

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



1999

Public sitting

held on Thursday, 19 August 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

Southern Bluefin Tuna Cases

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

(Requests for provisional measures)

Verbatim Record

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

Australia represented by:

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

as Agent and Counsel;

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

as Counsel;

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

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

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

Mr Paul Bolster, Adviser to the Attorney-General,

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

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

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

as Advisers.

New Zealand represented by:

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

as Agent and Counsel;

Mr Bill Mansfield,

as Counsel and Advocate;

Ms Elana Geddis,

as Counsel;

and

Mr Talbot Murray,

as Adviser.

Japan represented by:

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

as Agent;

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

as Co-Agents;

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

as Counsel;

and

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

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

as Advocates.

1 **THE PRESIDENT:** This sitting, as was agreed, will be devoted to the submission on
2 behalf of Japan. I now invite His Excellency the Agent for Japan to introduce the
3 representation and indicate the schedule of submissions.
4

5 **MR TOGO:** Mr President, distinguished Members of the Tribunal. May it please the
6 Tribunal. I feel it a great honour today to be given this opportunity to speak as Agent
7 of the Government of Japan on this important issue concerning the Japanese catch
8 of southern bluefin tuna. It is indeed such a great privilege, such a unique
9 opportunity for me to be able to speak and to explain to you some of the vision and
10 direction which my country has been harbouring and those concrete achievements
11 we have already made in order to realize the important objective of conservation and
12 optimum utilization of southern bluefin tuna.
13

14 But before going into concrete matters, I would like to echo wholeheartedly the
15 statement made by Mr Daryl Williams, that the relationship between Australia and of
16 course New Zealand on the one hand, and Japan on the other, is multifaceted and
17 strong, and precisely because of this strength, our countries will survive
18 disagreements on particular questions such as the conservation of southern bluefin
19 tuna.
20

21 Honourable Judges, it is a great honour to appear before you as the Agent of the
22 Government of Japan. As I have already introduced to you yesterday, I appear with
23 Professor Nisuke Ando, President of the Japanese Association of International Law,
24 and Mr Robert Greig, partner with the law firm of Cleary, Gottlieb, Steen and
25 Hamilton of New York.
26

27 In presenting our views, our delegation would like to proceed in the following order.
28 First, let me give you a broad overview of the subject matter. Then Mr Greig will take
29 the floor and will discuss the relevant facts. Thus he will refute the Applicants' claims
30 that the conduct of experimental fishing by Japan represents a significant risk to the
31 southern bluefin tuna stock or runs counter to the conservation and optimum
32 utilization of that stock.
33

34 After that, Professor Ando will take the floor and he will deal with our legal
35 arguments. Thus he will demonstrate amply why we consider this Tribunal should
36 reject the Applicants' claims seeking provisional measures.
37

38 Honourable Judges, as for my presentation of a broad overview, the following six
39 points will be presented in order. First, the importance of maritime living resources
40 for Japan. Second, the importance of southern bluefin tuna for Japan and all our past
41 efforts and endeavours. Third, new challenges as we see them emerging and the
42 importance of an experimental fishing programme to face these challenges. Fourth,
43 today's difficulty and the importance of objective and scientific knowledge to
44 overcome this difficulty. Fifth, a short legal statement and, finally, the conclusion.
45

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

1
2 For this reason Japan and the Japanese people have considered adequate
3 conservation and optimum utilization of fishery resources to be of paramount
4 importance for the wellbeing of our people, now and in the future. To leave abundant
5 fishery resources for our posterity is, so to speak, in the natural and structural
6 interest of the Japanese people. I am confident today in declaring that Japan, as a
7 nation, is firmly committed to the principle of conservation and optimum utilization of
8 maritime living resources. History shows the extent of the engagement we have
9 indeed accomplished and are accomplishing towards this end.

10
11 It follows from these facts that the international cooperation in matters relating to the
12 renewable resources of the sea has been and is of great importance for our country.
13 History shows again numerous examples of Japanese initiatives and contributions
14 towards positive international cooperation leading to conservation and optimum
15 utilization of maritime living resources.

16
17 In this context I would like to draw your attention to Japan's long-standing
18 commitment to resolving international disputes peacefully. In international
19 negotiations Japan makes every effort to reach agreement with other parties. In this
20 context it is worth noting that this is the first international adjudication to which Japan
21 has been made a party in more than ninety years. As will be shown by the
22 presentations we will make, it is the inflexible attitude of others, not inflexibility by
23 Japan, which has brought us before you today.

24
25 Honourable Judges, Japan has an especially strong interest in the conservation and
26 optimum utilization of the southern bluefin tuna, the subject of the case at hand.
27 Japan consumes over 90 per cent of the southern bluefin tuna catch and the cuisine
28 is deeply connected with our traditional culture. Thus, for Japan the conservation and
29 the use of the southern bluefin tuna is a matter of sustaining an important resource
30 for its people now and in the future. For other nations it is mostly a matter of the
31 allocation of market share in sales to Japan. There is a shared commitment in the
32 minds of all Japanese that we do not want to lose this precious resource from the
33 scope of our life and cuisine, and that our children, our grandchildren and all of our
34 posterity should be able to enjoy this precious treasure of the sea.

35
36 Mr Crawford has mentioned the sad experience one had to go through on the
37 northern cod catching in Canada. But, if there is one country in the whole world
38 which simply does not want that kind of marine resource extinction to happen, that
39 country is Japan.

40
41 So, at the beginning of the 1980s, when it came to the knowledge of all that there
42 had been a decline in the southern bluefin tuna stock around the southern part of the
43 Pacific and Indian Oceans, Japan became an active member of the international
44 community in major efforts to conserve and at the same time achieve optimum
45 utilization of the stock.

46
47 From 1985 to 1989 Japan, Australia and New Zealand embarked on a cooperative
48 scheme of substantial reduction of the annual total allowable catch for those three
49 nations from 38,650 tonnes to 11,750 tonnes as stated by the Applicants yesterday.
50 Japan took the greatest burden in achieving this reduction, and its own annual catch

1 fell over this period by more than 17,000 tonnes to the level of 6,065 tonnes, a
2 74 per cent reduction.

3
4 Based on this positive achievement Japan also took the lead in the early 1990s in
5 negotiating and in 1993 agreeing to the Convention for the Conservation of the
6 Southern Bluefin Tuna. This is an ambitious international agreement, with the twin
7 objectives to conserve and to provide for the optimum utilization of southern bluefin
8 tuna, introducing a new concrete structure and rules governing the southern bluefin
9 tuna fishing activities.

10
11 Honourable Judges, it is my firm recognition that after those decades of successful
12 cooperation among like-minded countries, at this very closing period of the twentieth
13 century, Japan, Australia and New Zealand and, in fact, all who are in some way or
14 other interested and related to the fishing of southern bluefin tuna, are facing
15 fundamentally new challenges.

16
17 Let me explain to you in some detail the problem as we see it arising and the vision,
18 direction and endeavour with which Japan is trying to face and overcome these new
19 challenges. At the centre of these new challenges lies the issue of southern bluefin
20 tuna catch by non-parties to the 1993 Convention. This issue has such an important
21 bearing on the proper management of the southern bluefin tuna stock.

22
23 Since the early 1990s countries and an area such as Indonesia, Republic of Korea
24 and Taiwan that are not party to the 1993 Convention have made large increases in
25 their catch of southern bluefin tuna. In factual terms what was said yesterday is
26 correct. Of the roughly seventeen thousand tonnes of southern bluefin tuna caught
27 last year, these non-parties to the 1993 Convention accounted for about 30 per cent
28 or approximately five thousand tonnes. This is roughly equivalent to the amount
29 caught by either Australia or Japan and more than ten times the amount caught by
30 New Zealand.

31
32 For the true long-term conservation and optimum utilization of the SBT, Japan
33 strongly believes it essential to expand the cooperative framework of the Convention
34 for the Conservation of the Southern Bluefin Tuna by bringing into it all countries and
35 areas that fish for the SBT. Faced with this new mutually connected situation, Japan
36 indeed has tried to gather its thoughts: what is the best way to allow the fishermen,
37 not only of my country but of all countries and areas, to become more engaged in
38 cooperative measures for fishing for SBT while, at the same time, not causing
39 irreparable damage to these riches of the sea, so that they may be enjoyed by the
40 next generations? What is the best way to induce those other fishing parties to join in
41 the cooperative framework of the 1993 Convention and to allow their SBT fishing in
42 accordance with adequate conditions for conservation and optimum utilization of the
43 resources? What is the best way to harmonize and satisfy in a fair manner the
44 conflicting interests of various parties in their geographical and "generational"
45 distributions of these natural resources?

