

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 3.00 p.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)

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**Verbatim Record**

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<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

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Mr James Crawford SC, Whewell Professor of International Law, University of  
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*as Counsel;*

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Ms Rebecca Irwin, Principal Legal Counsel, Office of International Law, Attorney-  
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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.*

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Mr Bill Mansfield,

*as Counsel and Advocate;*

Ms Elana Geddis,

*as Counsel;*

*and*

Mr Talbot Murray,

*as Adviser.*

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*as Agent;*

Mr Yasuaki Tanizaki, Minister, Embassy of Japan, Berlin, Germany,  
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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,  
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Mr Hisashi Endo, Deputy Director, International Affairs Division, Fisheries Policy Planning Department, Fisheries Agency of Japan,  
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Mr Sachiko Tsuji, Section Chief, Temperate Tuna Research Group, National  
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Mr Moritaka Hayashi, Professor at Waseda University School of Law,  
Ms Atsuko Kanehara, Professor of Public International Law at Rikkyo University,  
Mr Akira Takada, Associate Professor of Public International Law at Tokai University,  
Mr Yamato Ueda, President of the Federation of Japan Tuna Fisheries Cooperative  
Associations,  
Mr Tsutomu Watanabe, Managing Director of the Federation of Japan Tuna  
Fisheries Cooperative Associations,  
Mr Kaoru Obata, Associate Professor, School of Law, Nagoya University, Attaché,  
Embassy of Japan, The Hague, The Netherlands,  
Mr Matthew Slater, Cleary, Gottlieb, Steen and Hamilton,  
Mr Donald Morgan,

*as Advocates.*

1 **THE PRESIDENT:** Mr Slater, are you ready to commence the cross-examination?  
2  
3 **MR SLATER:** Yes, thank you, Mr President.  
4  
5 **THE PRESIDENT:** Professor Beddington, you are still on your declaration.  
6  
7 **PROFESSOR BEDDINGTON:** Yes, sir.  
8  
9 *Cross-examined by MR SLATER*  
10  
11 Q President Mensah, honourable Judges, may it please the court. Professor  
12 Beddington, turning back to the Commission for the Conservation of Southern  
13 Bluefin Tuna, I know that you are aware that the Commission engaged a  
14 panel of independent scientists to conduct a peer review of the Scientific  
15 Committee in 1998, is that correct?  
16 A Yes, I am aware of that.  
17  
18 Q Do you know who the members of the peer review panel were?  
19 A I believe it was Maguire, Tanaka, Mohn and – I am sorry, it has escaped me.  
20 It is an Irish name based in New York.  
21  
22 Q Professor Sullivan?  
23 A That 's right, yes. My apologies.  
24  
25 Q You view them as qualified scientists, do you not?  
26 A Yes, I do.  
27  
28 Q These gentlemen were selected by consensus of the three parties, were they  
29 not?  
30 A As far as I am aware, yes.  
31  
32 Q You are aware that they were selected because the Commission was troubled  
33 by the lack of consensus within the Scientific Committee on the probability of  
34 stock recovery, is that right?  
35 A Yes, I believe that was their brief.  
36  
37 Q Professor Beddington, you mentioned in your paper that such use of outside  
38 experts is not uncommon when fishery management organisations encounter  
39 difficulties with stock assessment and projections, is that right?  
40 A That is correct.  
41  
42 Q In the case of the CCSBT you were not engaged to play that neutral peer  
43 review role, were you?  
44 A No.  
45  
46 Q Do you know what the peer review panel did to fulfil their assigned role on  
47 behalf of the parties?  
48 A Not in any detail.  
49  
50 Q Mr President, is there a problem with the translation?

1  
2 **THE PRESIDENT:** It is too fast.  
3  
4 **MR SLATER:** I am terribly sorry. May I repeat the question? I was asking you,  
5 Professor Beddington, if you are aware of what the peer review panel did to fulfil  
6 their assigned role in 1998?  
7 A No, not in any detail. All I've done is read their report.  
8  
9 Q From your review of the report are you aware that they attended the stock  
10 assessment group meeting in 1998?  
11 A Yes, I was aware of that.  
12  
13 Q Are you aware that they attended the Scientific Committee meeting in 1998?  
14 A On that I don't recall, but I am perfectly happy to believe it.  
15  
16 Q From your review could you tell that they had read the papers that had been  
17 submitted both to the stock assessment group and the Scientific Committee?  
18 A I don't think it would be possible from a short report to be able to deduce that,  
19 but I wouldn't query their competence or the way they went about their work  
20 and their reason to do so.  
21  
22 Q Are you aware that the parties directed that a panel be involved in facilitating  
23 the development of a joint experimental fishing programme for 1998?  
24 A Yes, I was.  
25  
26 **THE PRESIDENT:** Professor Beddington, excuse me. In order to enable the  
27 interpreters to translate Mr Slater's question, maybe you should allow a little pause in  
28 between the question and the answer.  
29  
30 **MR SLATER:** Do you know who was selected by the parties for the panel in 1999?  
31 A I don't recall, I'm afraid.  
32  
33 Q Was it the same folks?  
34 A I believe it was, but I don't recall. I'm speaking too quickly again, and I'm  
35 sorry, sir. I will try to force myself to pause.  
36  
37 Q I think we are complementing each other in the wrong direction. Again, do you  
38 know what the panel did in regard to the 1999 experimental fishing  
39 programme?  
40 A No, I am not aware of that in any detail.  
41  
42 Q You reviewed the reports of the four multi-day meetings of the experimental  
43 fishing programme working group, did you not?  
44 A I read them. I would not say I went into them in comprehensive detail, as I  
45 think I made clear in my paper.  
46  
47 Q But you are aware that at least some of the panel members did attend those  
48 meetings?  
49 A Yes, I am.  
50

1 Q They made recommendations for decision rules, did they not?  
2 A Yes, they did, as far as I am aware, but as I said in answer to your previous  
3 question, I have not studied that piece of work in any significant detail.  
4  
5 Q Are you aware that the panel made other suggestions to help forge a  
6 consensus for a joint programme for 1999?  
7 A Yes, I was aware that they made some proposals.  
8  
9 Q Are you familiar with the fact that the parties directed that the panel could be  
10 invited to play an adjudicating role on issues where there was not consensus?  
11 A Yes, I believe I was aware of that. I am sorry to appear to be equivocal, but I  
12 have read a lot of material and that is a particular issue that I did not focus on.  
13  
14 Q Honourable Judges, here I refer your attention and that of the witness to  
15 Japan's Annex 7, page 107274, paragraph 2, which was the record of the  
16 agreed results of the first negotiations among the parties in dispute resolution  
17 concerning the 1999 experimental fishing programme. I just highlight the  
18 language inviting the independent scientists to play an adjudicating role in  
19 completing the working group's advice to the Commission. Does that refresh  
20 your recollection?  
21 A Just slightly, but not completely.  
22  
23 **THE PRESIDENT:** Yes, Mr Crawford?  
24  
25 **MR CRAWFORD:** I wish to object. I do not want to make a habit of it, but we did not  
26 call this witness to give evidence as to what happened within these working groups.  
27 We called him to give evidence on the state of the stocks. This is not a document  
28 which he has been asked to review. If he is asked legal questions about it, it is not  
29 within his competence to answer them.  
30  
31 **THE PRESIDENT:** Mr Slater, yes?  
32  
33 **MR SLATER:** The witness's written statement has made extensive commentary on  
34 both the 1998 pilot programme and the 1999 experimental fishing programme that  
35 has been conducted by Japan. We think this is relevant to the testimony that he has  
36 provided, Mr President, and to give the court context for the comments that he has  
37 made.  
38  
39 **THE PRESIDENT:** Please proceed and we will see how it develops.  
40  
41 **MR SLATER:** Turning to another question, Professor Beddington, it is not  
42 uncommon to rely on a commercial fleet for some or all of an experimental fishing  
43 programme, is that correct?  
44 A Not uncommon, no.  
45  
46 Q For example, in Australia's proposal for a scientific research programme in  
47 which it proposed to have commercial vessels engaged in random fishing,  
48 Australia acknowledged that the programme would cost the fisheries about  
49 9.4 million dollars, which Australia equated to about 1,429 tonnes of fish in

1 addition to any that might be taken during the experimental fishing. Were you  
2 aware of that?

3 A Only peripherally, as I indicated in my answers to your earlier questions. I  
4 have not studied this textually and I would find it very difficult to recall or  
5 confirm that I have actually read this and remember those figures, but clearly  
6 if they are an extract from the report I would not be disputing them.  
7

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

13 A It is a slightly curious question to ask myself, to think myself into the role of a  
14 fish that's going to be caught in some method or other. I find it rather difficult  
15 to answer. Would you like to explain in a bit more detail what your question  
16 is?  
17

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

20 A Clearly, if the fish is caught by a different method, it would depend if it is the  
21 same fish, the same age, the same size and the same location: if that is the  
22 case, the answer is clearly yes. If, on the other hand, fish is caught, and we  
23 talk in more generic terms, for example, fish caught that is smaller or in  
24 a different location, then obviously the answer will be different.  
25

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

28 A In terms of the effect on the parental biomass, clearly if you actually have  
29 a catch that is directly affecting that parental biomass, that will be an  
30 immediate result; i.e. if you are taking fish that are older than some age of  
31 maturity, so you're taking directly from the parental stock. If you are taking  
32 younger fish, it will ultimately affect the parental stock but only subsequently  
33 after a period of time. So, to flesh that out, if you catch something aged four, it  
34 is clearly not going to grow to be aged eight or ten and become sexually  
35 mature. If you catch something that is already mature, then you immediately  
36 remove the fish from the stock.  
37

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

41 A What I actually said in answer to Mr Crawford's question is that the catch  
42 should be reduced.  
43

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

46 A I do not recall that that was it but I would be prepared to stand corrected and  
47 look at a transcript. My recollection is that he asked me about the overall  
48 catch and I responded that I believed the overall catch should be reduced.  
49

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

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

5

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

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

13

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

16 A Yes.

17

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

20 A Yes, I am aware of that.

21

22 Q More generally, Dr Beddington, you are aware that Australia and  
23 New Zealand were prepared to agree to experimental fishing programmes for  
24 1999 involving annual catches in the 1,200-1,500 tonne range in addition to  
25 the commercial allocations, are you not?

