 of times. In summary, the SBT ranges across a broad part of the oceans of the
30 southern hemisphere, including in the exclusive economic zones of Australia and
31 New Zealand. It is not found in the marine areas subject to the jurisdiction of Japan.

32
33 There do remain important uncertainties about SBT biology, including the mean age
34 of maturity, the length of time that individuals spend on the spawning ground and
35 whether individuals spawn each year. However, what is absolutely clear is that, as
36 a relatively long-lived species with a lengthy pre-maturity period and virtually life-long
37 exposure to fishing pressure, the SBT stock is slow to recover from depletion. This
38 contrasts with other species like some tropical tuna which have a three to four year
39 breeding cycle. This vulnerability of SBT only serves to heighten the need for
40 compliance by States with their international obligations relevant to the conservation
41 and utilization of SBT.

42
43 The history of that utilization, particularly in its early years, is not a pretty one. In this
44 respect I am not singling out Japan for criticism: Australia too was involved in what
45 was an unsustainable level of exploitation. Significant commercial harvesting of SBT,
46 both in the long-lining and surface fisheries, commenced in the early 1950s with a
47 peak of over 81,000 tonnes being taken in 1961. The cumulative reported catches of
48 SBT in tonnage over that period since 1950 are shown on the screen (Figure 2). The
49 catches of Japan are in red, those of Australia in green and those of New Zealand in

1 blue. Figure 2 illustrates that historically by far the highest proportion of catch is that
2 of Japan. Since 1997, the Japanese catch has not included any EEZ fishing.

3
4 The ratio of the current size of the parental stock to that at the very beginning of
5 exploitation is a key statistic for measuring the degree of exploitation. A common
6 benchmark is that serious over-fishing has occurred when that ratio is below
7 20 per cent. Assessments for SBT point to figures well below this, typically in the
8 range of 6-12 per cent.

9
10 The expectation when parental stock has been reduced so markedly is that this will
11 be accompanied by declines in recruitment of fish to that stock, recruitment being the
12 key to the future well-being of the stock. This is exactly what has happened in the
13 case of SBT. Recruitment is estimated to be around one-third of the level of that
14 prevailing in the 1960s and there is no indication of any increase. I emphasize this is
15 not the Applicants' view alone; it is an agreed view of the Scientific Committee
16 established under the 1993 Convention.

17
18 The sorry state of the stock with a depleted parental biomass and significantly
19 reduced recruitment is not in question. So how have the parties responded? That
20 brings me to my second point concerning management practices.

21
22 Prior to the early 1980s, there was no form of multilateral regulation of SBT. The
23 interaction between the parties at that stage was primarily on a bilateral basis. For
24 example, in 1979 Australia and Japan entered into an agreement on fisheries which
25 provided for yearly subsidiary agreements concerning Japanese tuna long-line
26 fishing. These enabled entry into the Australian EEZ by Japanese vessels for the
27 purpose of long-lining.

28
29 In the early 1980s Australia voluntarily placed its own limitations on the catch of
30 juveniles following a collapse of a major component of the surface fishery off the
31 south-east coast of Australia. Given the highly migratory status of SBT, such
32 voluntary restraint in the EEZ component of the fishery needed to be complemented
33 in the high seas component of the fishery.

34
35 From the mid-1980s until 1993, the management and conservation of SBT was
36 determined under a trilateral arrangement between the three parties to these
37 proceedings. These arrangements were consistent with the then obligations of the
38 parties under international law as reflected in the text of UNCLOS. Under these
39 trilateral arrangements, annual global and country catch quotas were established for
40 southern bluefin tuna from the three countries. Japan first agreed to a catch limit on
41 SBT in 1985 when a global quota of 38,650 tonnes was set. There was a major
42 reduction in both the TAC and quota in 1988. Nevertheless, even then, the catch
43 limit allocated to Japan considerably exceeded the actual catch its long-line fleet was
44 able to take. In 1989, there was a further major reduction and it was agreed that the
45 TAC should be 11,750 tonnes, with an allocation to Japan of 6,065 tonnes, to
46 Australia of 5,265 tonnes and New Zealand 420 tonnes. In response to a matter
47 raised by the Tribunal, I should state that all the commercial catch by Australia and
48 New Zealand within their EEZs does form part of the TAC. Also, all of the
49 New Zealand catch and almost all of the Australian catch of SBT is caught within
50 their respective EEZs.

1
2 In 1993, Australia, New Zealand and Japan adopted the 1993 Convention. It entered
3 into force in 1994. The Preamble to the 1993 Convention demonstrates that it was
4 intended to assist in the implementation of the international obligations of the parties
5 as reflected in UNCLOS, even though UNCLOS had not yet entered into force. The
6 inter-relationship between UNCLOS and the 1993 Convention will be explained in
7 some detail by Mr Mansfield.

8
9 Deliberations under the 1993 Convention, both in the Commission for the
10 Conservation of Southern Bluefin Tuna and in the Scientific Committee, have been
11 long, laboured and difficult. In the submission of the Applicants, this is because
12 Japan routinely has sought a higher degree of commercial utilization of the stock
13 than can be justified both under relevant principles of international law and on the
14 scientific evidence. It has done so despite the consistent conclusion of the Scientific
15 Committee that the low level of the parental biomass is a cause for serious biological
16 concern. Let me give an example from the Scientific Committee's reports, which
17 Japan has put in evidence. In 1995, the Scientific Committee reported:

18
19 The current parental biomass level is considerably lower than the
20 1980 level. The continued low abundance of SBT parental biomass
21 is cause for serious biological concern. The 1980 level of parental
22 biomass corresponds to commonly used thresholds for biologically
23 safe parental biomass. Below that threshold, the risk of poor
24 recruitment is expected to increase while the stock becomes more
25 likely to experience abrupt and unpredictable recruitment decline.

26
27 As I have noted earlier, recruitment has indeed declined markedly.

28
29 Yet, at the second meeting of the Commission in 1995, Japan sought an increase of
30 6,000 tonnes in the total allowable catch. This would amount to an increase of over
31 50 per cent in the existing TAC. Given the assessment of the Scientific Committee, it
32 is not in the least surprising that no consensus was reached on the total allowable
33 catch or its allocation at that meeting. Therefore, the Commission convened a
34 special meeting in October 1995. At that meeting, Japan submitted an alternative
35 proposal that an experimental fishing quota be set. That "experimental" quota was,
36 coincidentally, 6,000 tonnes. The practice of Japan in seeking an increase in TAC
37 and then seeking the same level of increase, characterized as experimental fishing,
38 clearly suggests that its experimental fishing is a disguised form of commercial
39 fishing. Indeed, in 1995 it expressly indicated that the figure of 6,000 tonnes for its
40 proposed special experimental quota could be reduced if the TAC were increased by
41 the same amount.

42
43 It was not until a second special meeting of the Commission in May 1996 that the
44 Commission decided that for the 1995-1996 fishing year the total allowable catch
45 would remain unchanged at 11,750 tonnes with the same allocations.

46
47 Mr President, this may seem a somewhat lengthy example but the simple point is
48 this: how can an increase of 6,000 tonnes be consistent with a conclusion that the
49 continued low abundance of the SBT parental biomass is cause for serious biological
50 concern? Part of this 6,000 tonnes of increased catch would have been taken from

1 the parental stock, thereby directly reducing the parental biomass. The remainder
2 would have been taken from younger age groups, removing fish that otherwise
3 would have contributed to maintaining or perhaps increasing the future parental
4 biomass. This is in the context of the parental stock being well below biologically
5 safe levels.

6
7 On top of all this, in 1997 Japan then proposed changes to the existing mechanism
8 for determining allocations of TAC among parties. The proposed mechanism would
9 have provided a considerably more favourable national allocation of the TAC to
10 Japan at the expense of Australia. In short, Japan has been determined to get
11 additional commercial catch, whether by way of an increase in TAC, by way of an
12 experimental fishing programme or by favourable changes to the long-standing
13 national allocations of TAC. Such instances, of which I have given just one example,
14 demonstrate a lack of cooperation and a lack of elementary care for the conservation
15 of the stock.

16
17 Until 1998, the practice of Japan within the Commission and in the Scientific
18 Committee served to cause significant delays in the setting of TACs. However, in
19 1998 and in 1999, delay turned into failure to agree. This was due solely to the
20 promotion of increases in commercial catch by Japan, increases which were and
21 are, on any dispassionate judgment, unsustainable. For example, despite the
22 conclusion in 1998 by the Scientific Committee that "the continued low abundance of
23 the SBT parental biomass is cause for serious biological concern", Japan proposed
24 raising the total allowable catch by 3,000 tonnes or more. Again, there was no
25 agreement, so again the spectre of experimental fishing was raised and then
26 implemented unilaterally, albeit at a lower tonnage.