46
47 In Japan's view, the only way to bring these non-parties into the cooperative
48 framework of the 1993 Convention is to re-establish the proper functioning of that
49 Convention; that is to say, scientifically establish the appropriate level of total
50 allowable catch for long-term conservation and optimum utilization and offer

1 appropriate allocation to each country. Without a share in the fishing of SBT, we
2 cannot imagine any of these non-parties will choose to join the cooperative
3 framework of the 1993 Convention.

4
5 Japan has been making constructive proposals to this end. Allegations have been
6 made that Japan is diverting its responsibility by blaming these outside parties. On
7 the contrary, in Japan's view, blocking decision-making by exercising a veto in the
8 1993 Convention is not at all the best way to induce these outside parties to join it.
9 Indeed, quite to the contrary, it is only by demonstrating that the Convention for the
10 Conservation of SBT can function normally and provide a reasonable basis for
11 cooperation, based on a reasonable analysis of the best scientific data available that
12 we will be able to induce non-parties to join its cooperative framework. This is
13 Japan's goal.

14
15 Mr President, honourable Judges, after prolonged and serious deliberations, we
16 came to the conclusion that the only way to achieve our goal is to introduce and
17 implement an effective mechanism of an experimental fishing programme. An
18 experimental fishing programme to be agreed by all the parties concerned could and
19 should become the sole objective basis for any new distribution of its wealth as well
20 as the most effective way of inducing non-parties to join in the cooperative
21 framework of the 1993 Convention.

22
23 In order to achieve these objectives, it is of paramount importance, in our view, that
24 the EFP be genuinely effective. Most careful scrutiny has to be given therefore to the
25 geographic area and the period of its implementation.

26
27 An allegation we heard yesterday, which we saw on a colourful display, is that
28 76 per cent of the 1998 EFP was really commercial fishing in disguise. A statement
29 was also made that the 1999 EFP catch would be worth US\$ 30-50 million. These
30 statements are totally false or misleading. One hundred per cent of EFP fishing took
31 place during months or geographical locations that are not currently fished on
32 a commercial basis. In addition, the 1998 EFP operated at a substantial loss, and
33 a similar loss is anticipated for 1999. This loss is tolerated only because it is
34 a scientific, not a commercial, operation, as alleged. My colleague will later expand
35 on this point in a concrete and clear manner.

36
37 At the same time, from the outset of our considerations we were of the view that
38 there is one obvious prerequisite to be met: the experimental fishing programme
39 should not create irreparable damage to the stock situation of the SBT. Hence, the
40 key notion of payback is of great importance to us: in case the experiment (contrary
41 to expectations) shows that it has caused the SBT stock to decline, then the strict
42 amount of that experimental catch should be subtracted from future allocation of total
43 allowable catch of the country which had implemented the programme.

44
45 The allegation we heard yesterday that Japan is advancing EFP "with no indication
46 of the criteria on which it would make that unilateral decision" ignores an important
47 fact that an objective criterion for payback was incorporated in the decision rules
48 proposed by the independent scientists in the EFP Working Group. Japan clearly
49 endorsed that criterion. Thus, any possibility of creating irreparable damage for the
50 conservation of the SBT may be avoided completely.

1
2 Honourable Judges, up until quite recently, in fact until May of this year, we were of
3 the view that the Japanese vision and direction towards further consolidation of
4 conservation and optimum utilization of SBT through the experimental fishing
5 programme was shared by our Australian and New Zealand colleagues. Agreement
6 was near, so we thought. In fact, if translated into a simplified form of numerical
7 order, the difference of the amount of expected experimental fishing programme
8 between Japan on the one hand and Australia and New Zealand on the other was
9 only just around a few hundred tonnes, or a few per cent of the total catch of SBT.

10
11 Yet, consensus could not be reached by the end of the month of May. After thorough
12 reflection of the overall situation, we came to the conclusion that, particularly given
13 the extreme sensitivity and the importance duly to take into consideration the timing
14 of the EFP, the most constructive approach is to initiate the programme (as we have
15 projected) beginning in the month of June and to show (through the outcome of
16 these exercises) the objective contribution we are going to make for the deliberations
17 of future determination of total allowable catch by the Commission for Preservation
18 of SBT, the main organ of the 1993 Convention.

19
20 Yet, contrary to our expectation and to our deep disappointment, Australia and
21 New Zealand did not show understanding for our vision, direction and endeavour. So
22 here we are: Japan is being told by the two countries to take provisional measures
23 for its "failure to conserve, and to cooperate in the conservation of the Southern
24 Bluefin Tuna stock ...". Well, the short answer is this: Japan has been cooperating in
25 this goal and no such "failure" exists.

26
27 In coming today to this podium, I have gone through, with utmost care and attention,
28 all the principal documents presented by our colleagues from Australia and
29 New Zealand. I listened carefully to what our Applicants' colleagues said yesterday.
30 As I stated at the beginning, I do not doubt, or rather would like to underscore, the
31 basic soundness of multi-faceted relations between Australia, New Zealand and
32 Japan. But, all the more so, the more I read and the more I became familiar with the
33 contents of the documents and the statements, the more I could not help but feel a
34 strong sense of puzzlement and dismay. Why is our vision, direction and all past
35 endeavour apparently so little credited or understood by colleagues from Australia
36 and New Zealand? Why is it ignored that Japan assisted and even subsidized a part
37 of the Australian SBT industry in its difficult period of transition? Was it not Japan
38 which came up with the best advice for the sake of conserving the stock of juvenile
39 tuna in the catching of which Australia was taking the lead in its fishery activities?
40 Why and how can the Applicants reconcile themselves with two entirely contradictory
41 positions: Mr Crawford's statement of yesterday that "an EFP of 2,000 tonnes might
42 well have significant adverse effects on the stock and on its recovery" and, at the
43 same time, supporting a joint EFP of up to 1,500 tonnes during the negotiations in
44 May this year. Why are the three countries in dispute between themselves for
45 a matter of, figuratively speaking, a few hundreds of tonnes of SBT when a new
46 challenge is emerging of, to put it mildly, a few thousand tonnes of SBT catch which
47 is coming from outside the framework of the 1993 Convention?

48
49 Finally, why did Australia and New Zealand commence this case at so late a date
50 that, even if this Court acts with great dispatch, no decision could be reasonably

1 expected before the 1999 EFP is on the verge of ending? In this context, let me
2 confirm, as Agent of the Government of Japan, my country's clear commitment that
3 the 1999 EFP will end by 31 August.

4
5 Honourable Judges, in going over the Australian and New Zealand papers again and
6 again and in listening carefully to what our colleagues from the other delegations
7 have had to say yesterday, it seems to me that the single and profound reason why
8 the two sides cannot agree on a common experimental fishing programme lies in the
9 difference of views concerning the scientific and objective knowledge, first on the
10 status of SBT stock and, secondly, on the evaluation of the implication the EFP will
11 or will not have *vis-à-vis* this stock.

12
13 Let me tell you quite frankly that as to the real evaluation of the objective and
14 scientific status of a maritime living resource found in the sea in the southern ocean
15 of the other hemisphere, I am not able to bring in personally authentic views. But,
16 inasmuch as I am personally unable to do this, let me emphasize with my strongest
17 conviction that there is such an overwhelming weight of views among those most
18 distinguished independent scientists that the stock situation of the SBT in recent
19 years is in a tangible recovery, and, even more so, that the projected EFP by Japan,
20 particularly together with its firm commitment to the principle of payback, simply
21 cannot be the source of irreparable damage to the fate of the SBT stock. The papers
22 that we have already presented show this conclusion. The presentations by my
23 colleagues that are to follow will prove it even more clearly.

24
25 Mr President, honourable Judges, I have now covered the fundamental points
26 concerning the goals and objectives of my Government for the conservation and
27 optimum utilization of the SBT. However, before concluding, let me as the chief legal
28 adviser on international law of the Government introduce very briefly the gist of the
29 legal arguments of the issue at hand. Professor Ando will develop those arguments
30 in detail later on.

31
32 First, I deal with the matter of *prima facie* jurisdiction. Japan respectfully submits that
33 the Annex VII arbitral tribunal cannot be considered to have *prima facie* jurisdiction
34 over this case. Thus, this Tribunal lacks the precondition to order the provisional
35 measures requested by Australia and New Zealand.