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

27

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

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

33

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

37 A I was not aware of that, I am afraid.

38

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

43

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

50

1 A I have certainly read that on one occasion but I would say that again, as in my  
2 answer to some of your earlier questions, I have not read it carefully in the  
3 sense that my brief was to comment on the scientific status of the stock and  
4 this particular point, as I see it, goes to the material of this dispute.  
5

6 **MR CRAWFORD:** I have no re-examination.  
7

8 I do not know whether Members of the Tribunal have questions for  
9 Professor Beddington. That may be described as an unusual procedure but, since he  
10 is here as an independent witness, I would have no difficulty if Members of the  
11 Tribunal did have questions that they wanted to ask?  
12

13 **THE PRESIDENT:** We have no questions at this point.  
14 Thank you, Professor Beddington. You may stay in the courtroom, as I have said.  
15

16 *(The witness withdrew.)*  
17

18 **MR CRAWFORD:** Before lunch, I was talking about the issue of scientific agreement  
19 and I quoted from a series of recent papers, Scientific Committee papers and so on,  
20 which indicated key points of agreement. You heard Professor Beddington say, with  
21 one qualification which was the sort of qualification that a good academic scientist  
22 would make because of course we do not actually know precisely the state of the  
23 stock, that he agreed with the six propositions. You also heard the advice he would  
24 have given to those responsible for fisheries management on the basis of those six  
25 propositions. That advice was: reduce the TAC.  
26

27 I have to say that he did of course appear as an independent witness, and we are  
28 not putting him forward in support of an argument for that proposition. But that was  
29 the advice he gave.  
30

31 Let me turn to some questions of scientific disagreement. Mr President and  
32 Members of the Tribunal, there are some disagreements, as you will have observed  
33 from the paper.  
34

35 I repeat the point that all you need to do for present purposes, given the areas on  
36 which there is agreement, is to conclude that the Australian and New Zealand views  
37 about the stock are reasonable and that there is a reasonable basis for concern.  
38

39 Of course, if for some unexplained reason the Applicants are bringing this action in  
40 bad faith, I suppose the question might be different. This may explain that  
41 extraordinary allegation made for the first time in the Japanese written response. The  
42 Tribunal has heard the Attorney-General of Australia and it has heard  
43 Professor Beddington on the state of the stock and it has read the materials. You  
44 can decide whether the claimants are acting in bad faith. But assuming that they are  
45 acting in good faith, I suppose it is reasonable to say something on the issues of  
46 scientific disagreement, even though we say it is not necessary for you to resolve  
47 those disagreements.  
48

49 The first point I want to make about the scientific disagreement is that it is not in  
50 essence a disagreement about the present state of affairs. It is a disagreement about

1 the future. It is a question of projection. Projections are just predictions. They are  
2 based on the available data and on a series of assumptions. In this respect they are  
3 like weather forecasts. Weather forecasts require a lot of science and they require a  
4 lot of observation. They are based on a set of assumptions and yet, of course, as we  
5 know daily, in Hamburg as well as in The Hague, the weather is still uncertain, even  
6 from day to day. With fish stocks the uncertainty is much worse because in our case  
7 we are trying to predict the state of the fish stocks a considerable period in advance,  
8 something like 20 years. Such projections are difficult and may require very sensitive  
9 assumptions about a range of matters.

10  
11 Japan in its EFP focuses on only one matter: that is the density of fish in unfished  
12 areas. But that is only one aspect of one uncertainty in stock assessment and  
13 projections. There are others which are important and which cause much more of the  
14 difference between our projections and those of Japan.

15  
16 Those other matters include: the size and composition of the plus group – I will come  
17 back to that in a moment; productivity of SBT at historically low levels; the age of  
18 maturity and so on. I apologize if in this speech I have to use scientific terms. I am  
19 not a scientist; I will try to be as clear as I can, but I have had to do a crash course in  
20 fisheries science in order even to get to this preliminary stage. The plus group is the  
21 group of all of the rest. In the case of SBT it is the group of fish twelve years and  
22 older.

23  
24 So there are uncertainties on all of these questions and those uncertainties  
25 contribute much more to the difference in the projections than the question of the  
26 density of fish in unfished areas. Moreover, the problem about projections is that  
27 they can be spectacularly wrong, partly because if they begin to predict a recovery in  
28 the stocks, then they build on themselves and the predicted fish, as it were, breed  
29 even more predicted fish. So a recovery can be produced on paper which bears no  
30 relationship to the real world.

31  
32 Just to illustrate that point, I want to show you a graphic, which shows very clearly  
33 and graphically the difficulties of stock projection. This is taken from an article on  
34 northern cod. You may be aware of the collapse of northern cod as a commercial  
35 stock in 1992. That came as a huge surprise to Canadians. It had devastating social  
36 and economic consequences in the maritime provinces and Quebec. The  
37 descending line that you see on the graph from left to right – this time I would stress  
38 that we are going forward in time from left to right – is our current best estimate of  
39 the parental biomass figure over time for northern cod. You can see that in 1991 it is  
40 going down. In 1992, for commercial purposes, it disappeared from the chart.

41  
42 You can also see that there are seven lines, which are essentially perpendicular to  
43 the direction of the downward line. Those seven lines were stock projections made at  
44 various times during the 1980s by the North Atlantic Fisheries Organization and by a  
45 Canadian consultative body. In other words, that is a series of lines, there are seven  
46 of them shown on that chart, each of which predicted the rapid recovery of northern  
47 cod. The striking factor is that they are perpendicular to the actual line of the stock.  
48 Despite those seven projections, the stock collapsed.

49

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

14  
15 So we are not talking about physical extinction. I have to say that I note a recent  
16 Japanese scientific paper published in the scientific literature in which it is said that,  
17 if catches of SBT continue at the 1997 level, the southern bluefin population will be  
18 below 500 mature individuals within the next 100 years and may be listed as  
19 vulnerable. What they mean is vulnerable to extinction. So that in the long term there  
20 is a significant risk of extinction of this single stock. The common skate has  
21 a different stock in the North Sea and therefore the species survived. Southern  
22 bluefin has a single stock which breeds south of Java. If that stock goes, southern  
23 bluefin goes.

24  
25 So in the long term if fisheries continue at the 1997 level, that is even on the cards,  
26 as that Japanese paper cited in the footnote demonstrates.

27  
28 Just as with northern cod, so with SBT: the history of predictions based on CPUE,  
29 that is catch per unit of effort, commercial catch rate, is that they have been too  
30 optimistic, and that is true of both the Australian and the Japanese predictions, but it  
31 is especially true of the Japanese predictions. Let us look, for example, at Japan's  
32 1995 projection in relation to SBT. You can see it on the screen; it is tab 5 in your  
33 folders. I should say, Members of the Tribunal, that you may find it easier to look at  
34 some of the graphics, especially the coloured ones in your graph, because the colour  
35 may come out more clearly. The black and white ones seem to show up sufficiently  
36 on the screen.

37  
38 This was Japan's 1995 stock assessment. It showed the decline in parental biomass  
39 and you can see that in 1995 it showed a sharp recovery. The thinner lines are the  
40 orders of magnitude of possible disagreement or the degree of uncertainty. The  
41 middle, dark line is the projected line. You can see that, in accordance with that  
42 projection, the SBT stock was predicted to recover to 1980 biomass by the year  
43 2000 or slightly before, possibly by this year.

44  
45 The Scientific Committee had this to say in 1995 about that Japanese projection:

46  
47 Japanese projections indicate very rapid recovery of the parental  
48 biomass to 1980 levels in 3-4 years. This recovery results from the  
49 current age structure of the SBT population as estimated by

1 Japanese VPAs and does not depend on any assumption about the  
2 stock recruitment relationship.

3  
4 So there was a prediction of rapid recovery.

5  
6 Earlier Australian projections were also optimistic. In 1991, Australia predicted that  
7 the stock would recover in five years. It is 1999 and it is agreed that we are nowhere  
8 near recovery to 1980 levels. Since 1993, Australia's projections have become much  
9 more conservative. They show possibly a gradual rebuilding of the stock, but on the  
10 assumption that catch rates do not increase. Catch rates have increased for the last  
11 two years and have increased significantly. Therefore, the assumption underlying  
12 even the projection of gradual recovery is undermined. By contrast, Japan's  
13 projections have generally continued to predict a rapid recovery. In effect, it would be  
14 fair to say that Japan is taking considerable amounts of extra SBT on the basis of a  
15 projected recovery of the stock, and Australia objects to that.

16  
17 In the light of this experience and the experience of the unreliability of the predictions  
18 of rapid recovery, and of all the data, there is every basis for Professor Beddington's  
19 conclusion at paragraph 42 of his report, as follows:

20  
21 There is a substantial probability that, under 1997 harvest levels,  
22 the spawning stock will not recover to 1980 levels ...

23  
24 – the level of the safe biological level as agreed –

25  
26 ... by 2020"

27  
28 – the date by which that is supposed to happen.

29  
30 Indeed, there is a distinct probability that it will not increase at all  
31 under 1997 harvest levels.

32  
33 1998 harvest levels were higher than 1997 and, because of the increased EFP 1999  
34 levels, will be higher again. So you can see the basis of concern.

35  
36 In the light of the six agreed propositions that I have outlined and of Professor  
37 Beddington's report and his testimony today, I invite the Tribunal to hold that some  
38 provisional measures are appropriate; the threshold of an arguable case is already  
39 met, and the parties are accordingly under an obligation to conserve the stock so as  
40 to ensure the recovery of the stock to biologically safe levels within a reasonable  
41 time. In particular, they are under an obligation not to increase their catches above  
42 the previous agreed level. This is why you do not need to go any further into the  
43 scientific issues at this stage. The situation as agreed by the Scientific Committee  
44 and as portrayed by Professor Beddington is well above any threshold at which  
45 urgent conservation action is necessary. It is well above any threshold at which the  
46 precautionary principle would come into play.