27
28 By contrast, in the absence of agreement, Australia and New Zealand restrained
29 their catch to the level first established in 1989. Moreover, this restraint has been
30 most markedly exercised in relation to the fishery for juveniles in the Australian EEZ.
31 Japan has sought, and has largely achieved, a fully policed restraint by Australia and
32 New Zealand in respect of their EEZ fisheries. It has failed to show similar restraint
33 on the high seas. Yet it now accuses Australia and New Zealand of bad faith, an
34 accusation which is unfounded and uncalled for.

35
36 The Applicants are not opposed to the concept of an experimental fishing
37 programme as a means of enhancing the understanding of the stock and reducing
38 uncertainty as to the state of the stock. However, both Australia and New Zealand
39 are vehemently opposed to experimental fishing of SBT being conducted on a
40 unilateral basis, in a form which will not deliver scientifically valid and meaningful
41 results and which has the serious potential to contribute to a decline in the stock.

42
43 Mr President, this leads me to the dispute which is presently before the Tribunal. In
44 this respect, let me particularly refer the Tribunal to Annex 2 to the Applicants'
45 Statements of Claim. This is a document entitled *Objectives and Principles of the*
46 *Design and Implementation of an Experimental Fishing Programme*. These were
47 agreed by the Commission in 1996. The preamble to that document refers to the
48 utility of experimental fishing as a measure to improve the quality and quantity of the
49 scientific information. It states:

1 Increasing removals above the current TAC should provide an
2 opportunity for experimental fishing to proceed. This could happen
3 where there is agreement within the Commission that the risks of
4 such removals are outweighed by the benefits.
5

6 This passage demonstrates two things. First, it was always anticipated that
7 experimental fishing should be done by agreement, by consensus and not
8 unilaterally. It was also agreed that the risks of extra removals from the fishery by
9 way of experimental fishing must be outweighed by the benefits.
10

11 The proposals put forward by Japan for experimental fishing programmes, and the
12 unilateral experimental fishing carried out by Japan, do not meet those objectives
13 and principles, as will be demonstrated by Professor Crawford.
14

15 In February 1998, Japan refused to extend the TAC arrangements. Japan
16 announced that it would conduct unilateral experimental fishing over a period of
17 three years. After months of discussion, and over the express objections of the
18 Applicants, Japan did conduct unilateral experimental fishing from 10 July until 31
19 August 1998. This resulted in an additional 1,464 tonnes of catch of SBT being taken
20 by Japan over and above previously agreed levels of catch. This catch was taken
21 essentially for commercial purposes, with minimal scientific gain.
22

23 Before considering whether there is a dispute between the Applicants and Japan
24 over the interpretation and application of UNCLOS, let me first examine the legal
25 requirements for a dispute. The Permanent Court of International Justice in
26 *Mavrommatis Palestine Concessions*, defined a dispute as "a disagreement on a
27 point of law or fact, a conflict of the legal views or of the interests between two
28 persons" (*P.C.I.J., Series A, No. 2*, p.11). The International Court in the Tunisia-
29 Libya case held that, in order to constitute a dispute "it should be sufficient that the
30 two Governments have in fact shown themselves as holding opposite views..."
31 (*Tunisia-Libya Continental Shelf case, I.C.J. Reports 1982*). Commenting on this
32 passage, Merrills states that "provided a clear difference of opinion on a legal issue
33 is manifest, negotiation is not a prerequisite of adjudication" (J.G. Merrills,
34 *International Dispute Settlement*, 3rd ed.). Therefore, the legal threshold for the
35 existence of a dispute is not very high. As will be demonstrated, that threshold is
36 clearly met in this case.
37

38 A consideration of the various exchanges establishes that this dispute is not simply
39 one over science under the 1993 Convention. Those exchanges establish that this is
40 a dispute about fundamental conservation obligations under UNCLOS.
41

42 On 31 August 1998, both Australia and New Zealand formally notified Japan of the
43 existence of a dispute between them over its conduct of unilateral experimental
44 fishing in 1998. They stated that in conducting its unilateral experimental fishing,
45 Japan had placed itself in breach of its obligations under international law and, in
46 particular, its obligations under the 1993 Convention, UNCLOS and customary
47 international law, including the precautionary principle. Express reference was made
48 to the obligations under UNCLOS concerning the "conservation of highly migratory
49 species", "the duty to have regard to the interests of coastal states" and the "the
50 duties to co-operate in, and take such measures necessary for, the conservation of

1 the living resources of the high seas". The relevant diplomatic notes concluded that
2 there was a dispute between Australia and Japan over the conduct of unilateral
3 experimental fishing and its legality under international law. They called for, and
4 Japan agreed to, negotiations under article 16, paragraph 1, of the 1993 Convention.
5 The Applicants also reserved the right to take such measures as might be necessary
6 to protect their legal interests.

7
8 Those negotiations under article 16, paragraph 1, in December 1998 failed to resolve
9 the dispute. However, without prejudice to the legal position of the Applicants, the
10 delegations to the negotiations decided that they should develop a future EFP, to be
11 adopted by consensus, which took account of the 1996 Objectives and Principles
12 that I mentioned earlier and the results provided by Japan from its 1998 EFP.

13
14 Also, in the course of the December negotiations, both of the Applicants made
15 statements on their legal position in which they referred to Japan's conduct of
16 unilateral fishing as being in breach of the 1993 Convention, UNCLOS and
17 customary international law. These form part of Annex 7 to the Response of Japan.
18 Indeed, the statements of the Applicants' legal position referred expressly to
19 articles 64 and 116 to 118 of UNCLOS. In the light of these statements and of the 31
20 August 1988 diplomatic notes, the statement by Japan in paragraph 33 of its
21 Response that the Applicants did not identify until June 1999 any provisions of
22 UNCLOS alleged to have been violated is simply wrong.

23
24 Between February and May 1999, a series of meetings was held between the parties
25 concerning a joint EFP, many in the forum of an Experimental Fishing Programme
26 Working Group. Japan has sought to paint the Applicants as agreeing to certain
27 elements of proposals put forward by Japan in the course of those discussions and,
28 on the other hand, of frustrating the negotiations by their own proposals.

29
30 However, Japan's single-minded determination to proceed with its own proposals for
31 an EFP, without change, was manifest in those discussions.

32
33 At this stage, let me also place on record that Australia does not accept the
34 chronology of discussions regarding the EFP which forms Annex 4(1) to the
35 Response of Japan. It is selective and does not accurately portray the views and
36 positions of the parties in those discussions. Similarly, we do not accept the
37 declarations appended to the Response of Japan as being accurate and
38 comprehensive. However, at the provisional measures stage, it is not necessary for
39 the Tribunal to decide all the issues of fact.

40
41 On 26 May 1999, in the course of a meeting between senior officials in Canberra,
42 Japan issued what can only be described as an ultimatum. In effect, it said "agree to
43 our experimental fishing programme by 31 May with an expected catch of
44 1,800 tonnes, plus or minus 20 per cent, or we will carry out an experimental fishing
45 programme on 1 June, with an expected catch figure of 2,000 tonnes plus or minus
46 20 per cent".