36
37 This is a dispute under the Convention for the Conservation of the SBT. That
38 Convention alone prescribes the conservation measures to be taken with respect to
39 the SBT in a concrete manner. The United Nations Convention on the Law of the
40 Sea does not. This is why it is absolutely not possible to deal with this dispute under
41 the Law of the Sea Convention independently from the 1993 Convention. By relying
42 solely on article 288, paragraph 1, of the Law of the Sea Convention and not on
43 paragraph 2 of that article, Australia and New Zealand are bringing this dispute to
44 a forum in which it does not belong.

45
46 Furthermore, even if one presupposes that the dispute could be submitted to the
47 Section 2, Part 15, of the Law of the Sea Convention, its procedure cannot be
48 applied because not all the procedures in Section 1, Part 15, have yet been
49 exhausted.

1 Secondly, Japan denies any justification to order the provisional measures requested
2 by Australia and New Zealand. Australia and New Zealand have not, among other
3 things, sustained their burden of demonstrating irreparable damage and urgency.
4 Mr Burmester yesterday proposed a revolutionary, not evolutionary, proposal to
5 ignore irreparable damage as an essential criteria for provisional measures.
6 However, irreparable damage is the core concept needed to prove the "urgency" for
7 the prescription of provisional measures. This has been firmly established throughout
8 the long history of international jurisprudence. Complete lack of urgency in protecting
9 their alleged rights has been amply demonstrated in my intervention.

10
11 I would like to add one word on the "dichotomy" of science and law presented by
12 Mr Crawford yesterday. As you may well appreciate, Japan's position is not as
13 simplistic as Mr Crawford might have liked to have depicted it. The 1993 Convention
14 prescribes, only by consensus, total allowable catch and national quota. TAC should
15 be decided upon scientific data. Quota should be decided after negotiation for the
16 distribution of TAC. Both are of a non-judicial character. They become legally binding
17 only upon the decision of the Commission, and both are decided every year in the
18 Commission. The Applicants' claim that Japan should abide by the 1997 quota in
19 1998 and thereafter can be raised only in the light of the 1993 Convention, not under
20 the Law of the Sea Convention.

21
22 I have to add here that my appearance in this Tribunal is without prejudice to Japan's
23 position on any matters relating to the jurisdiction of the Annex VII arbitral tribunal.

24
25 Mr President, honourable Judges, Japan came to this Tribunal with maximum
26 goodwill and a willingness to cooperate. We are prepared to cooperate in any and all
27 spheres as you might consider necessary.

28
29 Japan came to this Tribunal with a strong and clear sense of direction. We absolutely
30 wanted to present to you the objective and scientific knowledge which is guiding our
31 activities, as well as the vision, direction and aspiration which underlie our activities
32 for the conservation and optimum utilization of the southern bluefin tuna stock.

33
34 Honourable Judges, Japan came to this Tribunal with a view to reiterating its strong
35 determination to communicate and to negotiate in good faith with our Australian and
36 New Zealand colleagues for the sole purpose of enhancing and consolidating our
37 cooperation for the conservation and optimum utilization of the southern bluefin tuna.

38
39 In particular, Japan registers a strong plea that there is no more important period for
40 us, the three countries of the 1993 Convention, first of all, to resolve the relatively
41 minor differences of our views on the basis of objective and scientific knowledge,
42 and then to squarely face those new challenges which surround us all.

43
44 Japan therefore expresses its strong desire that the proceeding and discussion
45 unfolding here in this Tribunal will provide an opportunity to remove the basic
46 misunderstandings or, perhaps better stated, the lack of a spirit of compromise,
47 which currently exist.

48
49 Mr President, honourable Judges, I have spoken here this morning as the
50 representative of my country. I have spoken with my best knowledge and intention

1 from the bottom of my heart and soul. I have spoken so that the Japanese effort for
2 the conservation and optimum utilization of SBT will become elucidated under the
3 bright light of this Tribunal. May justice and wisdom prevail. Thank you for your
4 attention.

5
6 With your permission, I would now like to leave the floor to Mr Greig.

7
8 **THE PRESIDENT:** Thank you very much, the Agent for Japan. Mr Greig, please.

9
10 **MR GREIG:** Mr President, honourable Judges, ladies and gentlemen, it is a great
11 honour indeed to have the opportunity to appear before this Tribunal on this historic
12 occasion. With this its third and fourth matters, this Tribunal has an opportunity to
13 build on its already strong tradition of inclusiveness, fairness and restraint. The
14 Tribunal has the opportunity to further the broad purposes of the Law of the Sea
15 Convention to promote cooperation among nations in conserving and achieving
16 optimum utilization of renewable resources of the sea.

17
18 Standing before you, I cannot help but be keenly aware of the rich variety of
19 experience and accomplishment that you judges bring to this Tribunal. Among you
20 are some of the world's most distinguished diplomats, including former
21 ambassadors, fisheries experts, scholars of international law in general and the law
22 of the sea in particular. Given this collective wealth of experience, you could not be
23 better suited to grasp in all its intricacy this dispute and the context from which it
24 springs, and to appreciate the challenges that this dispute poses to this Tribunal as
25 an institution.

26
27 The presentation by Australia and New Zealand yesterday demonstrated once again
28 that it is they, not Japan, who seek to evade solemn international undertakings and
29 to substitute judicial processes for dialogue, compromise and scientific debate. Their
30 presentation was mired in old issues. When you understand the actual events that
31 led the parties to this esteemed Tribunal, you will be left wondering why we are all
32 here.

33
34 The headline facts are as follows: In cross-examination yesterday, Dr Beddington
35 conceded that the Commission has engaged experts, independent scientists to help
36 forge a consensus on a joint fishing programme, that such use of independent
37 experts is common and can be desirable in fishery management, and that the
38 independent experts in this case were actively involved in the details of the stock
39 assessment process and in the details of experimental fishing programmes.

40
41 The parties agreed that, should they be unable to reach a consensus on an EFP, the
42 independent scientists would perform an adjudicative role. Japan has since called
43 upon Australia and New Zealand to abide by their agreement and let the
44 independent scientists resolve the dispute. The Applicants have refused.

45
46 Why are we here? Why do Australia and New Zealand resist the views of truly
47 independent scientists? I will explore these and other issues in the course of my
48 presentation today.

49

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

6
7 As Japan's written response demonstrates, Applicants bear the burden in this court
8 of proving an urgent threat of irreparable damage. Applicants' unsupported argument
9 for a grossly lower standard is tantamount to an admission that they have no
10 possibility of getting over the applicable hurdles of "urgency" and "irreparable harm".

11
12 My presentation this morning will cover the following points:

- 13
- 14 1. Japan is committed to the conservation of SBT and to the work of the
- 15 Commission.
- 16 2. Scientific uncertainty prevents the Commission from functioning at present.
- 17 3. The Commission retained independent scientists to assist in resolving technical
- 18 disputes between the parties.
- 19 4. An EFP is appropriate to reduce scientific uncertainty.
- 20 5. Japan's EFP is scientifically sound and without realistic alternative.

21
22 There is simply no urgency justifying any provisional measures. There is no risk of
23 any irreparable damage. The provisional measures requested by the Applicants
24 would be ineffective, and would result in positive harm.

25
26 Japan greatly appreciates the opportunity to present this Tribunal the facts relevant
27 to the present dispute – a dispute over how best to resolve the uncertainty within the
28 scientific community over the state of the SBT stock.

29
30 That uncertainty exists, everyone acknowledges.

31
32 That the Commission set up under the 1993 Convention for the Conservation of SBT
33 desires and needs that uncertainty to be resolved, is also undisputed.

34
35 That an experimental fishing programme can be an effective way in the short term to
36 help eliminate that uncertainty is also conceded.

37
38 That the current state of the SBT stock can support such an experimental fishing
39 programme with no permanent significant adverse effect also has been conceded by
40 Australia and New Zealand during the parties' negotiations.