47  
48 However, there are a number of reasons for supporting the Applicants' projections as  
49 against Japan's projections. Those reasons, which I am going to list, are well above  
50 the level of a good arguable or *prima facie* case. There are good reasons for

1 believing that the Applicants' concerns as to the current and likely future state of the  
2 stock are not merely arguable but are actually justified. We do not have to show that  
3 they are justified but I think we can. Let me give five reasons which powerfully  
4 reinforce and validate the Applicants' concerns.

5  
6 The first reason that I would give is that the projections which you have seen are  
7 based on virtual population analysis (VPA). That is a computer-generated prediction  
8 based upon a mathematical model of the stock. These VPAs depend in this case on  
9 commercial catch rates. There is no independent survey data. The reason why the  
10 northern cod projections, which I have shown you, were so hopelessly wrong is that  
11 they too were based on CPUE, not upon independent surveys. In fact, in the case of  
12 northern cod there were independent surveys, but there were not very many of them  
13 and no one believed them. They believed the CPUE figures instead.

14  
15 There are serious difficulties in relying too much on CPUE. Hilborn and Peterman  
16 describe it as "extremely fallible". To a layman such as me, one of these sources of  
17 fallibility is really remarkable, and I could not believe it when I first found out about it.  
18 It is this: In order to compare CPUE over time, the assumption - you have to be able  
19 to make a comparison over time because the catch rate in any one year does not tell  
20 you anything - the assumption is made that fishing power, that is the capacity to  
21 catch fish, remains stable. In other words, 1,000 hooks in 1969 is the same as  
22 1,000 hooks in 1999. That assumption is just not credible. Compared with 1969,  
23 fishers these days have global positioning systems (GPS), they have satellites that  
24 tell them the surface temperature of the water, they have lots of gear improvements  
25 and so on. It may be that they cannot catch the last fish in the sea but they can do  
26 very well. It would be more realistic to estimate that fishing power increases with  
27 time.

28  
29 In the case of northern cod after the collapse, it was suggested that the fishing power  
30 had increased at the rate of about 3 per cent per annum over time. That means that  
31 over a period of about 25 years fishing power would actually double; the capacity to  
32 catch fish would double. But in the case of SBT at least, the CPUE indices assume  
33 that there has been no change in fishing power, so it tends to tell an over-optimistic  
34 story. It is, as the article by Hilborn and Peterman says, "strongly biased by  
35 technological change" and biased upwards.

36  
37 Given the fallibility and possible bias of CPUE as an indicator, it is very important to  
38 try to get other indications of the state of the stock so that you can act as a cross-  
39 check. In the case of SBT, the other indications that we have are largely negative in  
40 terms of any predicted recovery. Following the fishery collapse off south-eastern  
41 Australia in the late 1970s, there has been no recovery of the surface fishery for  
42 juvenile SBT. Tagging and aerial surveys tell a similar negative story. So we should  
43 be very sceptical about relying on stock predictions, such as the Japanese, which  
44 predict a rapid recovery.

45  
46 That brings me to my second reason for doubting the Japanese predictions of rapid  
47 recovery. This is a slightly complicated story but I think it is worth telling because it  
48 demonstrates graphically what is going on. It concerns what has been happening to  
49 SBT since the catch reductions of the 1980s. There were two groups of catch  
50 reductions in the 1980s, once it was clear that the fishery could not sustain the levels

1 at which it had been fished. First, Australia cut back significantly on the juvenile  
2 fishery in the EEZ, and it did this in 1983-1984. Then the three parties to this case  
3 adopted voluntary global catch restraints which took effect, in the sense of starting to  
4 limit the amount of fish, in the late 1980s. Taken together, these measures should  
5 have resulted in a significant increase in four-year-old fish in the early 1990s,  
6 because those fish would not have been caught.

7  
8 If you look at tab 6 in your folder, you will see perhaps more clearly than on the  
9 screen the CPUE effort indices for four-year olds in that period. If there had not been  
10 some increase in the four-year-old fish in the early 1990s, the situation would have  
11 been very serious indeed because a significant cutback in the catch really had to  
12 have some effect. There were increasing numbers of four-year-olds, as you can see  
13 from the graph – based upon CPUE figures, I might say. These increases could have  
14 been the basis for a recovery if a substantial proportion of those increased numbers  
15 or those postulated increased numbers based upon CPUE had made it through the  
16 next seven or eight years and started to reproduce, because they reproduce around  
17 the age of twelve; that seems to be the best estimate. The FAO guidelines indicate  
18 that that is what should have been done to ensure the recovery of the stock. That  
19 period of improved fish should have been allowed through.

20  
21 Now I draw your attention to the chart shown in Professor Butterworth's paper at  
22 page 6. This shows the CPUE-based estimate for six to seven-year-old fish. They  
23 are a couple of years older than the fish that we have just been looking at. Professor  
24 Butterworth uses this graph to show there is a difference between the constant  
25 squares and variable squares hypothesis. It is true that for ages six to seven there is  
26 a difference. Constant squares show more fish than variable squares. That is, of  
27 course, an assumption built into the model. It is not necessarily reflecting what is  
28 happening in the water.

29  
30 There is something else that you can also see from that graph, and it may be clearer  
31 if we look at it in the coloured form that I have already shown you. I stress that the  
32 data that you will see on the form now – and this is tab 7 in your folder – are the  
33 same as shown in Professor Butterworth's graph. They are shown in a slightly  
34 different way but they are the same. You can see that there is a difference between  
35 constant squares and variable squares. You can also see that although there is still  
36 some sign of improvement in that cohort, it is not as much as it was. Moreover,  
37 although there is a gap between constant and variable squares, both of them show a  
38 falling off in that class.

39  
40 Let us now look at the CPUE data for 8 to 11-year olds a few years later. It is the  
41 same age cohort that we are following through which should have been produced by  
42 those catch constraints, and this is the 8 to 11-year old CPUE data. You can see, if  
43 you look at the period around 1997, that the lines have flattened out. There is very  
44 little difference between constant and variable squares. The cohort has been "fished  
45 down", as they say; this is another fisheries term. The class of the late 1980s, which  
46 benefited from Australia's reductions in its surface fishery and the subsequent  
47 agreed reductions, failed to contribute to a recovery; they did not come through. The  
48 critical point here is that the first opportunity to rebuild the parental stock was lost,  
49 and the amount of fishing since 1997 has gone up sharply, especially because of  
50 Japan's EFP, also for other reasons.

1  
2 You can see essentially the same phenomenon in a different form on the graphic  
3 which is now on the screen, and here I would definitely recommend that you look at  
4 tab 10 in your folders, where it is much clearer because of the colours. This is  
5 looking at the 1980-1991 cohorts, and you can see on the right-hand side various  
6 years of the birth of those SBT. If you look at the five coloured lines at the top left-  
7 hand side of the picture, you will see that those are the years from 1987 through to  
8 1991, the years that we are talking about, which should have benefited from those  
9 catch reductions. To start off, there were high numbers, well below the thick red line  
10 which represented the picture in 1980. But you can also see that each of those  
11 cohorts over time was fished right down so that it joined the narrow band of cohorts  
12 of the early 1980s, when the stock was in a seriously depleted state. So the effect of  
13 fishing, and especially of fishing for four-year-old and older tuna, was to fish the  
14 stock right down.

15  
16 I note that most of that decline is due to long-line fishing for fish of four years old or  
17 more. It is not due to Australian surface fisheries which target fish in the one to four-  
18 year-old range by and large. It is true, if you look at that graph, that the recruits of  
19 1990 and 1991 still have some potential, but still a bit above the 1980 red line, but so  
20 were their predecessors at that age, and look where they ended up. We are talking  
21 about a fish that is still nowhere near maturity.

22  
23 You can see, Mr President, Members of the Tribunal, how crucial restraint is right  
24 now. If there is to be any recovery at all of the parental stock, these are the fish that  
25 will feed through into the parental stock, and they have gone down to levels where  
26 we know they have not fed through to any significant degree. That is my second  
27 reason.

28  
29 Talking of the parental stock brings me to my third reason for concern, and that is the  
30 current state of the plus group. The Tribunal will recall that SBT is a long-lived fish  
31 which has a long development period. Our papers give the reason for believing that  
32 the mean age of maturity is around twelve. That means that with SBT which has a  
33 plus group of 12-year-old and older, it actually includes the whole of the spawning  
34 stock. The plus group equals the whole parental stock. In some other fish the plus  
35 group is really the old-age pensioners. They have already done their reproducing  
36 and they are, as it were, what is left over. The plus group for SBT is the critical  
37 group, the spawning biomass.

38  
39 There are actually 28 age classes in it, because SBT live to be 40, or up to the age  
40 of 40. Now there are good reasons for believing that the age structure of the plus  
41 group is seriously skewed with few young adults and many more middle-aged fish.  
42 Due to Australian research in the early 1990s it is now possible accurately to  
43 determine how old an individual SBT was. Before that point we could only do that by  
44 inferring its age from its length, and that is a rather inaccurate method, especially  
45 with older fish, or in situations in which the density of fish is changing. So for the first  
46 time in 1994-95 we got a picture of the age profile of the plus group of the mature  
47 fish. There was a similar picture taken in 1996-97. The two pictures tell essentially  
48 the same story. The bulk of the parental stock is around 20 or more, middle-aged in  
49 SBT terms. There is a big gap, you can see, in the period from twelve to 18. These  
50 are the new fish coming into the plus group. There is a big decline in new fish.

1  
2 The next generation is severely depleted, but you saw from the earlier graph how  
3 few fish of the 8 to 11-year olds are coming into the plus group. In other words, there  
4 is no sign of a recovery, because the 8 to 11-year olds are not recovering either.  
5 That is a very worrying distribution of fish. The combination of an apparently ageing  
6 parental stock, low levels of pre-spawners, and the fishing down of younger fish  
7 indicate that the stock is in a very poor condition. It calls for urgent conservation  
8 measures. The thing it does not call for is substantial unilateral increases in catch.