47
48 In paragraph 16 of his declaration at Annex 4 to Japan's Response, Mr Komatsu
49 describes the visit by representatives of Japan to Canberra for the purpose of that
50 meeting as "a last effort at negotiations showing compromise". Mr Komatsu was not

1 at that meeting. I can assure that there was no hint of compromise on the part of
2 Japan. It was take it or leave it. Indeed the delegation of Japan stated that it had no
3 room to change the package that they had brought with them.
4

5 The Applicants did not succumb to the ultimatum and noted that if Japan were to
6 proceed with another unilateral EFP from 1 June 1999 then its actions would amount
7 to termination of the 1993 Convention article 16 dispute resolution process. On
8 31 May, both countries formally requested Japan not to proceed.
9

10 Japan informed the Applicants on 1 June 1999 of its decision to commence its
11 unilateral experimental fishing on that date, and both responded by stating that such
12 an action was unacceptable and in breach of international law. On the same day the
13 Australian Foreign Minister called in the Ambassador of Japan to Australia to convey
14 Australia's strong protest over the commencement of unilateral fishing.
15

16 There followed a series of diplomatic exchanges concerning how the dispute might
17 be resolved. Given their recent disappointing and fruitless experience of trying to
18 resolve the dispute with Japan by non-compulsory means, the Applicants favoured
19 compulsory dispute resolution under UNCLOS entailing binding decisions. However,
20 Japan continued to favour non-compulsory means under the 1993 Convention. In an
21 effort to accommodate Japan, the Applicants indicated their readiness to again try
22 non-compulsory means such as mediation, provided Japan stopped its newly
23 commenced unilateral EFP and provided the non-compulsory means were
24 expeditious. Japan would not accept these reasonable conditions. One day before
25 the commencement of the Annex VII arbitration, Japan belatedly offered dispute
26 resolution by an arbitral panel under article 16, paragraph 2, of the 1993 Convention,
27 but without agreeing to stop its EFP pending such arbitration. Throughout these
28 exchanges the Applicants noted that the obligations of Japan under UNCLOS and
29 customary international law are core elements of the disputes which must be
30 addressed if it is to be resolved.
31

32 In response to an issue of timing raised by the Tribunal let me make the following
33 comments. The diplomatic exchanges, of which the Tribunal has copies, clearly
34 indicate that the Applicants did not stand silently by for six weeks after 1 June before
35 commencing legal action. There was a need for the highest levels of government to
36 consider the impasse. Also, as one would expect the first and proper response was
37 one of strong protest. The Applicants then proposed binding dispute settlement
38 under UNCLOS at the same time as Japan offered mediation. The Applicants offered
39 to accept this proposal provided the unilateral EFP ceased. When Japan rejected
40 this, procedures were promptly commenced.
41

42 Mr President and Members of the Tribunal, this survey of the SBT fishery and
43 Japan's conduct in relation to it establishes a number of matters. First, the records of
44 the Commission evidence the agreement of all the parties that the continued low
45 abundance of SBT is a cause for serious biological concern. Secondly, despite this,
46 Japan in recent years has sought large and unsustainable increases in the total
47 allowable catch, at one point seeking an additional 6,000 tonnes. It has done so both
48 under the rubric of an increase in quotas and of experimental fishing, without much
49 or any distinction between them. Furthermore, in circumstances where it has been
50 unable to get the agreement of the Commission to an additional commercial tonnage

1 as agreed total allowable catch it has sought that tonnage as part of an experimental
2 fishing programme exclusively for the use of its own vessels. Thirdly, throughout the
3 dispute, Australia and New Zealand have consistently invoked the obligations of the
4 Parties under UNCLOS and under customary international law as core elements of
5 the dispute which must be addressed if the dispute is to be resolved.

6
7 The question then becomes what legal consequences flow from the facts as I have
8 outlined them. There are here three legal issues. First, is this a dispute exclusively
9 under the 1993 Convention, as Japan argues? The answer is clearly “no”, as my
10 colleague Mr Mansfield will establish. Secondly, is the Japanese conduct as I have
11 outlined it, *prima facie* inconsistent with its obligations under UNCLOS – at least in
12 the sense of raising a triable issue on the merits? The answer to this question is
13 clearly “yes”, as Professor Crawford will show. And thirdly, what provisional
14 measures should be indicated now? This will be a matter for Mr Burmester. So
15 Mr President, to deal with the first of these legal issues I ask you to call upon
16 Mr Mansfield. Thank you, Mr President.

17
18 **THE PRESIDENT:** Thank you very much, Mr Campbell. I indicated that there would
19 be a break in the sitting. It is now twenty past. There are two possibilities. We could
20 have the break early and come back earlier than envisaged, or ask Mr Mansfield to
21 commence on the understanding that at a convenient point the presentation will
22 break. I would suggest that perhaps it would be more convenient for us to break
23 early, but I will leave it to you to decide. Mr Mansfield, please. Would you like to start
24 and break at a convenient point?

25
26 **MR MANSFIELD:** I think that would be convenient, Mr President, to make sure we
27 keep to time. I will try and find a convenient point to break in about ten minutes.

28
29 **THE PRESIDENT:** That will be acceptable to the Tribunal. May I now call
30 Mr Mansfield to continue the submissions.

31
32 **MR MANSFIELD:** Mr President, Members of the Tribunal, as someone who
33 participated in most, if not all of the negotiating sessions of the Law of the Sea
34 Conference and has a strong commitment to the Convention it produced, may I say it
35 is a great honour to appear before you today.

36
37 Mr President, in this presentation I will address the relationship between UNCLOS
38 and the 1993 Convention so far as it is necessary to do so for the purposes of these
39 proceedings. I say “so far as it is necessary”, because in our view this is not in fact
40 very far at all. This Tribunal has *prima facie* jurisdiction under article 290,
41 paragraph 5, of UNCLOS. The Applicants make a substantial claim under identified
42 articles of UNCLOS, and the facts *prima facie* sustain that claim; at any rate they
43 clearly raise an arguable issue. It will be for the arbitral tribunal under Part XV –
44 unless the parties otherwise agree – to decide whether any jurisdictional objection
45 Japan may make is valid or not. For present purposes it is enough that the claim is
46 *prima facie* properly brought under Part XV of UNCLOS. That is really the only issue.

47
48 Japan of course does not agree. In fact in its Response it spends almost half of its
49 space at this point trying to avoid the jurisdiction of this Tribunal and of Part XV. I will
50 show in what follows that this dispute does in truth arise under UNCLOS and that the

1 dispute settlement procedures of Part XV do apply to it as a matter of law. But the
2 Applicants do not need to go so far. It is sufficient that the dispute is *prima facie* one
3 to which Part XV applies, and this is clearly the case. So what I will say on the issue
4 of substance goes further than is strictly necessary. But I do this for two reasons.
5 First, in order to respond more fully to the extensive argument Japan makes.
6 Secondly, and more importantly, because the reason why Japan's argument on this
7 point is wrong sheds useful light on the relationship between UNCLOS and other
8 implementing Conventions, and thus, for our purposes, on the role of this Tribunal in
9 relation to high seas fisheries. In this respect what I have to say builds on the
10 argument already presented by the Honourable Attorney-General of Australia.

11
12 Specifically, I will discuss the primacy of the relevant obligations contained in
13 UNCLOS and the subsidiary nature of agreements such as the 1993 Convention. In
14 particular I will submit that while the 1993 Convention is intended to give effect, in
15 part, to the relevant obligations under UNCLOS, it in no way excludes or replaces
16 those obligations. In that regard I will also submit that the practice of States Parties
17 under agreements such as the 1993 Convention is directly related to the question
18 whether they are fulfilling their obligations under UNCLOS. Japan tries to force
19 implementing agreements such as the 1993 Convention into a separate watertight
20 box, distinct from the obligations of UNCLOS. We submit that this is wrong: wrong in
21 relation to the facts of the present case, and wrong in law as well.

22
23 First, Japan's argument is wrong in relation to the facts of the present case. As
24 outlined by Mr Campbell it is the firm contention of the Applicants that this dispute
25 concerns a breach of important obligations under UNCLOS. It has been the constant
26 contention of the Applicants since the dispute was first notified to Japan that the
27 conduct of Japan specified in the Statements of Claim constitutes a breach of its
28 obligations under UNCLOS. The relevant provisions are articles 64 and 116 to 119.
29 The dispute thus turns on the interpretation and application of those particular
30 provisions, related provisions such as article 300 and underlying principles of
31 international law which are relevant to their interpretation and application.

32
33 Secondly, Japan's argument is wrong in law as well; it fails to appreciate the central
34 function of UNCLOS as the key convention for the law of the sea, and likewise of this
35 Tribunal with its specific responsibilities under UNCLOS.

36
37 UNCLOS establishes a comprehensive legal regime for all ocean space. It is a
38 regime that carefully balances rights with obligations and looks to create a lasting
39 legal order to promote the peaceful and sustainable use of the oceans and seas for
40 the foreseeable future. What is particularly relevant for this dispute is that in relation
41 to marine living resources it balances both the conservation and use of those
42 resources and the rights and duties of coastal States and distant water fishing
43 States.

44
45 Mr President, UNCLOS is often referred to as a "constitution for the oceans" and it
46 creates an overarching regime. It envisages subsidiary processes to develop the
47 detailed measures necessary or appropriate to give effect to its provisions. In many
48 cases it specifically enjoins States to engage cooperatively in such processes. But at
49 the same time it spells out substantive legal obligations for the States which are
50 party to it.