41
42 Despite these areas of substantial agreement, Japan finds itself inexplicably here in
43 court. Without a doubt, there is a range of expert views about the current and future
44 state of the SBT stock and about the best way to conduct an experimental fishing
45 programme. But this range of scientific opinion over highly complex questions is
46 hardly surprising. Indeed, as the panel of independent fishery experts invited by the
47 Commission to review its work notes, and I quote:

48
49 In fact it is rare that there is a single correct interpretation of the
50 data with all others being necessarily incorrect. There is room,

1 therefore, for honest disagreement among parties, and in most
2 stock assessment processes we are familiar with, the differences
3 would be resolved cooperatively.
4

5 That same panel has put before you its expert opinion that Japan's EFP is
6 necessary, scientifically sound and poses no risk of irreparable harm to the recovery
7 of SBT stock. In fact, the 1998 EFP results, which Dr Beddington admits he did not
8 review, show that the agreed goal of restoring the SBT stock to 1980 levels is well
9 within reach.
10

11 The panel of independent experts selected by the parties is made up of
12 Messrs Maguire, Sullivan, Mohn and Tanaka. Their professional expertise and
13 objectivity is graciously conceded by Dr Beddington. They submitted their report
14 directly to this court, and a copy is attached as Annex 1 to Japan's response. Brief
15 biographical statements of these experts appear at the end of their report.
16

17 But Japan does not ask this Tribunal to attempt to resolve the scientific dispute that
18 until now has divided the parties and the fishery experts. Rather, Japan asks this
19 Tribunal to affirm that extraordinary provisional measures are appropriate only when
20 there is a clear risk of imminent and irreparable damage – factors not present here.
21 This dispute should have been, and still can be, resolved cooperatively on the basis
22 of neutral scientific principles. In short, this is a dispute to be resolved by the parties
23 based on science. There was a dispute under the 1993 Convention over the
24 scientific data needed to set the total allowable catch, or TAC. The Commission has
25 retained independent scientists. These independent scientists concluded that EFP is
26 necessary to reduce uncertainty, and scientifically sound. Independent scientists
27 agree that any adverse effect of EFP can be remedied through future adjustment of
28 national quotas. There is therefore no basis for any provisional relief.
29

30 To understand what this dispute is about, it is necessary to understand the history of
31 Japan's commitment to the conservation of SBT, both before and after its accession
32 to the 1993 Convention and its participation in the Commission.
33

34 Japan has achieved much in the way of conservation of SBT over the last 40 years.
35

36 In the 1970s, Japan voluntarily restricted SBT fishing over spawning grounds,
37 recognizing the substantially greater adverse impact that fishing in that area has on
38 the long term status of the species – something that Indonesia, for example, has not
39 followed to this day.
40

41 In the late 1980s, Japan agreed that a significant reduction in TAC is necessary.
42 Japan reduced its catch by 74 per cent from previous levels, bearing the greatest
43 share of the overall TAC reduction.
44

45 In the early 1990s, Japan provided the Australian fishing industry with technical
46 assistance to enable it to reduce use of methods that depleted the stock of juvenile
47 SBT.
48

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

1
2 Today, in the late 1990s, the SBT classes of early 1990s are reaching maturity and
3 are starting to be responsible for the recovery of the parental stock, as you will see
4 graphically in a few moments.

5
6 In 1993 the SBT conservation efforts of Australia, New Zealand and Japan were
7 formalized under the 1993 Convention and the formation of the Commission to
8 manage the SBT stock.

9
10 The 1993 Convention incorporates two purposes – the conservation and optimum
11 utilization of SBT – two principles that must be afforded equal weight.

12
13 What objective did the Commission set in order to achieve the twin aims of
14 conservation and optimum utilization? As a stock management objective, the
15 Commission resolved to restore the parental biomass level that existed in 1980 by
16 the year 2020.

17
18 That management objective was put forward some years earlier when it was
19 estimated that the stock level that existed in 1980 was sufficient to ensure no
20 substantial drop in recruitment – the introduction of fish into the biomass. So even
21 though by 1980 the parental stock had significantly declined from the level that
22 existed in 1960 or 1950, the annual recruitments seemed roughly constant. That
23 means that a lesser parental biomass was adequate to maintain the same sustained
24 level of catch of the species. That is why the agreed management objective of all
25 parties was the restoration of the 1980 biomass level, not those of 1960 or 1950.

26
27 How best to achieve that management objective and thereby promote the twin goals
28 of conservation and optimal utilization of SBT? SBT is, as you have heard, a highly
29 migratory species, fished by a number of countries across tens of thousands of
30 kilometers of open seas. For the stock to be managed effectively, we need to
31 persuade other nations, now catching large quantities of SBT, to participate in
32 a multinational framework, either under the Commission or some other regional
33 organization. As recent events demonstrate, other nations will not participate unless
34 they can be assured that they will not be bound to national allocations absent their
35 consent. This is what the 1993 Convention and other tuna conventions such as the
36 Indian Ocean Tuna Convention provide – that no one party be permitted to impose
37 its view on the others.

38
39 From the outset, the parties to the 1993 Convention understood that consent formed
40 the framework for future action, but that it was only the beginning of the process.
41 Thus there is much work left to be done.

42
43 In particular, optimum utilization requires that the TAC be based on scientific
44 principles. Through 1997, Australia achieved its goal of maintaining the TAC at
45 existing levels, not on the basis of scientific assessments demonstrating that such
46 a limit was then appropriate, but based on coercion. That is, Australia threatened to
47 exclude Japanese vessels from Australia's exclusive economic zone and from its
48 ports unless Japan first agreed to Australia's proposal for the annual TAC.

49

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

3
4 As you can see on the chart the catch by non-parties to the 1993 Convention, which
5 is shown in purple, has increased dramatically since 1995 to roughly equal in the
6 aggregate the commercial catch of either Japan or Australia. These large,
7 unregulated catches far exceed the size of Japan's EFP.

8
9 Article 13 of the 1993 Convention specifically obligates the parties to "cooperate with
10 each other to encourage accession by any state to this Convention where the
11 Commission considers this to be desirable." The Record of Discussions under
12 Article 16(1) of the 1993 Convention, held in December last year concluded:

13
14 The parties recognized strongly the need to control non-member
15 catches of SBT ... they also recognized the urgency of taking
16 effective action to persuade non-members to accede to the [1993
17 Convention] or, for those for whom accession is not possible, to
18 comply with the management measures of the Commission.

19
20 But, in order to gain the cooperation of these non-members, they must be offered an
21 economically realistic and scientifically justifiable quota. The Republic of Korea
22 explained its understandable reluctance to join the 1993 Convention in clear terms:

23
24 What is hindering Korea most above all is the CCSBT's insufficient
25 offer of quota for Korea, which is far from the present fishing reality
26 of Korean Southern Bluefin Tuna industry.

27
28 No State, I submit, will join the 1993 Convention unless it can be given a reasonable
29 quota to make joining viable.

30
31 If the EFP were to demonstrate that Applicants' pessimistic projections are realistic it
32 will be practically difficult to induce non-parties to the 1993 Convention to participate.
33 On the other hand, if the EFP leads to more optimistic conclusions, bringing the
34 Republic of Korea and other non-parties into a regional southern bluefin tuna
35 management arrangement should be feasible.

36
37 With this background I will now discuss the current state of scientific uncertainty with
38 respect to the work of the Commission, which has made it impossible to date for the
39 Commission to operate effectively. The principal problem facing the Commission,
40 one that it recognizes, is the scientific uncertainty that has developed in recent years
41 over the current and future state of the southern bluefin tuna stock.

42
43 The current state of affairs is that there are a wide range of assessments of southern
44 bluefin tuna stock resulting from numerous conflicting assumptions. "Assumptions" is
45 the apt word to describe the situation; the inexact nature of the process inherently
46 requires scientists to make assumptions or estimates as to the future.

47
48 A major source of that uncertainty is the status of the stock at times and in areas
49 currently not fished commercially. We have data provided by Japanese long line
50 fishing vessels that helps track the abundance of southern bluefin tuna in the areas

1 currently fished, but in order to assess the overall abundance of the species, one has
2 to make some assumption as to the relative abundance in the stock in the times and
3 areas not fished.

4
5 It is precisely because of the widely divergent assessments of the stock that arise,
6 depending on what you assume is the state of affairs in the unfished areas, that the
7 parties are not able to agree on a TAC and have not been able to do so since 1997.
8 Thus, the fundamental stock management tool that the Commission has –
9 establishing a total catch for its members and to provide for additional States to
10 join – cannot be utilized unless the uncertainty over the stock assessment is
11 reduced. Simply put, the scientific uncertainty has led to paralysis at the
12 Commission.

13
14 As you will see, the only feasible way of reducing that uncertainty in the next few
15 years is by an experimental fishing programme like the one Japan is conducting. The
16 Commission has acknowledged that the degree of uncertainty in the stock
17 assessment process is simply too high to permit the Commission to function
18 effectively.

19
20 In 1998 the Commission retained the panel of independent scientists chosen by
21 a consensus of the three parties to advise its Scientific Committee of all aspects of
22 stock assessment. The Commission explained the reason for its decision to invite
23 neutral outsiders to evaluate the process by which quotas were set:

24
25 The Scientific Committee's advice is based on valid, high quality
26 scientific analyses taking into account all available data. However,
27 at recent Scientific Committee meetings, there has been a lack of
28 consensus on the estimates of the probability of recovery of the
29 Southern Bluefin Tuna stock. The Commission is concerned about
30 this and decided to undertake a peer review of the stock
31 assessment process by a panel of experts.