9  
10 Let me turn now to my fourth reason, which concerns the most recent trends in  
11 fishing, and the relations between the Japanese EFP and third-party fishing. The  
12 1997 projections assumed a constant total catch for the next few years. That  
13 assumption is already wrong. From 1997 to 1998 the total catch went up by around  
14 22 per cent of which Japan was responsible for 43 per cent, nearly half, with its EFP.  
15 So that gives added cause for concern.

16  
17 Japan's response to that – and you heard Professor Beddington say there should be  
18 a reduction in TAC, there has been an increase for one year of 22 per cent, and it  
19 has gone up again this year – Japan's response is to say that third parties are at  
20 least as much to blame, so why don't we go off and sue the third parties. But the  
21 answers to that are obvious enough. First of all, Japan's proposed 1999 EFP take of  
22 2,000 tonnes, plus or minus a certain percentage, taken alone, will be of the same  
23 order as the fishing for each of Indonesia, Korea and Taiwan. So the take in 1999 is  
24 of the same order of magnitude as the take of those three States, which are the third  
25 States most responsible for new catching, and they have come in relatively recent  
26 years.

27  
28 Secondly, the percentage increase of catch for Japan in 1998 was 30-40 per cent  
29 over and above its previous quota. In effect Japan has seized an over-quota catch of  
30 that proportion at a time when there was no scientific case whatever for increasing  
31 the TAC. Moreover, a substantial fraction of Japan's EFP catch was, on any view,  
32 commercial fishing, and it could have been taken within the limits of its previous  
33 quota. As to the argument that the Applicants could have sued third parties for  
34 substantial new fishing, the fact that other parties may be acting in that manner does  
35 not justify Japan doing so. To the contrary, the fact of additional third State fishing  
36 provides a reason for reconsidering previous quotas down, and you heard  
37 Professor Beddington on that, as well as taking other measures to contain or deter  
38 further increases. Far from acting as a deterrent, Japan's action must be a positive  
39 encouragement to third parties to grab what they can as well, in what has become –  
40 because of Japan's refusal to agree to a continuation of the TAC – a virtually  
41 unregulated fishery. That is the fourth reason.

42  
43 Then, Mr President, I come to the fifth reason, which confirms our concerns as to the  
44 state of the stock, and this is the question which I have to say has been called "lack  
45 of fit". It is a technical issue, and I hope very much not to have to bring it before you,  
46 because it took me a long time, and I still do not think that I understand it, but I will  
47 do my best. One of the reasons for doing that is that Professor Butterworth tries to  
48 make something of it, he accuses us of bias, and so I think we need to respond.

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

16  
17 Why is this lack of fit important for VPA projections, why cannot we just let the  
18 scientists and mathematicians get on with it? The answer is that those VPA models  
19 which tend to predict a high probability of recovery are those that have a very  
20 significant lack of fit. In other words there is something statistically wrong with them.  
21 High probabilities of recovery tend to come from the VPA models which do not fit the  
22 data which has gone into the model. That raises a serious doubt as to their capacity  
23 reliably to predict the future. The effect of all of this on the predictions of the  
24 scientists can be seen in the figure which is now on the screen, and again I think  
25 given the problems with the screen I am looking at, which is a little better, but you  
26 may prefer to look at it in tab 12 in your folders.

27  
28 On the left you see the difference in the projections without taking into account lack  
29 of fit, and you can see there is a huge difference. Japan's probability of recovery to  
30 1980 levels by 2020 is nearly 70 per cent. Australia's is very much less, and New  
31 Zealand's is less still. That is without taking into account that statistical difficulty. But  
32 it is straightforward to see that when lack of fit is taken into account on the right hand  
33 side of the graph the estimates of recovery decrease for all three sets of predictions.  
34 The difference between the estimates was also reduced substantially, much more  
35 than might have been expected even from a well designed EFP, so that the lack of fit  
36 procedure itself, if agreed on, goes much further to settling the difference between  
37 the predictions you see on the left than a well designed EFP, a fortiori an EFP such  
38 as we have now. Even more importantly, the estimates of the three parties when lack  
39 of fit is taken into account all indicate that recovery is unlikely. These results were  
40 based on assessments done in mid 1998. They do not take into account the  
41 increased catches that have occurred since then, including those from this year's  
42 Japanese EFP in progress. If you apply the lack of fit procedure it is obvious in what  
43 direction appropriate conservation action lies. It lies in the direction of urgent  
44 conservation.

45  
46 Now Professor Butterworth has accused Australian scientists of "wishing away" data  
47 in applying this lack of fit procedure. Let me assure you that this is not the case.  
48 There is voluminous documentation and discussion on the problems in the SBT data  
49 in the Australian scientific papers, and this shows how seriously the question of how  
50 best to fit all of the data has been considered. Some of the alternatives considered

1 for estimating the plus group do not rely upon the 12-plus CPUE index, and  
2 Professor Butterworth has pointed that out. However, those alternatives have also  
3 been adopted by Japanese scientists as possible approaches. These alternatives  
4 are not simply “wishing away” data. They are based on a highly plausible  
5 observation, one which Professor Butterworth himself makes in his report. This is  
6 that the plus group CPUE, because of its size and its range, is unlikely to be  
7 a reliable measure of abundance, because of the large number of age classes the  
8 plus group contains.

9  
10 The short point is this. No matter which methods are used to estimate the plus group  
11 – in other words the size of the adult stock – a fundamental requirement must be that  
12 the methods need to fit the data which has gone into the model. As indicated in the  
13 graphic, the Japanese projections that recovery is highly likely do not meet this  
14 requirement. When these Japanese VPAs are adjusted to meet this requirement,  
15 they cease to predict a rapid, or any, recovery.

16  
17 Mr President, Members of the Tribunal, let me summarize. The Applicants’ view of  
18 the SBT stock and its current state is a plausible view, and it indicates a reasonable  
19 concern. That is all we need for present purposes. You do not have to decide the  
20 merits of this case; that is for the future. What you have to decide is the possibility of  
21 a prospective future, that it should be kept open by suitable conservation measures  
22 now, and especially by the avoidance of unilateral increases in catch. But in fact the  
23 Applicants can show, and have shown that their view of the stock is not only  
24 arguable or reasonable, but that it is the better view, that it is to be preferred, and the  
25 five additional reasons I have given powerfully contribute to that conclusion.

26  
27 To recapitulate, they were first the fallibility and possible bias of CPUE base  
28 projections and the negative indications given by other indicators such as aerial  
29 surveys.

30  
31 Two, the fishing down of the year cohorts of the late 80s so that they failed to  
32 contribute significantly to any recovery.

33  
34 Third, the skewed composition, the skewed age composition of the spawning stock,  
35 which is ageing and not being sufficiently replaced.

36  
37 Fourth, the substantial increases in catches in 1998 and again in all probability in  
38 1999, for which Japan is more responsible than any other single party.

39  
40 Fifth, the failure of Japanese recovery projections to resolve the lack of fit problem  
41 and the convergence of negative projections when lack of fit procedures are applied.

42  
43 The effect of these five points is cumulative. They all point the same way. Even  
44 without the precautionary principle, they make the case for conservation now. With  
45 the precautionary principle or approach in their support, the effect is decisive.

46  
47 So we come to Japan’s main defence, which is that even if the EFP involves over-  
48 quota fishing, it is justified by its scientific or experimental character.

49

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

4  
5 First of all, it is said to be justified because it will help to determine the number of fish  
6 in unfished areas. This helps us to choose between the constant squares and  
7 variable squares hypotheses. You can see how much it helps from the graph which  
8 is, I hope, about to go on the screen now. We will see if we can adjust the colour a  
9 bit more. It is tab 13 in your folders and would be clearer there.

10  
11 You can see the red area. That is a recently fished area. We are talking about where  
12 the effort was in the experimental fishing programme in 1998. 76 per cent of the  
13 effort was in the recently fished area, the red area. Another 17 per cent was in a little  
14 narrow strip next to the previously fished area, a tiny strip. Another 4 per cent was in  
15 the little tiny strip next to that. One thing you can see very clearly on the screen here  
16 is the blue area, the vast areas of the Southern Atlantic and Pacific and of the  
17 Southern Ocean. They received 3 per cent of the fishing effort, those blue areas.

18  
19 Professor Butterworth tells us that the vessels were instructed to fish as widely as  
20 possible, but you can see what they did: they fished either in or very near where they  
21 had fished before, so from that point of view the experiment was rather useless.

22  
23 Secondly, there is the question of the focus of the EFP. What was it trying to show?  
24 That there were fish in the unfished areas? No one ever said there were not. Neither  
25 Japan nor Australia places its main priority on these extreme bounds. Constant  
26 squares and variable squares are, as it were, the extreme ends of the hypothesis of  
27 possible density.

28  
29 The graphic on the screen will show that. This shows the preferences for the three  
30 possibilities shown here, constant square, variable square and GS statistical.  
31 Japan's preferences are in pink; Australia's are in yellow. You can see that Australia  
32 places roughly equal weights, not exactly equal but at least some weight on each of  
33 the possibilities. Japan places some weight on each but the weights vary. Both  
34 prefer the middle ground GS statistical to either of the two extremes.

35  
36 In the graphs I showed you earlier about the depletion of the years of the late  
37 eighties, you saw that the two lines, constant squares and variable squares, moved  
38 closer together. Depleted stocks of pelagic fish tend to crowd together. The constant  
39 squares hypothesis is more likely to be true of a virgin stock over the range of its  
40 habitat, whereas variable squares is more likely to be true of a depleted stock.  
41 Australia gives weight to all three indices. So does Japan, but there are differences  
42 in emphasis.