1
2 Article 64 on highly migratory species is an obvious case in point. It requires the
3 coastal States and the distant water fishing States in a region to “cooperate directly
4 or through appropriate international organizations with a view to ensuring
5 conservation and promoting the objective of optimum utilization of such species
6 throughout the region ...”. It goes further and says that in regions where no
7 appropriate international organization exists coastal States and distant water fishing
8 States must cooperate to establish such an organization and participate in its work.
9

10 But the important point is that, even though UNCLOS envisages that some of the
11 most important obligations it establishes should be discharged through appropriate
12 subsidiary organizations the obligations themselves remain – and they are
13 fundamental. They are not excluded, diluted, or modified – let alone eliminated – by
14 the creation of such organizations.
15

16 The organizational arrangements established by the 1993 Convention are without
17 question the kind of international organization envisaged in article 64 of UNCLOS.
18 The entire thrust of the 1993 Convention is to provide the detailed practical means
19 by which the parties can give effect to their rights and obligations under UNCLOS
20 with regard to this particular species of highly migratory fish. It does not restate those
21 rights and obligations and it was not necessary for it to do so. For example, there is
22 no equivalent in the 1993 Convention of article 117 of UNCLOS. At the same time,
23 the 1993 Convention contains nothing which can be construed as intended to
24 exclude, override, or modify those fundamental rights and obligations.
25

26 This is the last point I will deal with before the break, Mr President.
27

28 What then is the relationship between the conduct of a party under a subsidiary
29 agreement such as the 1993 Convention and its obligations as a party to UNCLOS?
30

31 UNCLOS anticipates that much of the necessary work in conserving and managing
32 high seas living resources will have to be undertaken by States working together
33 and, in many if not most situations, working together through regional or sub-regional
34 organizations. In these circumstances the way in which States conduct themselves
35 within such organizations must be able to be considered in any assessment of
36 whether a State is fulfilling its relevant obligations under UNCLOS. If that were not
37 the case any such assessment would be virtually limited to whether the State
38 concerned had joined the relevant regional or sub-regional organization. Such an
39 interpretation would deprive the obligations of any content and render the relevant
40 UNCLOS articles essentially meaningless.
41

42 To the contrary, Mr President, the Applicants submit:
43

44 One: that the obligation under UNCLOS articles 64 and 116 to 119 to cooperate in
45 the conservation of the living resources of the high seas, including highly migratory
46 species, was always intended to be a serious obligation;
47

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

1
2 Three: that the conduct of States within regional or sub-regional organizations
3 formed for the purpose of ensuring the conservation of these resources and
4 promoting their optimum utilization is directly material to the question of whether they
5 are fulfilling this increasingly important obligation.

6
7 Thank you, Mr President, if it is convenient to you we could stop at that point.

8
9 **THE PRESIDENT:** Thank you very much indeed, Mr Mansfield. It is convenient for
10 us. The sitting will be suspended for half an hour and we will resume at twelve noon.

11
12 *(The Tribunal adjourned at 11.30 a.m.)*

13
14 **THE PRESIDENT:** Please proceed, Mr Mansfield.

15
16 **MR MANSFIELD:** Thank you, Mr President. Mr President, Members of the Tribunal,
17 before the break I was making the point that high seas obligations created by
18 UNCLOS are not excluded or modified by the creation of article 64-type regional
19 organizations.

20
21 I want to go on to say that just as the 1993 Convention contains nothing that
22 excludes, overrides, or modifies the substantive rights and obligations of parties
23 under UNCLOS, so too the procedural rights and obligations it creates, such as
24 those in respect of dispute settlement, in no way exclude or override the rights and
25 obligations of the parties under Part XV of UNCLOS.

26
27 Yes, the 1993 Convention contains its own dispute settlement provision. This is to be
28 expected but it certainly does not imply exclusion of Part XV.

29
30 Article 16 relates to disputes between two or more of the Parties concerning the
31 interpretation or implementation of the 1993 Convention. It does not purport to – and
32 does not – deal with disputes relating to the interpretation or implementation of
33 UNCLOS. Indeed it would have been somewhat surprising if it had done so unless it
34 had provided that such disputes were required to be settled in a specific, binding and
35 authoritative manner. Unless, in other words, it had settled on one of the means set
36 out in article 287 of UNCLOS and required any disputes relating to UNCLOS that
37 might arise in the operation of the 1993 Convention to be submitted to that specific
38 means – namely this Tribunal, the International Court of Justice, or an arbitral
39 tribunal constituted in accordance with Annex VII or Annex VIII.

40
41 But that is the second point about article 16 of the 1993 Convention. It does not
42 provide for compulsory, binding, third-party settlement. No party is bound to accept
43 any of the forms of dispute settlement to which it makes reference. Rather, the
44 mechanism is based on the mutual agreement of the parties. Paragraph 1 provides
45 that parties are to “consult ... with a view to have the dispute resolved by negotiation,
46 inquiry, mediation, conciliation, arbitration, judicial settlement” and so on. In
47 paragraph 2 it provides for reference to the International Court of Justice or to
48 arbitration, but only if the parties agree to that course. Finally, in paragraph 3 a
49 simplified form of arbitration is provided for, if the Parties agree to that course.

1 The effect then is that, although the article gives strong encouragement to the
2 peaceful settlement of disputes under the Convention, it does no more than provide
3 a list of possibilities for the parties to choose from by agreement. Nor, as Japan
4 asserts, are the parties required by the article to exhaust all the possibilities for which
5 it provides.

6
7 The inclusion of this provision in the 1993 Convention, while no doubt useful in the
8 context of the anticipated operation of the Convention, cannot be read as excluding
9 or replacing the rights of the parties to avail themselves of the compulsory dispute
10 settlement provisions of UNCLOS where a dispute involving the 1993 Convention is
11 at the same time one involving the interpretation or application of UNCLOS. In any
12 event the provision of a method for the settlement of disputes that is not compulsory
13 and binding, and which relates only to the 1993 Convention cannot preclude the
14 parties from using the mechanisms under UNCLOS for dispute settlement which
15 relate to that convention.

16
17 It is worth reflecting for a moment on the situation that could arise if that were not the
18 case. In those circumstances it would be open to a State Party to UNCLOS to
19 circumvent that Convention's carefully negotiated compulsory dispute settlement
20 provisions. It could avoid any risk of being taken to binding dispute settlement in
21 regard to its obligations regarding the conservation of the living resources of the high
22 seas. All it would need to do would be to join a regional or sub-regional organization
23 the dispute settlement provisions of which did not provide for compulsory binding
24 dispute settlement. Then, even if it did not cooperate for the purposes of that
25 organization and its conduct was at odds with those purposes, the other members of
26 the organization would have no effective legal means of holding it to account under
27 the subsidiary organization or, more importantly, under UNCLOS in relation to those
28 fundamental obligations in that convention.

29
30 Clearly, this was never the intention and indeed article 282 covers the point. It
31 establishes that the compulsory and binding procedures provided for in UNCLOS will
32 apply in respect of any dispute concerning its interpretation or application unless
33 States Parties have bound themselves to submit such disputes to a particular
34 compulsory procedure that similarly entails a binding decision. This, as I have noted,
35 is not the case with the 1993 Convention.

36
37 As explained by Mr Campbell, the first response of the Applicants to Japan's
38 decision to proceed unilaterally with its experimental fishing programme in 1998 was
39 to call for urgent consultations and negotiations under article 16, paragraph 1. The
40 steps that followed are set out in the Applicants' Statements of Claim and have been
41 discussed by Mr Campbell. Suffice it for me to note here that the reason the
42 Applicants embarked on the route of consultations and negotiations under article 16,
43 paragraph 1, on the first occasion on which Japan unilaterally undertook an
44 experimental fishing programme, was that the Applicants entertained a genuine hope
45 that it might prove possible to resolve the dispute through this process. As you will
46 have seen from their diplomatic notes at the time, they were careful to reserve their
47 legal positions and any other courses of action that might be open to them. But they
48 were willing to explore in detail the possibility of resolution and specifically to try to
49 develop an experimental fishing programme that fulfilled the objectives and
50 principles established by the Commission in 1996.