32
33 That panel of independent experts issues their Peer Review of the Scientific
34 Committee's Stock Assessment Process, which is Annex 13 to Japan's papers. That
35 review found that the process by which the Scientific Committee did its work had
36 become politicized:

37
38 The process we have observed in the Stock Assessment Group
39 and the Scientific Committee cannot be described as scientifically
40 neutral. In other scientific processes we are familiar with scientists
41 participate firstly as individuals, not as national representatives.

42
43 In the light of the shortcomings recognized by the Commission in the stock
44 assessment process the Peer Review Panel was given a broad mandate. The
45 independent scientists were to review all aspects of the assessment process. In
46 particular, the neutral experts were to review the factors that accounted for the
47 variance in stock assessments, including:

- 48
49 - existing data used in stock assessment;
50 - availability and necessity of additional data to be used in stock assessment;

- 1 - sets of weightings assigned to uncertainties;
2 - methods of treating uncertainties in models;

3
4 and a number of other items. On the critical issue of whether the scientific
5 community had the data that it needed to develop the best possible stock
6 assessment the Peer Review Panel's conclusion was that additional data was
7 required, data that could be obtained only from an experimental fishing programme.

8
9 We therefore see a strong need to gather additional information on the fishing
10 grounds because existing data are insufficient to unambiguously resolve the
11 difference in points of view.

12
13 The existing data based on information gathered from Japan's commercial fishing
14 vessels needed to be supplemented.

15
16 The area fished for any one period of time, shown in red on the map, is only a small
17 portion of the southern bluefin tuna fishing grounds. It therefore becomes more and
18 more important accurately to assess the stock status in those unfished areas for
19 which no actual data are available. Under the variable squares analysis favoured
20 particularly by New Zealand, the claimants are giving heavy weight to an assumption
21 that there are no southern bluefin tuna whatsoever outside the red fish area.
22 Applicants are also giving heavy weight to another even more incredible assumption
23 which Applicants did not admit to yesterday.

24
25 In fact, Applicants are also assuming that there are no fish even in an area
26 commercially fished, in any month in which there is no commercial fishing in that
27 area. In effect, they are assuming that all the southern bluefin tuna in a given
28 5 degree by 5 degree area swim away as soon as the commercial fishing ends. In
29 other words, area 8, which is the area of commercial fishing shown, is thought to be
30 devoid of fish in months when the fishing is out of season. That is the reason you
31 have to do some experimental fishing during those months to test that extreme
32 assumption.

33
34 Applicants' charts purportedly showing that 76 per cent of the EFP occurred in areas
35 currently fished is highly misleading, because all of this fishing is out of season
36 during periods when the variable squares assumption predicts that there are no fish
37 present.

38
39 Under the constant squares analysis the assumption is that southern bluefin tuna
40 have the same density in season and out of season in both the red and green areas.
41 The proper assumption regarding the density of fish in the unfished times and areas
42 will dramatically affect the overall stock assessment and the probability of reaching
43 the 1980 parental biomass level goal by 2020.

44
45 As the expert panel explains, actual data are necessary to assess at any given time
46 for any given location which hypothesis is correct – variable squares or constant
47 squares:

48
49 Recent catches in the order of 13,000 to 16,000 tons have not
50 resulted in clear changes in catch per unit of effort or CPUE with

1 some assessment hypothesis (variable square) suggesting stable
2 or decreasing stock sizes, while others (constant square)
3 suggesting stability or increases. This lack of signal in the CPUE
4 data is one of the strongest reasons for an experimental fishery
5 program.

6
7 An experimental fishing programme is designed to gather the data necessary to
8 make more informed decisions about the future state of the stock by providing hard
9 data where uncertainty previously reigned.

10
11 An EFP is a recognized tool of fishery management, as Australia's and New
12 Zealand's experts readily acknowledge. Dr Polacheck, Australia's main witness in
13 these proceedings, and main participant in the prior negotiations, concedes the
14 legitimacy of experimental fishing as a scientific technique:

15
16 Experimental fishing programmes, EFP, can be an effective tool for
17 improving the management of a fishery resource in terms of
18 conservation and optimal utilization. In the context of CCSBT
19 discussions and this paper, an experimental fishing programme
20 allows for short-term additional catches taken in a controlled
21 manner to provide specific information to improve the management
22 of the stock. The reason for considering an EFP is that fishery stock
23 assessments can contain many uncertainties and different
24 interpretations of available data, can lead to divergent estimates of
25 appropriate catch levels.

26
27 Likewise, Dr Beddington states in his paper:

28
29 Given the current extent of scientific disagreement about the
30 uncertainties in the SBT projections, it clearly is highly desirable if
31 action can be taken to reduce this. One possible means of doing so
32 is to use data collected during a well designed experimental fishing
33 programme.

34
35 Not only do Australia's experts believe that an EFP is a useful tool to eliminate
36 scientific uncertainty, but the parties undertook to develop a joint EFP for 1999.

37
38 By the way, the tentative letter Mr Garcia wrote to the Japanese, which my learned
39 opponent made use of yesterday, was actually a critique of an early draft of the 1998
40 pilot EFP. Most of his comments were taken into account in devising the actual EFP.

41
42 In 1998 the parties established the EFP Working Group in an effort to resolve their
43 dispute. The Working Group was charged with developing a joint EFP for 1999 and
44 doing so in time to implement it starting in June or July 1999. The EFP Working
45 Group was also advised by some of the independent scientists who had convened
46 and who had provided advice to the Commission. The Working Group was to rely on
47 the recommendations of the independent experts in the event consensus could not
48 be reached.

49

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

4
5 Several competing hypotheses on how to interpret the indices of
6 stock size currently exist, leading to significantly different pictures of
7 stock status. Additional modelling exercises will not provide a
8 solution as to which of these hypotheses is most likely. With regard
9 to the specific issue of how stock abundance is distributed over the
10 fishing grounds, i.e. constant squares versus variable square
11 assumptions, it is only by gathering data from those areas where no
12 commercial fishing takes place that this problem is likely to be
13 resolved in the short term.

14
15 In sum, there is a general consensus that an experimental fishing programme would
16 provide valuable data, a much-needed tool in the management of the SBT stock.
17 Given this fact, Australia's objections to Japan's EFP cannot seriously be said to
18 present a matter of urgent necessity, let alone such urgency as to require this
19 Tribunal to take the extraordinary step of granting provisional measures.

20
21 While reasonable scientific minds can and do differ over the technical details of an
22 ideal EFP, the simple fact is that Japan's EFP has been devised in the spirit of
23 scientific inquiry and is based on sound scientific principles. It incorporates the views
24 of scientists exchanged over years of discussion, including the views of Mr Garcia,
25 and is designed to address the major source of uncertainty that leads to the parties'
26 divergent assessments – the status of SBT stock in unfished areas and out of
27 season. In the spirit of consultation and cooperation, Japan has also incorporated
28 Australia's suggestion for a pilot tagging trial to the 1999 EFP. However, as I will
29 explain shortly, Australia's tagging programme is no substitute for an EFP.

30
31 There is simply no merit to the allegation made by Australia and New Zealand in the
32 press and in their presentation here that Japan's EFP is merely commercial fishing
33 masquerading as science. The 1996 Objectives and Principles state that an EFP
34 "should be designed for implementation by commercial fishing vessels". While I am
35 quoting from the 1996 Objectives and Principles, which were relied on so heavily by
36 Applicants yesterday, the only item out of seven, with many sub-points, which
37 Japan's EFP violates is that it was done without Applicants' consent.

38
39 Throughout the negotiations Australia and New Zealand readily acknowledge that,
40 whatever version of an EFP might be adopted, the commercial vessels engaged in
41 the fishing would operate at a loss for which compensation would be necessary –
42 either in cash or in fish. In Australia's proposal for a random fishing programme, for
43 example, Australia estimated the net cost at Australian \$ 9.4 million annually, which
44 Australia equated to around 1,429 tonnes of fish.

45
46 In accordance with this reality, Japan for its EFP is using a government-supported
47 research vessel and paying other vessels amounts which reflect the added effort
48 necessary to fish areas relatively remote from the areas of commercial fishing.

49

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

7
8 There is no merit to Australia's assertion that Japan's EFP would have a significant
9 adverse effect on the viability of SBT stock. As the chart shows, Australia was
10 prepared as late as May of this year to accept an EFP in the range of 1,200-
11 1,500 tonnes. Japan's EFP is only 500 tonnes larger. Surely Australia and New
12 Zealand would not have been willing to propose an EFP of 1,200-1,500 tonnes per
13 year if they seriously believed that such a programme would irreparably harm the
14 stock of SBT as they now claim in this Tribunal?