43  
44 You can see from the graphic that Japan's EFP is trying to prove a proposition that  
45 there are fish in unfished areas. That Australia has never denied. For the reasons  
46 stated in our documents, the design and implementation of that EFP is such that it  
47 provides no reliable estimates of the ratio R of the number of fish in unfished area as  
48 a whole. Even if it was superbly designed and executed, however, the different  
49 weighting of variable squares and constant squares cannot be resolved by a simple  
50 experiment over a few months or a few years.

1  
2 The reason is that the ratio R would only apply to the period observed, a few months  
3 or whatever it was. It cannot be extrapolated backwards. Even if it could be it would  
4 not resolve the differences between the parties which would still exist and which  
5 were due to other reasons. That is the second point.

6  
7 The third reason for criticizing the EFP is that it does not comply with the 1996  
8 Objectives and Principles which you have in your documents. You can read the  
9 Objectives and Principles for yourself and judge whether you think that this unilateral  
10 programme produced in the circumstances outlined by Mr Campbell complies with  
11 them.

12  
13 Let me rather look at the letter from the FAO's Dr Garcia, which is Annex 16 to the  
14 Japanese response. According to Japan, it was an unwritten response to their  
15 proposal and it was "favourable". It is dated 26<sup>th</sup> May 1998, five days before the EFP  
16 began. The Applicants knew of the existence of this letter. In fact, we had asked  
17 Japan for it. We are glad to see it now for the first time. Let me say at once that the  
18 Applicants accept Dr Garcia's credentials as an expert in the field as well as an  
19 independent FAO official. We do not require a *voir dire*. Any advice Dr Garcia gives  
20 is worth relying on.

21  
22 Incidentally, the Tribunal will be interested in his important 1995 paper in which he  
23 recommends "a systematic shift towards the precautionary approach". We must  
24 remember, of course, that when he is writing to a government, and especially the  
25 Government of Japan, as director of an FAO division, Dr Garcia has to be careful  
26 how he says things. A blistering critique of a very important government from the  
27 FAO on this matter might not have been well received. He is very careful in what he  
28 says and how he says it what he says.

29  
30 Let me summarize his main points. You can read the letter afterwards and see if it is  
31 accurate.

32  
33 First: he limits himself to the information provided in the Japanese documents, thus  
34 judging it in its own terms.

35  
36 Second: he notes the lack of any "context of the strategy for SBT fisheries  
37 management, emphasizing the link between the survey and its results with specific  
38 management decisions".

39  
40 Third: he notes the lack of any reference to costs and benefits.

41  
42 Fourth: he notes that there is no information given under the entire projected survey  
43 and its costs and benefits. This was only the first year.

44  
45 Fifth: he notes, as I have noted, that while the decline in six to seven-year-old fish in  
46 1993 seems to be reversed, this is not true for seven to eight-year-old fish. He  
47 makes the same point.

48  
49 Sixth: he notes that abundance "seems to be still much below the 1980 level".  
50

1 Seventh: he notes that the survey “may not allow a significant increase in catches at  
2 least in the short term”. He implies that this casts doubt upon the costs of the EFP by  
3 reference to its potential benefits.  
4

5 Eighth: he suggests that after reaching the management target, that is recovery to  
6 1980 levels, the fishery data then obtained “might provide better indication of the  
7 status of stock without the need to bear the additional cost of the survey”. I interpret  
8 that to mean first allow recovery before you increase the number of fish.  
9

10 Ninth: he points out that if the stock were allowed to recover to its 1980 levels, then  
11 there could be an increase in catch, and the area of the fishery “might extend from  
12 the present relatively small area to a much larger area”. Could it be that Dr Garcia  
13 does not believe in constant squares?  
14

15 Tenth: he notes that there is insufficient information underlining the key figure which  
16 is “critical for justifying the programme” and especially a lack of specification of “the  
17 assumptions involved.”  
18

19 Eleventh: he notes the complex relationship between age cohorts. This is “likely to  
20 make the interpretation of results of the pilot study difficult” and may necessitate  
21 “very intensive experimental fishing to be carried out for many years”. He does not,  
22 however, say whether the stock would sustain such intensive fishing for many years.  
23

24 Twelfth: he suggests that the same results could be obtained from “additional  
25 analyses of available data from commercial fishing, including simulations”, and  
26 suggests that the proposal would be technically sounder if these analyses and  
27 simulations were undertaken first.  
28

29 Thirteenth: he suggests that the proposal may assume what it is trying to prove,  
30 which is that the fished area has shrunk as a result of the TAC reduction. He notes  
31 that there might be other reasons for the shrinkage, of which the most obvious would  
32 be a substantial decline in the stock, although he does not say that.  
33

34 Fourteenth: he says that the experimental design was insufficiently documented. In  
35 particular, it is not clear how a reasonable spread of fishing effort across unfished  
36 areas is to be obtained. He was absolutely right about that. You saw what a spread  
37 of fishing effort there was.  
38

39 Fifteenth: he says that the conditions for spread of fishing effort are imprecisely  
40 specified. He was right about that too.  
41

42 Sixteenth: he disagrees with the Japanese view that a single year’s EFP catch will  
43 have an insubstantial effect. He notes “an additional catch of 2,000 tons per year  
44 would indeed be very significant if compared with the present TAC.” He calls for the  
45 overall effect of the entire EFP programme to be evaluated, of which this was only  
46 one year of unilateral fishing.  
47

48 Seventeenth: he notes that compensation by payback, which is the preferred  
49 Japanese solution “may not be considered adequate by the other parties involved in

1 case the stock and TAC is further reduced because of the survey catch.” He was  
2 right about that too.

3  
4 Eighteenth: he warns that under a payback arrangement Japan may lose out,  
5 because the losses to the stock “may be higher than the survey catches”.

6  
7 Nineteenth: he notes that “if the stock effectively decreases it may be impossible to  
8 prove that this was not provoked by the survey”, that is by the EFP, which implies  
9 that further reductions may, in his view, be caused by the EFP. In fact, for there to be  
10 any payback Japan actually requires that the other parties prove the decline was  
11 caused by the EFP.

12  
13 Dr Garcia seems to have a different view about the onus of proof, as compared with  
14 Japan. But perhaps he was only being precautionary.

15  
16 Twentieth: you will be pleased to know, Mr President, that this is the last: he  
17 complains that for a research survey 100 per cent coverage by observers is  
18 generally expected and that the proposed 20 per cent seems to be very low and that  
19 there are no countervailing mechanisms to ensure proper reporting. As I have said,  
20 you can read the letter for yourself and see whether, in your judgment, it amounts, as  
21 Japan argues, to support for its EFP.

22  
23 Mr President, Members of the Tribunal, with supporters of Japan’s EFP like Dr  
24 Garcia it does not need many opponents. In fact, this is a stringent criticism of the  
25 EFP in its concept and in its execution. No doubt polite and courteous in its  
26 expression, but lethal in its implications, it constitutes a clear indication from the FAO  
27 authority responsible in this field and a person of great personal authority in the field  
28 of the dangers and deficiencies of the EFP.

29  
30 It is not merely that the same information could be obtained in other ways from  
31 existing data and from simulations. It is not merely that the design of the EFP is  
32 seriously flawed. Clearly the writer of this letter thought that an EFP of 2,000 tonnes  
33 might well in one year have significant adverse effects on the stock and on its  
34 recovery. The Applicants agree entirely. The EFP stands condemned.

35  
36 Mr President, Members of the Tribunal, let me sum up the position. This stock is  
37 seriously depleted and yet it is being increasingly over-fished above the previous  
38 TAC. There is good reason for believing that the parental or spawning stock is still  
39 declining, and that there is a risk of recruitment failure. The agreed objective for  
40 recovery to a biologically safe level, the 1980 level, is increasingly postponed. Yet  
41 Japan, as Mr Campbell has shown, has systematically advocated more fishing, and  
42 when it could not get the Applicants to agree to this, it did it anyway, unilaterally,  
43 seizing an extra 30 per cent or more above its previous quota.

44  
45 The so-called scientific or experimental basis for this fishing has virtually no  
46 justification or value in terms of the additional information provided. It has been  
47 stringently criticized by responsible authorities. In fact, it has done little but increase  
48 the risk to a seriously depleted stock, especially in the next few crucial years. If the  
49 EFP is to be repeated in future years, as Japan threatened, and as was the basis of  
50 the letter to Dr Garcia, the increased risk is cumulative and it is significant.

1  
2 Those, for the Tribunal's purposes, can be taken to be the facts of the matter. At the  
3 very least they represent a likely view of the facts, a good arguable case.  
4

5 What legal conclusions follow from this? For the reasons already given by the  
6 Attorney General, articles 64 and 116 to 119 of UNCLOS require Japan to conserve  
7 and cooperate in the conservation of the SBT stock. The Applicants, as coastal  
8 States in the region of the fishery, as partners of Japan in the fishery, as parties with  
9 it in the relevant regional agreement, have a legal interest in the performance by  
10 Japan of its obligations under UNCLOS. They have a legal interest in the continued  
11 security of the SBT stock and a legal right that Japan not take unilateral action which  
12 significantly impairs that security. Of course, whether Japan is actually in breach of  
13 these obligations is a matter for a later stage and possibly another tribunal.  
14

15 It is, in our submission, clear from the evidence before you, clear from the basic  
16 points of scientific agreement about this stock, clear from what Professor Beddington  
17 has written and said, that there is a serious and present threat to those legal rights  
18 and interests. This is an ample basis for saying that provisional measures are  
19 appropriate.  
20

21 I would ask you now, Mr President, to call on my friend, Mr Burmester, to explain  
22 why the particular measures that Australia seeks are appropriate and urgent in terms  
23 of your Statute and Rules. Thank you, Mr President, Members of the Tribunal, for  
24 your patient attention, notwithstanding the weight of the science.  
25

26 **THE PRESIDENT:** Thank you very much, Mr Crawford. I now call upon  
27 Mr Burmester to continue with the submissions.  
28

29 **MR BURMESTER:** Mr President, Members of the Tribunal, it is an honour to appear  
30 before this Tribunal. I was involved some twenty years ago in meetings concerning  
31 the dispute settlement provisions in UNCLOS and it is a privilege to now appear to  
32 make submissions about their interpretation and application.  
33

34 In this last major presentation by the Applicants, my task is to outline why the  
35 particular provisional measures sought are, in the words of article 290, paragraph 1,  
36 "appropriate under the circumstances to preserve the respective rights of the parties  
37 to the dispute". This is the key requirement under UNCLOS. It requires a  
38 consideration of the particular measures requested and the rights asserted.  
39

40 The present application is, of course, brought under article 290, paragraph 5. That  
41 requires consideration of two further requirements – namely that "the urgency of the  
42 situation" requires provisional measures and that *prima facie* the Annex VII tribunal  
43 which is to be constituted would have jurisdiction. The issue of *prima facie*  
44 jurisdiction raised by paragraph 5 has already been covered by Mr Mansfield. He has  
45 shown that the provisions invoked satisfy the requirements imposed by that  
46 paragraph.  
47

48 Before turning to a consideration of the particular requirements, I draw the Tribunal's  
49 attention to the widespread jurisprudence on the award of provisional measures.  
50 This is, of course, familiar to the Tribunal, in part having been considered in the first

1 provisional measures case heard by this Tribunal, the *Saiga* case. I can therefore be  
2 brief.