1
2 It was the nature and manner of the ultimatum delivered by Japan at the end of May
3 this year, its insistence on recommencing unilateral fishing on its own terms on
4 1 June 1999 and its steadfast refusal to cease this programme to enable further
5 efforts to resolve the dispute that made it clear to the Applicants that no settlement
6 was able to be reached through the procedures of article 16. These actions
7 confirmed a pattern of behaviour in relation to the 1993 Convention that, in the view
8 of the Applicants, was inconsistent with Japan's obligations under UNCLOS.
9

10 In its Response to the request for interim measures Japan argues that this dispute is
11 simply about differences over the operation of the 1993 Convention, not about
12 UNCLOS or general principles of law, and should be dealt with exclusively through
13 the dispute settlement provisions of the 1993 Convention. But, as I have explained,
14 this is simply not the case. The essence of this dispute is that Japan's conduct in
15 relation to the 1993 Convention places it in breach of UNCLOS obligations that are
16 of major importance to the sustainability of the living resources of the high seas.
17 Moreover, Japan's conduct, including in relation to the exercise of the dispute
18 settlement procedures of article 16, has been such as to make it clear to the
19 Applicants that there was no prospect of resolving the particular points of
20 disagreement (especially over the EFP) through the procedures available under that
21 article in a timeframe that would meet the urgency of the situation. In particular, the
22 ultimatum presented by Japan at the end of May this year and its unilateral
23 commencement of fishing on 1 June were incompatible with a genuine desire to
24 resolve the issues surrounding the EFP and confirmed the impression that Japan
25 simply wished to use the EFP to increase its commercial catch.
26

27 It was only after the Applicants had advised that they were considering other options
28 open to them under international law that Japan proposed mediation under the 1993
29 Convention. But Japan refused to accept the reasonable conditions put forward by
30 the Applicants that the EFP be ceased for the mediation (i.e., that they refrain from
31 another *fait accompli*) and that the mediation be carried out to an expeditious
32 timetable. Similarly they gave no indication of a willingness to cease the EFP when,
33 shortly afterwards, they proposed arbitration under article 16. Japan thus confirmed
34 again that only through the compulsory and binding procedures of UNCLOS and in a
35 context where the substantive obligations of parties to UNCLOS can be examined is
36 there any prospect of the underlying issues in dispute here being resolved in a
37 timeframe that takes account of the fragile status of the SBT stock.
38

39 As I have already noted, article 16 does not purport to deal with disputes relating to
40 the interpretation or application of UNCLOS; nor does it provide for compulsory and
41 binding procedures. Equally, however, it does not preclude the parties from resorting
42 to other procedures that may be open to them. Accordingly, the conditions
43 established in article 281 of UNCLOS for the application of the dispute settlement
44 procedure provided for in Part XV are met in this case.
45

46 Having dealt with the main points at issue, let me now summarize, by reference to
47 the relevant articles of Part XV, the formal basis on which this Tribunal has
48 jurisdiction to consider the Applicants' requests for provisional measures.
49

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

10
11 *Considering* that before prescribing provisional measures the
12 Tribunal need not finally satisfy itself that it has jurisdiction on the
13 merits of the case ...

14
15 An arbitral tribunal under Annex VII would have jurisdiction to hear this dispute on
16 the basis of article 288, paragraph 1, of UNCLOS.

17
18 In order to found jurisdiction for a court or tribunal, article 288, paragraph 1,
19 establishes two conditions. First, it requires the dispute in question to be one relating
20 to the interpretation or application of UNCLOS. Secondly, it also requires that the
21 dispute be submitted to the court or tribunal in accordance with Part XV of UNCLOS.

22
23 As to the first condition, the fundamental point has already been made that this is
24 a dispute concerning the interpretation or application of UNCLOS. The dispute
25 relates directly to the meaning and content of obligations contained in article 64 and
26 articles 116 to 119 of UNCLOS, which will be the subject of more detailed discussion
27 by Professor Crawford.

28
29 As to the second condition, the necessary steps have been taken in accordance with
30 the requirements of Part XV.

31
32 Section 1 of Part XV imposes a general obligation on States Parties to settle
33 disputes by peaceful means before seeking to invoke the compulsory binding dispute
34 settlement procedures of Section 2. Article 283 imposes an obligation on parties to
35 a dispute to proceed expeditiously to an exchange of views regarding its settlement
36 by negotiation or other peaceful means, including at the point where a particular
37 procedure for the settlement of that dispute has been terminated. Where no
38 settlement has been reached by such peaceful means, article 286 then permits any
39 party to the dispute to invoke the compulsory procedures set out in Section 2.

40
41 As evidenced by the diplomatic notes which have been provided to the Tribunal and
42 the history of this dispute as outlined by Mr Campbell, the requirements of Section 1
43 have been met. There have been extensive negotiations and exchanges of views
44 in an attempt to settle the dispute.

45
46 With the failure to settle the dispute through recourse to Section 1, article 286 allows
47 the parties to invoke the compulsory procedures provided for in Section 2 which,
48 through the operation of article 287, is the establishment of an arbitral tribunal under
49 Annex VII.

50

1 In conclusion, Mr President, I have explained why this dispute is in fact a dispute
2 arising under UNCLOS. I have described the relationship between UNCLOS and the
3 subsidiary 1993 Convention. I have shown that the 1993 Convention is a means by
4 which the parties can give effect to their obligations under UNLCOS but that the
5 obligations of UNCLOS, both substantive and procedural, are in no way excluded or
6 overridden by the 1993 Convention. They remain fundamental. I have noted that
7 extensive efforts were made to resolve this dispute through the procedures of the
8 1993 Convention but that these efforts were unsuccessful and that, in the view of the
9 Applicants, there was no prospect of any further efforts proving timely and effective.
10 Accordingly, the Applicants have exercised their rights to have this matter settled in
11 a manner and a timeframe that matches the importance and urgency of the situation.
12

13 For the reasons I have outlined, the jurisdiction of the arbitral tribunal is firmly
14 established on the facts. But, as I have also discussed, it is not necessary for this
15 tribunal to agree with this conclusion. All it has to do is satisfy itself that jurisdiction
16 exists *prima facie*. This is clearly the case.
17

18 I now ask you to call upon Professor Crawford who will continue the legal
19 submissions for the Applicants.
20

21 **THE PRESIDENT:** Thank you, Mr Mansfield. I now call upon Mr Crawford to
22 continue the submissions on behalf of the Applicants.
23

24 **MR CRAWFORD:** Mr President, Members of the Tribunal, it is a great honour to
25 appear before you for the first time.
26

27 I see that you have copies of my speech. I make no promise that I will stick to that.
28

29 My task is to show the basis of our claim against Japan. In essence, the claim is that
30 Japan has failed to conserve and cooperate in the conservation of SBT, especially
31 through its unilateral over-quota fishing of a dangerously depleted stock. Of course, it
32 is not for the Applicants here to establish the merits of that case. That will be for
33 a later phase and, as things stand, a different tribunal. But you are entitled to ask
34 whether there is a sufficient basis of claim for our request for provisional measures to
35 be taken seriously. This is because you need to decide whether the request is
36 appropriate.
37

38 Fortunately, this does not require you to go very far into the scientific arguments, and
39 this is for several reasons. The first reason I have already given: the scientific issues
40 are for the merits and, as far as possible, you should not prejudge them. The second
41 reason is that, as I will show, the agreed fact is that the status of the tuna stock calls
42 urgently for conservation and certainly not for a 30 per cent increase in the Japanese
43 catch. So you do not have to form a view about scientific issues which are in dispute.
44 You may find that that is something of a relief but it is true. The scientific issues that
45 are not in dispute are quite enough for our purposes. But there is a third reason as
46 well why you do not have to go into the disputed scientific issues.
47

48 Once the Applicants' scientific concerns are seen to be reasonable, then the balance
49 of risks and benefits tips sharply in favour of the provisional measures. If Japan is
50 right, the tuna stock is recovering and so it will be able to fish with security in future.

1 Its extra fishing will simply be deferred for a while to accommodate our genuine
2 concerns about the stock. On the other hand, if the Applicants are right, the position
3 is quite different. At best, Japan is helping to put off to a more remote and uncertain
4 future the possible recovery of the parental stock to biologically safe levels;
5 meanwhile Japan is preventing the parties from reaching that agreed goal, and it is
6 placing further stress on an already highly depleted stock. At worst, Japan's actions
7 in frustrating the conservation goals of SBT might actually cause or contribute to a
8 further stock collapse, in which case there will be no fish for a considerable period of
9 time, and no possible payback in quotas will compensate for that. Japan's action
10 also limits the Applicants' opportunity to engage third parties in relation to their
11 fishing of SBT.
12

13 So the Applicants have to show for present purposes that their concerns about the
14 state of the stock and the impacts of unilateral Japanese actions are reasonable or
15 plausible. I think we can show much more than that and, to assist the Tribunal, we
16 are proposing to explore the matter further than we need to do, in particular, by
17 calling Professor Beddington here and by having him subjected to
18 cross-examination. But, whatever the ultimate strength of the Applicants' claim, we
19 can certainly show here and now that the situation facing the stock is a grave one
20 and that worst case scenarios are not excluded. That is a quite sufficient basis for
21 the Tribunal to order provisional measures now.
22

23 So my task is to set out, in simple terms, the likely position as to the state of the
24 stock, and I will show, by reference to UNCLOS, that if the stock is or may well be in
25 that position, then Japan is obliged to conserve it and not to aggravate the situation,
26 as it is currently doing through its over-quota fishing and its so-called "EFP".
27 Mr Burmester will then show the provisional measures that flow from this,
28 recognizing of course the flexibility and discretion that the Tribunal has with respect
29 to the content of provisional measures.
30

31 I turn to the scientific reports you have before you. These have to be read in the light
32 of the point I have just made. It is not your task to decide scientific disagreements at
33 this stage, but to consider whether provisional measures are appropriate.
34

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

1 principal jurisdictional argument, so it does not maintain the separation of law and
2 science with much consistency.