15
16 Australia and New Zealand complain about Japan's EFP in 1998 and 1999 because
17 they say it "represents an increase in the last agreed total allowable catch". Under
18 Applicants' position, were Japan's catch not to cause an increase in the last agreed
19 TAC, they would have no basis to complain about damage to the SBT stock and we
20 would not be here today. Japan's position on the other hand is that the TAC is not so
21 rigid as to create a dividing line between sound and unsound fishing. However, even
22 under Applicants' theory, the data simply do not support their claim.

23
24 In fact, there has been no total catch by the parties in excess of the TAC over the
25 last five years. After taking account of Japan's 1998 EFP that caught 1,464 tonnes,
26 there still remained a difference of 754 tonnes that could have been caught without
27 exceeding the aggregate TAC over the last five years. When one considers that the
28 difference between the Australian EFP proposal for 1999 and Japan's programme
29 was only 500-800 tonnes, using the remaining 746 tonnes for experimental fishing
30 cannot possibly be viewed as material.

31
32 As the table on the screen reflects, total catches by the three countries over the last
33 five years have been less than the aggregate TAC for that period by an amount
34 greater than the 1998 EFP tonnage. Using Applicant's terminology, there has been,
35 in effect, payback in advance, which should satisfy even Dr Beddington's way of
36 thinking.

37
38 The other criticisms raised by Australia and New Zealand relate to technical details
39 over the deployment of vessels in the unfished areas and whether every rule of
40 decision must be determined in advance before commencing the experiment. The
41 independent scientists who sat through the four Working Group sessions do not
42 believe that all decisional rules must be determined in advance; so there is no basis
43 for enjoining Japan's EFP on that basis.

44
45 What then is this Tribunal to make of Australia's and New Zealand's request to have
46 it enjoin Japan's EFP on an emergency basis? As demonstrated by their previous
47 negotiating positions, Applicants' Request for provisional measures certainly does
48 not appear to reflect a good faith belief that the SBT stock is in immediate peril.

49

1 In fact, the results of Japan's 1998 pilot EFP demonstrate that the more pessimistic
2 projections proffered by Australia are unwarranted. The data show dramatically that
3 the variable squares hypothesis is not realistic. Moreover, under New Zealand's
4 weightings of the factors most heavily influencing stock recovery, the results of the
5 July 1998 EFP would mean that New Zealand should calculate the likelihood of
6 achieving the 1980 level at 96 per cent in light of the data provided by the EFP.

7
8 As the chart illustrates, the results of the 1998 EFP for July and August each
9 demonstrate that Australia's and New Zealand's pre-1998 models, based on the
10 variable squares hypothesis weightings, were unrealistically pessimistic.

11
12 Another illustration of the projected recovery of the parental biomass is shown in this
13 next chart. The horizontal dotted line across the middle of the chart represents the
14 1980 parental biomass level. The case, shown in red, is based, among other things,
15 on the assumption favoured by New Zealand that there are no fish outside the
16 commercially fished areas. The comparable constant squares assumption yields the
17 case shown in yellow. Taking conservative results from the 1998 EFP into account to
18 choose between these two extreme results, you have the trend line shown in purple.
19 Leaving the unrealistic variable squares case aside, the projections show that the
20 1980 biomass level will be achieved long before the target date of 2020. Indeed, the
21 projection based on the 1998 EFP shows that more than double the 1980 parental
22 biomass level will be achieved before that date, even after taking into account
23 uncertainties in future recruitment levels, as shown by the small vertical lines as you
24 go out along the principal trend lines.

25
26 **THE PRESIDENT:** Mr Greig, may I suggest that we break now, unless you want to
27 conclude with a particular point.

28
29 **MR GREIG:** More logically, I could stop in a few minutes.

30
31 **THE PRESIDENT:** Please go ahead then.

32
33 **MR GREIG:** The Australian experts assert that spawning stock biomass and
34 recruitment are currently "at historically low levels". But, as the independent experts
35 and Dr Butterworth explain, this assertion is based on a statistical sleight of hand –
36 an assertion that the age of maturity of SBT is suddenly age 12, rather than age 8,
37 the age of maturity historically used by the Commission.

38
39 As a threshold matter, there is no reason why this Tribunal should accept an age of
40 maturity other than the one accepted by the Commission's Scientific Committee –
41 and that is age 8. While Applicants base their projections on age 12 as the age of
42 maturity, Professor Beddington testified yesterday that the proper range is 8 to 10.

43
44 Indeed, as this chart indicates, the downward decline in the abundance index relative
45 to the 1980 level – the level that the parties are seeking to regain – has indeed
46 turned the corner since 1994 and is on its way back up to 1.0, i.e. the 1980 level.
47 This is due in large part to the conservation efforts that were imposed in the late
48 1980s and early 1990s when the fish that are now eight years old spawned.

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

6
7 The graph that is now on the screen shows that by adding four years to the age of
8 maturity, Australia and New Zealand can attempt to argue that the recovery trend
9 continues to decline for 12 year olds, but that is simply misleading, since the 8-year
10 olds of today will in four years be 12, and at that time there will be a greater
11 abundance of such fish than there is today.

12
13 As the panel of independent scientists noted, whether the parties use age 8 or age
14 12 as the point of maturity is less important than that the reference age selected be
15 applied consistently. In this case, since the initiation of the Scientific Committee, the
16 parties have used age 8. Because the data for 8-year olds does not comport with the
17 doomsday scenario that Australia and New Zealand are eager to paint, they seek to
18 change the reference age to an age for which the upturn in the recovery rate has yet
19 to be documented. This Tribunal should not countenance the continued attempt by
20 purported scientists to manipulate the data to further their political agenda.

21
22 My Australian colleague states that the 1999 EFP focuses on only one matter and
23 that there are other matters which are important and which cause much more of the
24 differences between the projections. First, I must point out that he is contradicted by
25 the 1998 Scientific Committee report, which indicates general agreement that the
26 plus group options and the CPUE index interpretations were the two major causes of
27 these differences. The EFP addresses one of these two causes. Furthermore,
28 Dr Tsuji's declaration indicates that this CPUE index of uncertainty contributes
29 approximately two-thirds of the overall uncertainty.

30
31 Let me now deal with another red herring. Yesterday, Mr Crawford used a chart
32 about erroneous projections of increases in northern cod stocks that continued until
33 a collapse occurred, perhaps leaving the impression that there is good reason to fear
34 an SBT collapse. I will not take time to detail why the northern cod industry is
35 significantly different from that of SBT. However, I do note that the article entitled
36 "Lessons for stock assessment from the northern cod collapse", from which
37 Mr Crawford took his chart, was co-authored by Jean-Jacques Maguire, one of the
38 independent experts who participated in the 1998 review of the functioning of the
39 SBT Scientific Committee and one of the co-authors of the statement of that group of
40 independent experts which has been submitted to this Tribunal. That report is
41 Annex 1.

42
43 Mr Maguire, whose expertise and independence were conceded yesterday, surely
44 would not have approved the EFP if he thought that the northern cod experience was
45 applicable here. Indeed, his article explains that the evaluation of risk of
46 underestimation "should be based on a broad historic perspective about the fishery,
47 and on experience with other stocks". Mr Maguire is certainly well versed in the
48 history of SBT and obviously believes that the northern cod industry is significantly
49 different.