3  
4 The position is well summarized by Lawrence Collins in his Hague lectures in 1992.  
5 He concluded:

6  
7       There can be no doubt that the procedural power to grant  
8       provisional or protective measures reflects a general principle of  
9       law and that principle nowadays is based on the need to prevent  
10      the judgement of the court from being prejudiced or frustrated by  
11      the actions of the parties.

12  
13 In order to do that, the object of provisional measures, as is expressly recognized in  
14 article 290, is to preserve the respective rights of the parties. To ensure this, it may  
15 be appropriate for measures to apply to the parties on both sides of a dispute. This is  
16 reflected in the third, fourth and fifth particular measures sought by the Applicants. It  
17 is not reflected in the provisional measure which Japan has sought. But what is  
18 appropriate to preserve the respective rights of one party may be different from what  
19 is appropriate to preserve the rights of another. It is for this reason that the  
20 Applicants seek some particular measures applicable only to Japan. Only in this  
21 way, as I shall seek to indicate, can their respective rights be preserved.

22  
23 The use of the phrase “appropriate under the circumstances” in article 290 means  
24 that award of provisional measures is a matter within the discretion of this Tribunal.  
25 The wording used differs from that in article 41 of the Statute of the International  
26 Court which uses the expression “if it considers that circumstances so require”. It is  
27 submitted that this Tribunal has a broader jurisdiction. Article 290 was drafted, of  
28 course, in the light of the experience of interim measures of protection in the  
29 International Court. The drafters of UNCLOS deliberately chose to give this Tribunal  
30 a broader as well as a more effective provisional measures jurisdiction than that  
31 which the International Court has. For this reason, the Tribunal should be slow to  
32 circumscribe the discretion with unstated preconditions, such as “irreparable harm”  
33 or “irreparable prejudice”, terms which have been used in the past in International  
34 Court decisions.

35  
36 Rather, this Tribunal needs to consider all the circumstances put before it with a view  
37 to determining what is appropriate to preserve the respective rights of the parties.  
38 Obviously, in that context, the nature of the harm likely to be suffered is a relevant  
39 circumstance. I shall, therefore, say something about that issue. That should not,  
40 however, be seen as a separate requirement. This Tribunal, in the words of  
41 paragraph 1 of article 290, needs to consider, given all the material put before it,  
42 what is “appropriate under the circumstances”.

43  
44 It is also important to emphasize that, at the provisional measures stage, this  
45 Tribunal does not have to engage in any prejudgment of the merits. This has been  
46 stated already on a number of occasions today. This is not to say that it will not be  
47 necessary to consider the particular rights asserted by the Applicants. That,  
48 however, is for the purpose of determining that they are not manifestly incapable of  
49 existing in law. As well, the Tribunal is not required to make definitive findings of fact  
50 on the scientific material placed before it. In our submission it suffices, to adopt the

1 words of Judge Anzilotti in the *Polish Agrarian Reform and German Minority* case,  
2 that “the material establishes the possibility of the right claimed and the possibility of  
3 the danger to which that right was exposed”.

4  
5 The same approach was reflected in the *Nuclear Tests* cases. The International  
6 Court called on France as an interim measure to avoid nuclear tests causing the  
7 deposit of radioactive fallout on Australian or New Zealand territory. In the face of the  
8 scientific information available to it, the Court concluded that that information “does  
9 not exclude the possibility that damage to Australia (and New Zealand) might be  
10 shown to be caused by the deposit on Australian (and New Zealand) territory of  
11 radioactive fallout resulting from such tests and to be irreparable”.

12  
13 It was for this reason that the particular provisional measure was regarded as  
14 required. The Court did not insist that actual cancer cases arising from the  
15 atmospheric tests had to be demonstrated before it awarded the provisional measure  
16 in question. Nor, in response to an argument that Japan makes, was the fact that the  
17 cessation of atmospheric tests was one of the specific claims made in the  
18 applications instituting the substantive proceedings a bar to the award of that  
19 particular provisional measure.

20  
21 Similarly, in the *Diplomatic and Consular Staff* case, involving the United States  
22 Embassy in Teheran, the provisional measures order by the Court involved an order  
23 for the immediate release of the hostages, one of the matters of relief sought in the  
24 application instituting proceedings.

25  
26 Where, in order to preserve the respective rights of either party, it is necessary to  
27 order particular measures, there can be no objection to them on the ground that they  
28 are equivalent to an interim judgment on the merits. That they can never be. The  
29 issue for the Tribunal is to determine what is necessary to preserve the respective  
30 rights of the parties. There is, therefore, no basis for Japan to dispute the award of  
31 the particular measures sought by the Applicants, particularly the first and second,  
32 on the basis that they may anticipate the merits and amount to a final remedy.

33  
34 Nor can certain of the measures sought be characterized, as they are by Japan, as  
35 remedies for past infringements of rights. That is not their purpose, as I shall make  
36 clear. The particular concern of this Tribunal is to consider whether the measures  
37 requested or similar measures are appropriate in order to preserve rights asserted  
38 and which may subsequently be adjudged by the arbitral tribunal to belong to the  
39 Applicants.

40  
41 Article 290, paragraph 5, authorizes the Tribunal to prescribe provisional measures  
42 when an Annex VII arbitration has not yet been constituted where “the urgency of the  
43 situation so requires”. This requirement is not set out in paragraph 1 as a  
44 requirement for provisional measures generally. It is a procedural requirement that  
45 goes only to the circumstances in which this Tribunal should act, given that the body  
46 that is to hear the substantive dispute is not yet in existence.

47  
48 What paragraph 5 is designed to ensure is that this Tribunal can protect the rights of  
49 a party until an arbitral tribunal is itself in a position to deal with the situation. Once  
50 that body is created, it will have power to modify, revoke or affirm any provisional

1 measures on application of a party. But until then, this Tribunal has the power to act  
2 and should act where that is necessary to protect the respective rights of the parties.  
3 In other words, for so long as the *ad hoc* arbitral tribunal is not established (and this  
4 may take some time), the Tribunal steps into its shoes and has all of its powers.  
5 Indeed, it is precisely during the period of months before an *ad hoc* tribunal is  
6 established that provisional measures may be required. The basic test of  
7 appropriateness applies under both paragraphs 1 and 5.

8  
9 Let us consider what the urgency of the procedural situation requires. This Tribunal  
10 needs to consider two issues; first, how long before the arbitral tribunal will be  
11 established and will be in a position to consider provisional measures; secondly,  
12 what rights of the parties could be damaged or destroyed if provisional measures  
13 were not awarded to protect the rights before the arbitral tribunal is able to consider  
14 the issue.

15  
16 The timetable for establishment of an arbitral tribunal is set out in Annex VII,  
17 article 3. Applying the time limits demonstrates that the other party has 30 days from  
18 receipt of notification to nominate one member. Japan nominated an arbitrator on  
19 13 August within that period. The parties have 60 days from the date of the original  
20 notification of the arbitration to try and reach agreement on the remaining members.  
21 If there is no agreement, a request can be made within two weeks of the expiry of  
22 the 60-day period to the President of this Tribunal to make the remaining  
23 appointments within 30 days. Thus, if the full time is taken, it could be up to three  
24 and a half months from initiation of proceedings until an arbitration tribunal is fully  
25 constituted. Of course, further significant time is likely then to elapse while rules of  
26 procedure are agreed, a secretariat is established and arrangements for the Tribunal  
27 to sit are made.

28  
29 The Applicants submit that it is imperative that provisional measures be prescribed in  
30 this case, given the period of three or more months before the arbitration is likely to  
31 be constituted and capable of functioning. That period takes on to the end of this  
32 year's fishing programme.

33  
34 As well as the procedural urgency just outlined, there are reasons of substantive  
35 urgency which also require the immediate prescription of provisional measures. The  
36 "urgency of the situation" is closely related to whether in the circumstances the  
37 measures are appropriate. The substantive urgency of the situation is such that to  
38 require the Applicant States to wait a further three or more months would mean harm  
39 and prejudice to the preservation of their rights in relation to the existing SBT stock  
40 and its proper conservation. Contrary to what Japan asserts, the prejudice from  
41 unilateral additional fishing exists now; it is not only a medium or long term threat.