3
4 Anyway, these proceedings are not really about scientific disagreement. There are
5 vital areas of agreement, so far as the stock is concerned. These, taken alone and
6 without the resolution of any disputed scientific arguments, are a sufficient basis for
7 provisional measures in this case.

8
9 Let me try to set out six points on which I believe there is essential agreement. To
10 avoid argument, I will do so by quoting directly from the most recent Scientific
11 Committee and Commission reports. This is agreed language. The points are:

- 12
13 (1) "the parental biomass remains at historically low levels"
- 14
15 (2) "the continued low abundance of the SBT parental biomass is cause for
16 serious biological concern"
- 17
18 (3) "recent increases in the fishing mortality rates on juvenile fish... will lead to
19 lower recruitment from these cohorts to the parental biomass" and there are
20 "indications that recruitment has dropped in the last few years" – that in 1998
21
- 22 (4) "the Commission continued to be concerned with the level of catch outside the
23 Commission and recent significant increases of catch by some non-members"
24 – that in 1999
- 25
26 (5) "the range of predicted future stock size over a 20 year time interval is likely to
27 be very wide"
- 28
29 (6) "the projections produced by the Scientific Committee between 1982 and
30 1993 have been shown to be consistently biased upwards and hence have
31 been overly optimistic".

32
33 To summarize, the stock is at historically low levels; there is cause for serious
34 biological concern; recruitment is low and getting lower; catches have recently
35 increased significantly; predictions are uncertain and they include predictions of non-
36 recovery or even collapse, and earlier predictions have been consistently biased
37 upwards. Let me add to these points of scientific agreement one point of
38 management agreement: in 1996 the Commission agreed to a set of principles which
39 any experimental fishing programme has to meet. Mr Campbell has already referred
40 to them. In our view, Japan's EFP does not meet those standards, and I will establish
41 that in a little while.

42
43 Mr President, this is an historic case and it has an historic event in the middle of it,
44 because I understand that my learned friend and opponent wishes to put some
45 questions to Professor Beddington on the *voir dire*. This is an unusual procedure in
46 an international tribunal. States are normally entitled to seek independent advice
47 from qualified persons, and Professor Beddington's CV is contained at the end of his
48 report. However, in his own time or, if the Tribunal has time, in the Tribunal's time,
49 my friend is entitled to put any questions to Professor Beddington that are relevant to
50 his testimony today, and I am perfectly happy to give him the opportunity to do so.

1
2 **THE PRESIDENT:** Does the Agent of Japan want to make an intervention at this
3 stage?
4

5 **MR TOGO:** I would very much like to do so.
6

7 **THE PRESIDENT:** Very well.
8

9 **MR TOGO:** Mr President, I would like to introduce Mr Matthew Slater, one of our
10 advocates who will act as counsel representing Japan in connection with the
11 examination of the witnesses for Australia and New Zealand.
12

13 **THE PRESIDENT:** Thank you very much.
14

15 **MR CRAWFORD:** I bear in mind, Mr President, that at this point we are talking about
16 the *voir dire*. We are not talking about cross-examination. I have some questions to
17 ask Professor Beddington after this process. For those Members of the Tribunal who
18 are not familiar with it, the *voir dire* is an American procedure to test the eligibility of a
19 witness. After that procedure, it was agreed in our meeting yesterday that we would
20 nonetheless hear the evidence of Professor Beddington and that the Tribunal would
21 take into account the outcome of those questions to the extent that they might be
22 relevant. So the procedure will be the *voir dire* first, not in Australia and New
23 Zealand's time, then some questions from me, then the cross-examination, then
24 redirect, and then hopefully we can have some lunch! Thank you, sir.
25

26 **MR SLATER:** Mr President, honourable Judges of this court, my able and worthy
27 adversaries, representatives, agents and counsel for Australia and New Zealand,
28 may it please the court. I am Matthew Slater, a partner of Mr Greig, Counsel for the
29 Government of Japan. As Professor Crawford has just indicated, we had agreed that
30 there would be an opportunity for examination of the witness in advance of his direct
31 testimony, for the agreed purposes of testing both the credibility and the capability of
32 this witness to offer specialized expertise on matters relevant to the case before the
33 court. For that purpose, I appreciate this opportunity right now.
34

35 **THE PRESIDENT:** In accordance with article 79 of our Rules, an expert called by a
36 party must make the declaration that is required under our Rules.
37

38 **MR SLATER:** I would very much appreciate that.
39

40 **THE PRESIDENT:** I request that the expert be given the opportunity to make a
41 declaration, please.
42

43 **PROFESSOR BEDDINGTON:** I solemnly declare upon my honour and conscience
44 that I speak the truth, the whole truth and nothing but the truth, and that my
45 statement will be in accordance with my sincere belief.
46

47 **PROFESSOR BEDDINGTON,** *sworn in*
48 *Questioned by MR SLATER*
49

1 Q Dr Beddington, at the beginning of your written statement presented to the
2 court and, in addition, in the statements by Mr Caughley this morning, you
3 have been referred to as an independent scientist who will comment on a
4 report attached to Australia's and New Zealand's Request for provisional
5 measures, and I would like to examine that issue with you just a little. First,
6 when were you first contacted about providing an opinion in this matter?
7 A In the middle of July, I believe 15th or 16th July.
8
9 Q So it was after Australia and New Zealand had submitted their request for an
10 arbitration under UNCLOS, is that correct?
11 A. I believe that is correct, yes, sir.
12
13 Q By whom were you contacted?
14 A I was contacted I think initially by Mr Bill Campbell and then subsequently by
15 James Crawford.
16
17 Q You were not asked by the Commission for the Conservation of Southern
18 Bluefin Tuna to deliver an opinion, were you?
19 A No, I was not.
20
21 Q You were not asked by this Tribunal to do so?
22 A No, I was not.
23
24 Q In your curriculum vitae, which is attached to your paper, you have listed a
25 number of external appointments. Have those been at the invitation of fishery
26 management organizations to provide an independent assessment of
27 scientific issues, or have they been at the request of national delegations
28 participating in such organizations?
29 A The latter.
30
31 Q So strictly on behalf of national delegations?
32 A Yes. It depends on your definition of a fishery management organization but,
33 in general, most of my activities on international fishery organizations and
34 their scientific committees have been as a member of the British delegation, in
35 fact.
36
37 Q On behalf of a particular side?
38 A Yes.
39
40 Q When you have participated in those sorts of activities, how have you typically
41 performed your work?
42 A Could you clarify that question, please?
43
44 Q Have you generally attended the meetings of the fishery organization that has
45 been involved?
46 A Yes, I have.
47
48 Q Have you examined the scientific literature accumulated by the organization
49 on the stock in question?

1 A Yes. Usually, these things have a continuity and it depends on the
2 organization. For example, I would characterize the commission that I have
3 had the most experience with, which is the Commission for the Conservation
4 of the Antarctic Living Marine Resources. That started out with simply having
5 a scientific committee which reviewed papers and formed judgments on that.
6 As the work of that Commission evolved, it felt that it became far too technical
7 to simply operate on a scientific committee working for approximately four or
8 five days. So working groups were established which dealt with the very
9 detailed technical material. Assessments were done and then a report of the
10 working group was presented to the scientific committee for review; that is the
11 area that I have had most experience in. In fact, I think that is the practice of
12 many of the international commissions. Some of the international
13 commissions that I have been involved in and are represented in my CV are
14 bilateral commissions. For example, the UK has one jointly with Argentina. In
15 that situation, scientific assessments are done prior to the meeting of the
16 commission by essentially a joint group of Argentine and British scientists,
17 and similar activities occur in other commissions that I am involved in, for
18 example that with Mauritius and that with the Seychelles.

19
20 Q When you have been involved with these organizations in the past, who has
21 selected the literature that you have read in connection with your work?