1 As for Mr Crawford's quotation that there is a worst case scenario in which the SBT
2 population "will be below 500 mature individuals in the next 100 years", I ask, what
3 has this to do with something that is supposed to happen in the next three months?
4

5 1999 is not the only year in which Australian scientists have predicted disaster.
6 Minutes of a 1988 meeting of scientists from the three countries state, "The only safe
7 catch level we could recommend could be zero". How much unnecessary
8 socio-economic damage would have been caused had this plea been heeded?
9

10 Thank you.

11
12 **THE PRESIDENT:** Thank you very much. The sitting will be suspended for half an
13 hour. We will resume at approximately 10 minutes past noon. The sitting is
14 suspended.
15

16 *(The Tribunal adjourned at 11.40 a.m.)*
17
18

19 **THE PRESIDENT:** Mr Greig, please proceed.
20

21 **MR GREIG:** Rather than a legitimate attempt to address an urgent situation, Japan
22 submits that the Applicants' request for provisional measures is nothing more than
23 an improper effort to have this Tribunal enforce the will of one side on the basis of
24 what the Applicants admit are, at most, plausible worst case scenarios. This is
25 a dispute that can be fairly resolved only through consultation and negotiation, aided
26 by independent scientific opinion.
27

28 Moreover, even if the Tribunal were inclined to choose sides in this scientific
29 dispute – and I have no doubt that it will not do so – there is still no need as a matter
30 of fact for prescription of any provisional measures.
31

32 On behalf of Japan, I repeat Mr Togo's representation to this Tribunal that the 1999
33 EFP will be over in less than two weeks. It will be finished on 31 August 1999. The
34 total catch for this remaining two week period will amount to no more than a few
35 hundred tonnes. A few hundred tonnes is less than 3 per cent of the total annual
36 catch of all those fishing for SBT. The remaining 1999 EFP catch therefore cannot
37 be considered to pose an urgent or significant risk to the SBT stock. The Applicants'
38 suggestion that Japan should be enjoined from commencing a new EFP in the next
39 three months is, frankly, an affront to the Government of Japan.
40

41 Apart from these few hundred tonnes, what do the Applicants imagine will happen
42 before the Annex VII arbitral tribunal is constituted? Two arbitrators have already
43 been appointed, Japan having appointed Mr Yamada on 13 August. The remaining
44 three arbitrators will be appointed in due course.
45

46 Japan's entire three-year EFP programme is scheduled to be completed in August
47 2001. Before this date, if jurisdiction were to be found to exist, the Annex VII tribunal
48 should have concluded its proceedings. Moreover, at any time during its existence
49 the Annex VII tribunal would be in a position to consider the appropriateness of
50 provisional measures.

1
2 In their submissions to this Tribunal, Australia and New Zealand have conceded the
3 lack of urgency by referring exclusively to a supposed threat to the SBT stock in the
4 medium to long term. I quote from the Request for provisional measures:

5
6 In the interim, damage would be done to the SBT stock which
7 would threaten the conservation and recovery of the SBT stock in
8 both the medium and the long term.
9

10 The Applicants not once identify any short term damage they claim a need to avoid.
11 This Tribunal should not act on an expedited basis, without the opportunity for a
12 thorough presentation of all the legal and factual issues in this complex matter, in the
13 absence of any immediate exigency. Australia and New Zealand do not and cannot
14 allege any exigent circumstances; nor does Japan's EFP pose any risk of irreparable
15 damage to the SBT stock.
16

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

21
22 The Government of Japan has reiterated its position that if the EFP
23 should have a substantially negative impact on the stock, Japan
24 would stop the EFP and reduce its future national fishing quota by
25 the amount it has caught for the EFP.
26

27 As Dr Butterworth has pointed out in his statement to this Tribunal, under any of the
28 parties' respective assessments of SBT stock, the impact of the Japanese EFP is
29 minimal when one accounts for the possibility of reducing future catch to
30 compensate. Obviously, the effectiveness of this potential future remedy for any
31 negative impact of the EFP demonstrates the lack of irreparable damage that is
32 a prerequisite to the grant of provisional remedies.
33

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

37
38 Given that the expected catches from the EFP are smaller than
39 recent quotas for the country undertaking the EFP, it would be
40 possible to decrease that country's quota in future years to
41 compensate for any detectable negative effects on the stock.
42

43 Moreover, given the size of Japan's national quota relative to the size of the EFP
44 catch, it would be possible for Japan to remedy any substantial adverse effect of the
45 3-year EFP by adjusting its quota thereafter. By this time, as noted above, an
46 Annex VII tribunal would have had sufficient time to conclude any proceedings and
47 prescribe any remedies it deemed appropriate, including adjustments to Japan's
48 national quota. The effectiveness of this future remedy to address any adverse
49 effects of the EFP precludes a finding of irreparable damage sufficient to support the
50 grant of provisional measures.

1
2 In the negotiations among the parties over the EFP, the head of Australia's
3 delegation has stressed the importance not of compensation in fish, but future
4 monetary compensation to its fishery industry for any effects of the additional catch
5 taken by Japan in the EFP – thereby suggesting that Australia views the issue
6 primarily in terms of income and employment, and conceding that a future cash
7 payment would remedy any adverse effects of the EFP. I quote from the head of the
8 Australian delegation:

9
10 Australia notes that we have an important SBT industry in Port
11 Lincoln employing 1,400 people, whose take of SBT is within limits
12 imposed by the Commission. Therefore there is an expectation not
13 only from Australia, but also from its industry, that Japan will
14 provide restitution for the additional catch taken in the course of an
15 EFP.

16
17 Even in Australia's most recent press release dated August 11th, Australia frames its
18 argument by stating "the tuna industry is worth about \$170 million to Australia." In
19 short, Australia appears to be concerned not with fish, but primarily with money.

20
21 Further still, the decisional rule advocated by Australia and New Zealand in the EFP
22 working group also conceded the effectiveness of future quota adjustments. In the
23 decisional rules context, the dispute between Japan on the one hand and Australia
24 and New Zealand on the other, was not whether future quota adjustment was a
25 viable option, but whether schedules for future adjustments needed to be spelled out
26 in advance of commencement of the EFP. Obviously, Australia and New Zealand
27 would not have called for predetermined schedules of future quota adjustments
28 based on EFP results if they did not believe that such adjustments were effective.

29
30 Finally, Australia elsewhere has noted that a scenario under which Japan's EFP
31 increased its total catch by 3,000 tonnes per year over three years, followed by a
32 subsequent adjustment to its quota by the same amount per year over three years
33 would not substantially reduce the probability of reaching 1980 SBT levels by 2020,
34 and I quote:

35
36 Australia also noted that recovery probability of the SBT to the 1980
37 level by 2020 would be substantially reduced under all projection
38 scenarios except the one involving an increase in 3,000 tons for
39 three years, followed by a decrease for three years of 3,000 tons
40 below the current TAC.

41
42 Moreover, Australia and New Zealand's conduct and statements are inconsistent
43 with a good-faith belief that the SBT stock faces an urgent risk of irreparable harm: If
44 stock levels and trends were as alarming as Australia claims, Australia would urge a
45 reduction in national quotas rather than proposing keeping national quotas the same.
46 Australia would convert to longline fishing to alleviate the adverse impact of its purse
47 seine fishing on parental biomass.

48
49 The next graph shows that since 1980 the tonnages caught by both Australia and
50 Japan have declined. You see that the Japanese catch, shown in green, has

1 declined from really quite high levels in the late 50s and 60s down to relatively much
2 smaller levels in the 1990s. Australia's catch, on the other hand has increased from
3 these early periods, reaching a peak in about 1982, and then has declined
4 somewhat since that time. Look at the heading of this chart; this is a historic catch of
5 Japan and Australia in weight, or in tonnage.

6
7 However, when you look at the number of fish caught, Australia every year catches
8 a much larger number of SBT than does Japan. That is due to Australia's catching
9 methods which are targeted at juvenile fish. As Dr Butterworth's paper demonstrates,
10 catching juvenile fish has a substantially greater deleterious effect in the medium and
11 long term than does catching older fish.

12
13 If we look closely at the chart of the number of fish caught, we see that Australia's
14 purse seine methods netted an extraordinarily large number of fish. Again,
15 Australia's number of fish caught is shown in red. Look at the period say from 1974
16 right through maybe 1988; an extraordinary number of fish being caught during these
17 periods, and even in later periods you will see that in the number of fish caught by
18 Australia exceeds Japan, and in the most recent years that discrepancy is
19 increasing, not decreasing.

20
21 By the way, I had to ask two people to find out, but I understand that purse seine
22 refers to a method of drawing a net closed like snapping a purse shut, thus capturing
23 all the fish inside the net.

24
25 Turning back to the chart showing the abundance of 8+ year old fish, Australia's
26 extraordinary catch of juvenile fish in the early 1980s accounts for the continued
27 decline of the parental biomass through about 1994. With the number of fish caught
28 by Australia sharply declining in 1989 and the early 1990s, the parental biomass has
29 been recovering since 1995.

30
31 Now we have the charts up. It is the number of fish that matter. If you have got lots of
32 fish, they grow, and you see the extraordinary numbers being caught in this period
33 where my marker is running is followed by, six to eight years later, a continued
34 decline, and when the numbers finally fall off around say 1989, by 1995 let us see:
35 sure enough the parental biomass has bottomed out, and it has started moving back
36 up. I submit, Mr President, Members of the Tribunal, that this is a problem primarily
37 of purse seine fishing, not of Japan's EFP.

38
39 Another requirement for the imposition of provisional relief which is lacking in this
40 case is that the measures prescribed be effective to avoid the damage that would
41 otherwise result. The only way to assure effective protection of the stock is to control
42 the catch, which has been growing and is now about 17,000 tonnes per year. The
43 provisional measures which Australia request would not control the total catch.