42  
43 Let me illustrate why this is so in greater detail. Paragraphs 20 and 21 of the  
44 Applicants' Requests refer to the reasons for urgency. In particular, by the end of  
45 next month, September, Japan's catch since the beginning of its current fishing  
46 season will, with inclusion of the catch taken as part of its 1999 unilateral  
47 experimental fishing, probably have exceeded its last agreed national allocation of  
48 6,065 tonnes. One of the measures sought by the Applicants is, of course, designed  
49 to limit the overall catch taken by Japan to the level of their last agreed national  
50 allocation. If one takes the 1998 experimental fishing catch and includes that as well,

1 Japan has already exceeded their last agreed national catch allocation for both the  
2 1998 and 1999 seasons.

3  
4 To postpone any consideration of provisional measures until the arbitration tribunal is  
5 established would prevent any measures of protection designed to limit the future  
6 Japanese catch for the remainder of 1999 before that arbitration tribunal is  
7 functioning. It would effectively prevent any other provisional measures directed at  
8 the conservation of SBT during the 1999 season.

9  
10 The scientific material on which you have heard detailed presentation by Professor  
11 Crawford establishes that, in the present circumstances, further catch over and  
12 above the last agreed TAC substantially increases the risk of further harm to the SBT  
13 stock and fishery and makes even less likely its recovery in accordance with the  
14 agreed target. That material clearly establishes the possibility of harm occurring now  
15 as a result of the increased Japanese catch.

16  
17 It may be argued – and I understand that Japan argues – that because the 1999  
18 EFP is almost at an end, there is therefore no urgency requiring provisional  
19 measures to stop that programme, but that is to consider only one component of the  
20 measures requested in isolation. I will say more about that particular measure later.  
21 Whatever the position with the 1999 EFP itself, it says nothing about the urgency of  
22 provisional measures in this case in terms of a need to limit the overall catch taken  
23 by Japan, including that taken during any unilateral experimental fishing prior to the  
24 constitution of the arbitral tribunal.

25  
26 The provisional measures sought are urgent and pressing in order to prevent the  
27 further decline in parental biomass and the further deterioration in the stock as a  
28 whole, which has been shown to be a likely and certainly possible consequence of  
29 the current Japanese fishing effort. Scientific Committee reports consistently attest to  
30 the serious biological concern that already exists. In our submission, once this  
31 Tribunal considers the scientific evidence of harm arising from increased fishing,  
32 once it considers the pattern and size of Japanese fishing, it will become evident that  
33 the urgency of the situation cannot be other than to require this Tribunal to prescribe  
34 provisional measures now. It cannot properly leave the matter for consideration in  
35 some months' time by some other tribunal, by which time this year's Japanese  
36 fishing season will be over. By that time, significant and valuable rights of the  
37 Applicant States in relation to SBT will have been impaired or lost if no measures of  
38 restraint are prescribed. To decline to act now would involve this Tribunal turning its  
39 back on the fundamental principles enshrined in UNCLOS relating to the  
40 conservation and management of high seas fisheries.

41  
42 Mr President, I have so far carefully avoided reference to irreparable harm or  
43 prejudice. Neither paragraphs 1 nor 5 of article 290 refer to "irreparable harm" as a  
44 requirement for the prescription of provisional measures. There is no reference to  
45 this requirement in the *Saiga* provisional measures decision by this Tribunal. Any  
46 suggestion that it is a separate requirement under UNCLOS should be rejected. This  
47 Tribunal, as I have indicated, should be guided by the words of article 290 alone.

48  
49 This Tribunal should view with caution, therefore, what is urged by Japan, namely  
50 the automatic adoption of principles stated by the International Court of Justice.

1 Those principles appear to regard "irreparable prejudice" as an essential element for  
2 the award of provisional measures. Judge Laing considered this issue in his  
3 Separate Opinion in the *Saiga* case. He said, "if the Tribunal chooses to use this  
4 paraphrase, its subsidiarity or supplementarity should be very clearly indicated".  
5 Judge Laing also said, "the rather grave standard of irreparability is inapt for  
6 universal use, at least in many of the situations under UNCLOS". The Applicants  
7 agree.

8  
9 Rather, the focus should be on identifying the measures necessary to preserve the  
10 respective rights of the parties. That is the purpose of provisional measures, to  
11 preserve the *status quo pendente lite* by preserving the respective rights of the  
12 parties. In some instances, irreparable harm will clearly establish the basis for  
13 particular measures. We can give as an example the consular convention cases  
14 before the International Court. The imminent execution of the individual whose rights  
15 were alleged to have been infringed clearly involved a situation where the rights of  
16 the parties would be irreparably damaged and not preserved if the execution went  
17 ahead. But whatever the position may be with the International Court, provisional  
18 measures under UNCLOS and before this Tribunal do not require such life or death  
19 situations.

20  
21 In the present case, we are dealing with the conservation of living resources.  
22 Scientific evidence in relation to resources such as SBT does not have, and can  
23 rarely be expected to have, the exactness that will necessarily enable actual  
24 irreparable harm to be shown at the time. For instance, even if there was an actual  
25 recruitment collapse of SBT, it would take at least two years for that to become  
26 known, because of the time that it takes from spawning to recruitment of fish into the  
27 juvenile fishery. This demonstrates the inappropriateness of requiring irreparable  
28 harm or prejudice to be shown.

29  
30 This sort of harm to stocks of living resources is not capable of being made good by  
31 payment of compensation. It deprives coastal States like the Applicants of their rights  
32 to fish a sustainable resource. Economic harm to particular communities dependent  
33 on the fishing may result from harm to the resource, but that does not define the limit  
34 or even the fundamental nature of the harm complained of by the Applicants. It is not  
35 the harm in relation to which provisional measures are sought.

36  
37 I reiterate that what is required is that this Tribunal can reasonably conclude that  
38 particular measures are appropriate – not necessary – under the circumstances in  
39 order to preserve the respective rights of the parties. In other words, the Tribunal  
40 needs to ask whether a particular measure is suitable to preserve the rights of the  
41 parties having regard to all the circumstances, including the rights asserted and the  
42 damage that could possibly be done to them. That may require the Tribunal to  
43 consider alternative measures, including measures different from those specifically  
44 sought. This may require consideration of which measures are most appropriate,  
45 given that the object of any measures is the preservation of the rights of the parties.  
46 As I shall elaborate, one consideration is the need for the Tribunal itself to adopt a  
47 precautionary approach.

48  
49 I turn then to consider the rights of the parties in this case which the particular  
50 measures requested are designed to secure.

1  
2 The rights which the Applicants seek to preserve are set out in paragraph 16 of both  
3 Requests. Professor Crawford has indicated how the conclusions from the scientific  
4 material raise a strong case of prejudice to the rights conferred by UNCLOS on the  
5 Applicants. But, as I have already indicated, this Tribunal does not have to pass  
6 judgment on the merits of the case. You do not have to say that the claim is strong or  
7 that it is bound to succeed. It is sufficient if the rights asserted are not manifestly  
8 unfounded. The rights under UNCLOS and related rights asserted by the Applicants  
9 have been amply demonstrated already to have a sound basis in international law  
10 and certainly a sufficient basis to found provisional measures to preserve these  
11 rights if that is otherwise appropriate.

12  
13 The effect that particular measures might have on the rights of Japan is, of course,  
14 relevant. Measures that preserve the rights of Australia and New Zealand cannot, of  
15 course, destroy the rights of Japan. The measures sought do not do that.

16  
17 Assume that the measures sought by the Applicants were granted, effectively limiting  
18 the ability of Japan to take overall catch in 1999 above the last agreed TAC. If the  
19 Applicants do not ultimately succeed on the merits, Japan will be free to again take  
20 additional catch under an EFP or more generally, and there is scope to adjust future  
21 national TACs.

22  
23 In short, Japan's right to continue to fish for additional amount will have been  
24 postponed; it will not have been destroyed. In postponing it, the right may actually be  
25 enhanced, because all scientific assessments point to the parlous state of the stock,  
26 and it is an appropriate precautionary measure in any event to postpone additional  
27 harvesting.

28  
29 By contrast, if Japan is allowed to take unlimited catch, or to continue through the  
30 means of an EFP to exceed its annual national allocation, the Applicants will have  
31 suffered loss both of their future rights to fish for SBT and through the increased risk  
32 of a recruitment collapse.

33  
34 If the stock collapses completely, a possibility which has been dealt with in the  
35 evidence, the Applicants will have lost completely their right to exploit SBT. There  
36 will be no stock able to be exploited. If the stock does not collapse but the recovery  
37 to 1980 levels is delayed significantly because of the increased Japanese tonnages,  
38 the Applicants will not be able to increase their own catches commensurately with  
39 Japan, thereby giving Japan a disproportionate or unjustifiable benefit. In keeping  
40 with the precautionary principle, any increase in catch will be delayed beyond the  
41 point when it would have been possible but for Japan's EFP. Either way, this will  
42 clearly prejudice, for possibly a lengthy time in the future, the right of the Applicants  
43 to exploit the stock. Japan will have gained an immediate benefit at the cost of the  
44 rights of the Applicant States to share equitably in the resource. There is no  
45 evidence, nor is it likely, that Japan will willingly share any future sacrifice  
46 proportionately with the Applicants in a way that takes account of past EFP catches.  
47 The point is that there is a possibility of very serious loss to the Applicants.  
48 Arguments about the need to continue experimental fishing for data collection  
49 purposes cannot be persuasive in the face of the possible impact of continued  
50 fishing above the agreed TAC on the rights of the Applicants.

1  
2 Mr President, Japan suggests in their scientific papers that it would be possible to  
3 decrease a country's quota in future years to compensate for any detectable  
4 negative effects on the stock from EFP, but that suggestion is naïve. It does not  
5 address the existing rights of the Applicants referred to above also to exploit the  
6 stock. More to the point perhaps, given the serious present risk, it does not address  
7 the rights of those States to have the stock conserved and protected in accordance  
8 with UNCLOS in a sustainable way and consistently with the precautionary principle.  
9 These rights include the rights of the Applicants to have Japan cooperate in the  
10 conservation of the stock and not to engage in unilateral decision-making about its  
11 management. Provisions for future adjustment (which cannot be guaranteed and  
12 which, in the event of a stock collapse, would be meaningless) cannot, therefore,  
13 preserve the existing rights of the Applicants. In particular, I note that Japan has  
14 made any offers of payback contingent on its own acceptance that the EFP has  
15 caused "substantially negative impact" on the stock, with no indication of the criteria  
16 on which it would make that unilateral decision. I refer the Tribunal to page 2 of our  
17 Diplomatic Note of 15 July. The suggestion of payback in no way provides a  
18 justification not to prescribe provisional measures.