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

29
30 Q So you have read the range of scientific literature that has been produced by
31 the organization itself and by the member States of that organization, as well
32 as your own readings in the scientific literature, is that correct?

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

37
38 Q Have you been involved in computer modeling of fishery stocks?

39 A Not for about ten years.

40
41 Q That is not your area of expertise?

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

45
46 Q Turning back to the Commission for the Conservation of Southern Bluefin
47 Tuna, are you aware that the Commission has in the past invited outside
48 independent scientists to help with the stock assessment and projection
49 process?

50

1 **MR CRAWFORD:** Mr President, I do not see how that question is relevant to the
2 qualifications of this witness. What CCAMLR has done has absolutely nothing to do
3 with the qualifications of this witness. He can ask it in cross-examination as much as
4 he likes. The question is whether he is qualified to give his testimony.
5

6 **THE PRESIDENT:** I was going to say, Mr Slater, that you will, of course, have an
7 opportunity to cross-examine. I understand that the purpose of the present
8 proceeding is to enable you to put in context something connected with the suitability
9 or expertise of the witness. I suggest that you restrict it to that. You will still have an
10 opportunity to cross-examine him on the substance.
11

12 **MR SLATER:** I very much appreciate that. I think it is important that the court should
13 have the opportunity to understand the distinctions between how this assignment
14 has been handled by this witness and how he has handled his professional
15 assignments in the past and to understand in full context whether or to what degree
16 this witness is being presented as an independent scientist and whether his opinion
17 should be accepted on that basis, which is what has been presented to the court so
18 far.
19

20 **THE PRESIDENT:** As I said, you are permitted, by agreement between the parties,
21 to lead questions to that effect. The point that I am making, and the point that
22 Professor Crawford made, is that when it comes to whether the expert is capable of
23 providing the scientific evidence, that is part of the evidence itself. If there is
24 something to suggest that the expert is not a suitable, independent person, that is
25 the purpose of your questioning at this stage. I think you should try to draw a
26 distinction between the two, his independence, and therefore suitability, as a
27 witness, and his capacity and expertise. The latter question belongs to the cross-
28 examination stage.
29

30 **MR SLATER:** I will certainly try to focus on the question of independence, and that
31 was really the question that I was asking, which was this witness's recognition that
32 the Commission has selected independent experts itself in the past.
33

34 **MR CRAWFORD:** Mr President, the behaviour of the Commission has nothing to do
35 with the qualifications of Professor Beddington. The question of whether Professor
36 Beddington is qualified to give the evidence is given. What the Commission has
37 done is a completely different question and can be asked about in cross-
38 examination.
39

40 **MR SLATER:** The Commission has identified for itself, that is Australia, New
41 Zealand and Japan have collectively by consensus identified a number of
42 independent scientific experts who, they have agreed, could present independent
43 evidence and advice to the Commission. I think it is important that the Tribunal
44 should have an opportunity to understand the difference between those independent
45 experts, those independent scientists, who have themselves made a statement to
46 this court, and this witness who is being offered on behalf of a party.
47

48 **THE PRESIDENT:** Mr Slater, I do not think that the fact that somebody not selected
49 by a commission as an independent expert rules that person out as an independent
50 expert. It is quite plain that there are always a limited number of experts who can be

1 chosen. There is also the question of whether those who make the choice are aware
2 of the abilities and interests of a particular person. Therefore, I do not think we can
3 accept that merely because the Commission has chosen some independent experts,
4 one could draw the conclusion that therefore anybody who is not on that list is *ipso*
5 *facto* not an independent expert.

6
7 **MR SLATER:** I appreciate that, Mr President, and I will try to ask some different
8 questions of this witness if you do not wish to have those on this occasion.

9
10 Q With regard to what you have done specifically with respect to this case,
11 Professor Beddington, you have indicated in your paper that you were invited
12 to comment on the Polacheck and Preece paper that was submitted as
13 Annex 4 by Australia. My question is, is that the first thing with which you were
14 provided in order for you to do your work?

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

19
20 I was sent the basic scientific documents from I think the three preceding
21 meetings of the Scientific Committee. I was sent the documents that were
22 concerned with the Stock Assessment Working Group - I think it is called the
23 Stock Assessment Group – in 1998, the documents from the reports of a
24 variety of meetings to do with the experimental fishing programmes, and
25 some other sort of scientific material that was felt – I am trying to recall the
26 exact detail of it. As you are well aware, Mr Slater and gentlemen, this is
27 rather voluminous, but by and large relatively comprehensive information in
28 the sense that I had the reports of the Scientific Committee, its deliberations,
29 its conclusions. I had the background papers that were part of the bound
30 volumes that are attached to those reports, and they were – I do not think they
31 were bound, but there were quite extensive reports of the various meetings
32 about the experimental fishing programmes and some of the background
33 material to those. I may have missed some out, I would apologize if I have,
34 but I did not have a list in front of me.

35
36 Q Did you see the Polacheck paper in draft form?

37 A Yes I did.

38
39 Q And did you comment on it?

40 A Yes, I asked for clarification.

41
42 Q You asked for clarification to be put in the paper itself?

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

45
46 Q And were you provided with written materials in respect of those questions?

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

49

1 Q Have those written materials been provided either to the court or to the
2 Japanese Government?
3 A Not as far as I am aware.
4
5 Q Your paper lists ten specific references and those include some that came
6 from the Commission for the Conservation of the Southern Bluefin Tuna now.
7 A No, they were selected essentially as I was writing my paper. They are
8 obviously a significant sub-set of all the material I was sent. What I was
9 attempting to do in my paper was to try to synthesize the matters of
10 agreement and areas where I could try as best as I could to characterize
11 where there was disagreement and why and its implications. So in a sense
12 this was selection once my paper was finalized of the larger set of material
13 that I was provided with. It was not a selection made by anyone other than
14 myself.
15
16 Q In terms of the material that you read, those were selected for you?
17 A No, in terms of all the material that was sent to me, that was all that was
18 available. I did in fact look at other material myself, for example I looked at a
19 report of the meeting of the Scientific Committee of ICAT which dealt with the
20 western stock of southern bluefin tuna, because I believe there were parallels,
21 but this I did out of the researches available in Imperial College Library.
22
23 Q Focussing specifically on the materials from the Commission for the
24 Conservation of Southern Bluefin Tuna, the materials from that Commission
25 that you relied upon were all sent to you by the representatives of Australia by
26 their selections?
27
28 **THE PRESIDENT:** Mr Slater, once again I believe that these are matters which you
29 could deal with in cross-examination. We are dealing here not with the basis on
30 which the documentation was produced, I think we are dealing here with the
31 question of whether this expert can be accepted as an independent expert. If he is
32 an independent expert, the fact that he had material sent to him by the parties would
33 not be either extraordinary or improper.
34
35 **MR SLATER:** The question is what range of materials was sent to him, and I just
36 have a few questions on that subject. By way of example, I did not see any reference
37 to the Protocol for the Pilot Experimental Fishing Programme that was conducted in
38 1998. Did you review that?
39
40 A I did read it, yes, but I did not reference it because I did not actually see in the
41 context of the paper that I wrote that it was pertinent to quote directly from it,
42 and as you will see, I think I have only included in the references in my paper
43 those where I have actually made a direct quote or referred across.
44
45 Q Did you review the results and analyses reported by the Japanese scientists
46 concerning the 1998 Experimental Fishing Programme?
47 A Not in any detail.
48
49 Q Did you review the Protocol for the 1999 Experimental –
50

1 **THE PRESIDENT:** Mr Slater, I do not think the expert should answer these
2 questions at this time. We are not talking about whether the work was done expertly.
3 We are talking about whether the expert is an independent expert, and I would
4 suggest that we keep those two issues separate.
5

6 **MR SLATER:** I will reserve the remaining questions for later. Thank you,
7 Mr President.
8

9 **THE PRESIDENT:** You are excused for the moment.
10

11 **MR CRAWFORD:** Mr President, Members of the Tribunal, now you have seen a
12 *voir dire*. Professor Beddington, your curriculum vitae is attached to your report. I will
13 not take you through it, but it is your curriculum vitae?
14

15 A That is correct.
16

17 Q I think the Members of the Tribunal can read that. Is this your Report?
18

18 A It is.
19

20 Q Did anyone tell you what to put in it?
21

21 A At no time did anyone ask me to put any particular material in it. I have,
22 however, to give you a complete answer, Mr Crawford, I was asked to clarify
23 matters which were unclear, primarily, I think, by Dr Polacheck.
24

25 Q Thank you. Professor Beddington, you will have heard me earlier identify the
26 six points of agreement in relation to this stock, drawing on the papers, a
27 complete set of which you were sent. Do you agree with those six points?
28

28 A I can certainly agree without qualification to the first five points. I think I would
29 probably qualify point six to a slight extent in the sense that the wording talks
30 about being consistently biased upwards, being overly optimistic. The point I
31 make is, I am afraid, a slight academic quibble in the sense that we do not
32 know what the truth is. What I could qualify and say is quite clear is that they
33 are biased upwards in the context of the latest assessments of the scientific
34 community, and we would hope that the later ones are closer to the truth than
35 the latter ones. That is the progress of science. So with that academic
36 quibble, I would say that I can agree to that.
37

38 Q I am sorry, complete your answer.
39

39 A It was not clear to me, Mr Crawford, whether you were asking comments on
40 these six points initially.
41

42 Q Yes, I was.
43

43 A Yes.
44

45 Q The effect of that answer is because there was still uncertainty in actual stock
46 assessments we cannot be unequivocally clear as to the state of the stock,
47 but on the basis of the most recent analysis of the state of the stock, earlier
48 predictions of the recovery have been consistently biased upwards?
49

49 A That is exactly correct.
50

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

4 A My advice would be that the evidence was such that the stock was in an
5 extremely poor state, and I would recommend a reduction in catches, and not
6 increasing those catches following that reduction until there was clear
7 evidence that there was some recovery in the stock.
8

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

12 A I would not say that. Clearly any proper management for conservation
13 involves rational utilization, and to that extent fishery management advice will
14 properly be taking place with a precautionary element to it. You do not wish to
15 take undue risks. I certainly would not be invoking the precautionary principle
16 to give that advice, and indeed what I would probably add, to perhaps
17 anticipate a subsequent question, is that if you were invoking the
18 precautionary approach and the precautionary principle I would expect that
19 the reduction in catches might be rather higher, and that the evidence that you
20 would require for there to be an increase, that the stock has increased and
21 can therefore increase the catches, would be more stringent.
22

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

26 A Let me take conservation first if I may, Mr Crawford. In the context of
27 conservation, as I have just said in answer to your earlier question, I believe
28 that it would be an appropriate conservation measure to reduce the total
29 catches from the stock. Therefore in the sense that you are asking me
30 whether an increase in catches is compatible with conservation, I would say
31 the answer is no, and I think my paper makes that clear. In the context of
32 management, which of course involves trying to improve on scientific
33 uncertainty in some sense, I would say that the experimental fishing
34 programme does contribute to an improvement over current uncertainty, but I
35 would qualify that, by saying that, for reasons I outline in my paper, I do not
36 think it actually improves it a great deal.
37

38 Q You have read Professor Butterworth's report.

39 A Yes, I have.
40
41

42 Q Does it cause you to change anything in your report?

43 A No, it does not, except one very minor point I would say is that I had not
44 planned to quote from the paper by Hilborn, Butterworth and Ianelli in my
45 paper, because it was characterized as a draft paper in the proceedings of the
46 Scientific Committee in 1998, but as I saw that Professor Butterworth was
47 quoting it I felt it was clearly appropriate to do so. That was the change I
48 made.
49

- 1 Q Can I take you to a graphic which is in Professor Butterworth's report. It is
2 Figure 6 in his report and it shows a curve with the heading SBT Stock
3 Recruitment. It is, I think, Members of the Tribunal, tab 3 in your folders. I
4 understand that is called a stock recruitment curve, but could you explain it to
5 us?
- 6 A Yes, okay. The first point would be that if you take the X axis, sorry, the
7 bottom horizontal axis, this is a plot of the position of the estimated spawning
8 stock biomass which has been used earlier in the proceedings to be the
9 parental biomass. They are equivalent in this context. So each point is a
10 realization of the spawning stock biomass, and on the vertical axis it is also a
11 realization of the level of recruitment that has been estimated to be associated
12 with that parent stock. I think the point here that may not be appreciated is
13 that this graph also has information about time. It has information about time
14 because the spawning stock biomass according to the paper by Hilborn and
15 others in fact shows that the spawning stock has been declining
16 monotonically; i.e. it never changes, it continues to go down on and on. So the
17 very furthest right hand point of the graph is actually the earliest piece of
18 information, and the very furthest left point on the graph is in fact the latest
19 information you have. So for example if you take the very lowest point that is
20 illustrated on the graph you actually have the latest estimate of the spawning
21 stock and the latest estimate of the recruitment that has been associated with
22 that spawning stock.
- 23
- 24 Q So what you are telling us is that the earliest date of the information is, as it
25 were, on the right hand side, it is a bit counter-intuitive. You would normally
26 think it went the other way. The most recent information is on the left hand
27 side of the graph?
- 28 A That is exactly right.
- 29
- 30 Q And it is also the case that although there is some fluctuation in the graph at
31 the top end as it goes down, as it goes to the left, or more recently the line
32 flattens out?
- 33 A Well, I think what I would observe from this graph is that as you look at the
34 spawning stock above, let us say, something in excess of units of 500 or so,
35 you see that as the stock has been reduced - the spawning stock - there has
36 been variation in recruitment and a modest trend, although there are clearly
37 differences in what is happening at some point, an increase possibly due to
38 environmental factors, and rapid decrease over another period. If you look for
39 the latest information, what you are seeing is a very closely linked relationship
40 between the spawning stock and the recruitment it is producing. Clearly it
41 shows that, as the spawning stock is being reduced, recruitment is actually
42 declining alongside. The curve is, I would have thought, a statistical fit of all
43 the data, but it is clearly a slightly odd fit to the most recent information.
- 44
- 45 Q Professor Butterworth says at paragraph 56 of his paper that this curve shows
46 "surprisingly low steepness", and that it shows that most of the decline in
47 recruitment of southern bluefin tuna has already occurred. Do you agree with
48 that?
- 49 A I really don't understand how he can make that assertion. If you look at the
50 bottom left hand corner of the graph you are seeing a decline in spawning

1 stock biomass and a decline in recruitment, and they are approaching what I
2 suppose is the one degree of certainty, which is that when spawning stock
3 biomass is zero recruitment will be zero and it is moving towards that point.
4 Whether in fact it is moving at a speed that I would expect or not expect I
5 couldn't comment, but quite clearly recruitment is declining with spawning
6 stock declines.

7
8 Q Finally, Professor Beddington, the Tribunal has raised the question of how a
9 management authority with responsibility for SBT should treat catches by third
10 parties. There are catches by third parties, we know. How, in your view,
11 should a management authority treat that question?

12 A This is a very difficult question, one I have had a little experience of in the
13 context of the South Atlantic Fisheries Commission, which is a Commission
14 jointly between the United Kingdom and Argentina. There is a fishery for squid
15 and the Elex squid, which is actually caught both in the Argentine EEZ, the
16 waters around the Falkland Islands in the Falkland Islands conservation and
17 management zone and on the high seas. It is very difficult, because the high
18 seas fishing is not controlled by either the Argentine or the British
19 Governments. What we have actually done in that context is to agree
20 procedures to take into account the high seas catches, and indeed on two
21 occasions in the last six years there has been an agreement between
22 Argentina and the UK to close the fisheries in their respective zones, taking
23 into account that fishing will continue on the high seas. I guess the answer is
24 that if you are in favour of a strongly conservation approach and you wish to
25 preserve a stock you must be prepared to make that sort of sacrifice. In the
26 context of the southern bluefin tuna I really could not say, but it is obvious that
27 if catches increase, in my view, the danger to the stock increases, so that if
28 you are the responsible parties and wish to have as your major goal
29 conservation, then you are probably going to need to take account of these
30 third-party catches and reduce your catches in the light of them.

31
32 **MR CRAWFORD:** Thank you very much. I have no further questions,
33 Professor Beddington. Perhaps we can resume the cross-examination of
34 Professor Beddington.

35
36 **THE PRESIDENT:** Mr Togo, it is now about four minutes to one o'clock. Do you think
37 you want to start the cross-examination now, or would you like to postpone it until we
38 come back?

39
40 **MR TOGO:** Mr President, thank you very much. I think we would like to adjourn for
41 luncheon, as you have suggested, and resume our cross-examination at the
42 beginning of the afternoon session. Thank you very much.

43
44 **THE PRESIDENT:** Very well, we will do that. Professor Beddington, you are excused
45 for the moment and you will come back in the afternoon.
46 The sitting is closed.

47
48 *(The Tribunal rose at 1.00 p.m.)*