19  
20 Mr President, I need to turn now to consider the particular measures sought by the  
21 Applicants. The first provisional measure requested is "that Japan immediately cease  
22 unilateral experimental fishing for SBT". This is self-evidently urgent. The reason this  
23 measure is appropriate is that so long as additional catch is taken by Japan through  
24 an EFP, any prospect of stock recovery is seriously prejudiced. This then, for  
25 reasons already given, prejudices the rights of the Applicants to have SBT properly  
26 conserved and managed so that their ability to fish the stock themselves and to  
27 enjoy the benefits thereof are not destroyed.

28  
29 I note that the measure sought only seeks to prevent "unilateral" experimental  
30 fishing. If such fishing is agreed by all three parties in accordance with the principles  
31 agreed in 1996, it can take place.

32  
33 The reason this measure is sought is because the Japanese EFP in 1998 and this  
34 year is fundamentally flawed for the reasons given in the Australian Scientific Report  
35 and also referred to by Professor Crawford. It is not a genuine scientific programme  
36 conducted in accordance with the objectives and principles agreed by all three  
37 parties in 1996.

38  
39 In the light of the deficiencies, I need to indicate why a provisional measure as  
40 requested is appropriate. You will be pleased to know that I do not need to recap on  
41 the particular deficiencies for the EFP explained by Professor Crawford. However,  
42 what that clearly demonstrated was that the unilateral experimental fishing by Japan:

- 43  
44 (a) is seriously flawed as a scientific programme;  
45 (b) will not from the information obtained provide a basis to resolve uncertainties  
46 in relation to the stock assessment or projections for recovery;  
47 (c) involves the taking under colour of scientific fishing of significant additional  
48 catch which properly forms part of the overall commercial SBT catch taken by  
49 Japan; and

1 (d) involves the taking of additional catch which is significant in terms of the  
2 possibility, in fact probability, of serious harm to the recovery prospects of  
3 SBT.  
4

5 One important and essential way in which to ensure that the Applicants' right that  
6 SBT stock can in fact recover is to prevent Japan from unilaterally carrying out any  
7 future experimental fishing.  
8

9 The current 1999 EFP is due to finish at the end of this month, according to Japan.  
10 However, this does not make a provisional measure as sought moot or  
11 inappropriate. There is nothing to stop Japan continuing or recommencing  
12 experimental fishing at any time. Moreover, it is only by calling its current EFP  
13 "experimental" that Japan can justify fishing at all. For the rest of this year it  
14 proposes to take still more fish. This measure is, of course, closely related to the  
15 second measure sought. If Japan was merely to be limited to an ordinary national  
16 allocation at that last agreed, this may well lead Japan to extend the EFP or  
17 undertake additional experimental fishing. There is no guarantee, therefore, that no  
18 more experimental fishing will occur after the end of this month until June or July  
19 next year.  
20

21 It is for this reason that a provisional measure as sought is appropriate in all the  
22 circumstances in order to protect the rights of Australia and New Zealand.  
23

24 The second measure requested by Australia and New Zealand is that "Japan restrict  
25 its catch in any given fishing year to its national allocation as last agreed by the  
26 Commission, subject to the reduction of such catch by the amount of SBT taken by  
27 Japan in the course of its unilateral experimental fishing in 1998 and 1999".  
28

29 Mr President, I note that it is not unprecedented for a provisional measure to impose  
30 a fisheries catch limitation on a State.  
31

32 In the *Fisheries Jurisdiction* cases between the United Kingdom and Germany on  
33 one side and Iceland on the other, the International Court ordered the United  
34 Kingdom and Germany to ensure their vessels did not take an annual catch of more  
35 than a particular respective tonnage.  
36

37 The United Kingdom in its Request had put forward a request allowing it to continue  
38 to take an amount of 185,000 tonnes, based on the average annual catch over the  
39 ten years from 1960 to 1969. In 1970 the catch had been 164,000 tonnes and in  
40 1971 it was 207,000 tonnes. The Court, dealing with the situation in 1972, settled on  
41 a figure of 170,000 tonnes based on the average annual catch for the preceding  
42 5 years, and having done that, they indicated a provisional measure allowing the  
43 United Kingdom to continue to take catch up to that level. A similar approach was  
44 adopted in the German case, using the particular figures applicable to Germany.  
45

46 In the present case, all three States agreed to a quota in 1989 as part of cooperative  
47 management measure, and there has been no subsequent agreement to an  
48 increase. The Japanese experimental fishing is in effect a way in which Japan can  
49 get around the agreed catch quota. It leads to a significant increase in the catch  
50 taken – as paragraph 20 of the Applicants' Requests indicates, the 1998

1 experimental fishing represented a 12.5 per cent increase in the last agreed TAC.  
2 The 1999 experimental fishing of up to 2,400 tonnes represents a 20.5 per cent  
3 increase over the TAC and a 39.5 per cent increase on the last agreed national  
4 allocation. These are not small, incidental increases as a result of a scientific effort.  
5 They are an effective increase in the commercial catch taken. An EFP could have  
6 been conducted effectively with a fraction of this catch.

7  
8 That this is so is emphasized by the fact that the areas fished and the boats involved  
9 in the experimental fishing are largely the same as those engaged in the ordinary  
10 commercial fishing. What happens is that the scientific fishing fills the 3 months gap  
11 between June and August, which in years when a scientific programme was not  
12 undertaken saw the relevant vessels redeployed elsewhere.

13  
14 The third measure requested is that the parties “act consistently with the  
15 precautionary principle in fishing for SBT pending a final settlement of the dispute.”

16  
17 The Attorney-General has outlined the importance of this principle to the effective  
18 implementation of conservation measures, including those imposed by UNCLOS.  
19 The principle dictates that a State cannot under the guise of science or ordinary  
20 commercial fishing undertake activities in a way that ignores real risks of harm to  
21 living resources, and southern bluefin tuna are no different in this regard from any  
22 other living resource.

23  
24 The proposed measure would require all parties to ensure that any fishing effort by  
25 them in relation to SBT be consistent with this principle. The 1996 agreed objectives  
26 and principles took account of this. They require that any increase in catch above the  
27 current TAC in order to accommodate an EFP should not jeopardize the potential  
28 recovery of the parent stock by the agreed date of 2020, and that the Commission  
29 agree as to the acceptable level of risk to the stock of any EFP. Japan has not  
30 shown compliance with these principles in the design of its EFP and in the significant  
31 catch undertaken.

32  
33 This Tribunal should itself have regard to the precautionary principle in considering  
34 what provisional measures are appropriate. As you have heard, this principle is now  
35 one that applies generally to resource management. This Tribunal, in considering the  
36 scientific material before it, should itself act in a precautionary mode. If the Tribunal  
37 accepts that this is the correct approach for it to adopt, it behoves it to ensure that  
38 the parties themselves in their respective actions in relation to SBT also act in a  
39 precautionary mode. Hence, the specific measure requested.

40  
41 It is no answer to say as Japan does that the proposed measure has no specific  
42 content as it does not indicate in a concrete manner how Japan should behave in  
43 order to comply. That is not a requirement of a provisional measure. In any case, the  
44 assertion that a requirement to act in accordance with the precautionary principle  
45 lacks content is demonstrably untrue.

46  
47 If Japan needs to be provided with specific content, let me make some suggestions:

48  
49 It could ensure any scientific fishing is in fact consistent with the criteria set out in the  
50 1996 Objectives and Principles. The current EFP manifestly is not.

1  
2 It could ensure any additional catch taken as part of an EFP is minimal and  
3 demonstrably related to the scientific purpose.

4  
5 Again, the Japanese catch taken as part of the EFP is significant and is for the most  
6 part disguised commercial fishing. It is not in accordance with the precautionary  
7 principle.

8  
9 Hence, a measure in the terms sought in the view of the Applicants is an important  
10 and appropriate way in which to protect their rights pending consideration of the  
11 merits.

12  
13 Mr President, that then leads to the fourth and fifth requests which are sought, and I  
14 have not got too much longer to go.

15  
16 The fourth and fifth requests apply to all parties. They can in shorthand be described  
17 as involving “non-aggravation of the dispute” and “non prejudice of any decision on  
18 the merits”. Measures like these are now common in the jurisprudence of the  
19 International Court. For instance, in the Cameroon/Nigeria Boundary case in 1996  
20 the Court unanimously indicated a measure to the following effect:

21  
22 Both Parties shall ensure that no action of any kind, and particularly  
23 no action by their armed forces is taken which might prejudice the  
24 rights of the other in respect of whatever judgment the Court may  
25 render in the case, or which might aggravate or extend the dispute  
26 before it.

27  
28 The first two provisional measures ordered in the *Fisheries Jurisdiction* cases in  
29 1972 also ordered the parties to ensure no action was taken which might aggravate  
30 or extend the dispute and which might prejudice the rights of the other party. This  
31 part of ICJ jurisprudence seems apt for adoption by this Tribunal.

32  
33 In the present case, these two measures are important. Contrary again to Japan’s  
34 contention, the lack of specificity is not a reason not to award these measures. It  
35 may be open to argument whether particular action by a party is inconsistent with  
36 measures in the form proposed. But the existence of the two measures would enable  
37 a party which considered another was acting inconsistently with the measure to raise  
38 its concern in that regard with the other party. In an extreme situation, a party could  
39 return to this Tribunal or the arbitral tribunal if it were then functioning if it considered  
40 action by a party offended either of these measures. So the proposed measures are  
41 certainly not devoid of content.

42  
43 Again, to give some examples, in the present case, a measure seeking non-  
44 aggravation would in the view of Australia and New Zealand require Japan to  
45 continue to participate constructively and in good faith in the work of the SBT  
46 Commission. It would for instance aggravate the dispute if Japan or the Applicants