44
45 The chart on the screen now is a version of the chart you saw earlier. The only
46 difference is that the yellow encompasses the total of all the fishing of the members
47 of the 1993 Convention, and the purple at the top shows the fishing of the
48 non-members to the 1993 Convention.

49

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

4
5 Catches from non-parties to the CCSBT now represent at least one
6 third of the global catch with some estimates substantially greater.
7 The majority of the non-party catches are taken by Indonesia,
8 Korea and Taiwan. Korea has greatly increased the number of
9 longline vessels targeting SBT since 1994, and the number of
10 vessels from Taiwan that are catching SBT has more than doubled
11 in the last 4 years. The Indonesian catch was taken on spawning
12 ground as a by-catch of their longline fishery for other tunas. The
13 Australian and Indonesian collaborative port sampling programme
14 has shown a doubling of the Indonesian catch of SBT from 1995 to
15 1996.

16
17 That is a quote from Dr Polacheck.

18
19 This non-party catch in the aggregate far exceeds the amount caught in Japan's
20 EFP. Moreover, as the chart confirms, the non-parties have been able to increase
21 their catch despite the dire recovery forecasts of Australia and New Zealand. There
22 is, therefore, no reason to believe that countries such as Indonesia would not
23 continue to increase their catch to more than make up for any tonnage Japan might
24 be proscribed from catching. Australia and New Zealand are seeking an adjudication
25 of their claims and, as such, the Tribunal's decision must be effective to remedy the
26 immediate damage asserted. Since no provisional measures levied exclusively
27 against Japan would be effective in this case, none may be levied at all.

28
29 While Australia and New Zealand express alarm about the increasing catches by
30 non-members of the 1993 Convention, they must acknowledge that since 1997, all of
31 the southern bluefin tuna that have been caught have been caught as a result of
32 unilateral decisions. No catch is being made today pursuant to any international
33 agreement. Australia and New Zealand took the lead within the Convention
34 members. Each unilaterally determined its catches for 1998 and 1999. Japan
35 followed this lead, also unilaterally deciding on the amount of its commercial and
36 EFP catches.

37
38 It would be arbitrary and capricious to single out and prescribe any particular catch
39 because it was decided upon unilaterally, since all catches have been set
40 unilaterally. It would be perverse to single out and proscribe the EFP, the one catch
41 that is designed to elicit scientific data that might help produce agreement about an
42 overall TAC for southern bluefin tuna.

43
44 The provisional measures advocated by Australia and New Zealand would delay for
45 years any resolution of the scientific uncertainty that has paralyzed the Commission
46 for the last three years already.

47
48 Although the 1998 EFP results are very encouraging, consistent sets of data over
49 several years are necessary to reduce variations in stock and catch rates based on

1 natural factors. If Japan's EFP were interrupted in the middle, an important scientific
2 need would not be met.

3
4 Indeed, suspension of Japan's commercial fishing would have the same type of
5 deleterious effect. Currently it is only Japan, and not Australia or New Zealand,
6 which collects and shares CPUE data from their commercial fishery. Applicants claim
7 that the CPUE data are not sufficient, but the result of their preferred remedy would
8 be to deprive the parties of consistent sets of data altogether.

9
10 Australia and New Zealand offer no realistic alternatives to experimental fishing.
11 Tagging is not, as Australia argues, a realistic alternative to the EFP. Tagging is not
12 effective in reducing uncertainties in stock assessments and it definitely offers no
13 answers in the short term. Tagging small tuna may be practical, but it takes many
14 years to get results and, even then, the results will be subject to many uncertainties.
15 Tagging large tuna is impractical. No fisherman will tag and release a fish that may
16 be worth as much as 30-50 thousand US dollars.

17
18 What do the independent scientists say about tagging? I will quote from the panel
19 report:

20
21 Given the geographically widespread nature of the Southern Bluefin
22 Tuna fisheries and the diversity of gear used, a traditional tagging
23 programme relying on voluntary reporting of TAC recoveries would
24 have considerable uncertainties with respect to the reporting rate.
25 We expect that these would be so large that such a conventional
26 tagging programme would achieve little to reduce the uncertainties
27 in stock status exploitation rates.

28
29 Again, I am quoting from the panel of independent scientists employed by consensus
30 of the parties before you. Dr. Butterworth has specifically addressed the issue of
31 whether tagging offers a feasible alternative to fishing in unfished areas as part of an
32 EFP. His view is that tagging is no such alternative. I quote from his declaration.

33
34 Tagging as a substitute for a CPUE-related experiment such as that
35 in the Japanese EFP has very little to offer, particularly in that,
36 unlike the Japanese EFP, tagging holds out no prospect for short
37 term resolution of one of the two current major uncertainties in the
38 Southern Bluefin Tuna stock assessment.

39
40 This discussion of tag-and-release as compared to Japan's EFP serves powerfully to
41 illustrate what we have been saying from the beginning. This is a dispute over
42 scientific uncertainty – uncertainty that is hindering the parties from reaching a
43 consensus on the appropriate TAC for southern bluefin tuna under the 1993
44 Convention going forward.

45
46 As the undisputed record reveals, Japan has dedicated itself to working through the
47 scientific dispute that arises solely under the 1993 Convention. Australia and New
48 Zealand characterized the party's discussions as consultations under article 16(1) of
49 the 1993 Convention. Australia and New Zealand only belatedly invoked the Law of
50 the Sea Convention. Australia and New Zealand stymied Japan's efforts to

1 cooperatively resolve the present dispute under article 16(1) of the 1993 Convention.
2 We heard them yesterday take the position that negotiations under the Law of the
3 Sea Convention would for some reason be futile.

4
5 Australia and New Zealand rejected independent scientists' proposed rules for
6 decision. They refused Japan's offer of mediation under the 1993 Convention and
7 they refused Japan's offer of arbitration under the 1993 Convention. As the
8 undisputed record reveals, Japan has dedicated itself to working through the
9 scientific disagreements and has been willing to defer to the guidance of neutral
10 experts better able to separate fishery science from national policy.

11
12 In light of Japan's commitment to conservation and active participation in all facets of
13 that endeavour, there is no basis in fact for Australia and New Zealand to accuse
14 Japan of violating any obligation.

15
16 Indeed, we are here today not because of any act of Japan, but because of unilateral
17 decisions made by Australia. Not merely is the fact that the parties are expending
18 enormous human and financial resources litigating rather than negotiating, but the
19 source of the underlying problems can also be attributed to the choices Australia
20 alone has made.

- 21
22 - Australia unilaterally refuses to provide catch data.
- 23
24 - Australia complains about the use of CPUE as a component of the abundance
25 index, but provides no data of its own.
- 26
27 - Australia unilaterally elects to use purse seine fishing over long line method.
- 28
29 - Australia unilaterally commenced commercial fishing before TAC and national
30 quotas were established in the 1995-96 and 1996-97 seasons.
- 31
32 - Australia unilaterally excludes Japan from Australia's EEZ and from Australian
33 ports.
- 34
35 - Australia unilaterally determined its own commercial catch levels for 1998 and
36 1999.
- 37
38 - Australia unilaterally rejected independent scientists' suggestion for the resolution
39 of EFP issues.
- 40
41 - Australia unilaterally refused to allow independent scientists that they themselves
42 helped select to arbitrate the scientific disputes, despite the parties' previous
43 agreement that they should do so.
- 44
45 - Australia unilaterally terminated negotiations under the 1993 Convention.

46
47 There is a question of which party has been negotiating in good faith in this matter.
48 My learned opponent invited this Tribunal to consider the record and decide that
49 question for itself, and I join him in this invitation.

50

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

6
7 As the Tribunal has seen, these independent scientists and their reports and
8 conclusions were never mentioned in the Application to this court, were never
9 mentioned in Dr Polacheck's declaration. Indeed, they were never mentioned in
10 yesterday's session, with two highly revealing exceptions. First, was on
11 cross-examination of Dr Beddington, who acknowledged their expertise, the scope of
12 their work and their critical role in this dispute.

13
14 The second was the devastating admission of Counsel at the very end of the day. In
15 opposing Japan's alternative request for provisional measures, Counsel objected to
16 any reference of this dispute to the panel of independent scientists on the grounds
17 that it would predetermine the outcome, thus admitting that the independent
18 scientists have rejected the views Applicants put forth to this Tribunal. It is no wonder
19 that when we showed the panel of scientists the Australian and New Zealand
20 application, they felt as they put it "morally obligated" to make their views known to
21 this Tribunal.

22
23 The strength of this young yet esteemed Tribunal lies in the collective wisdom and
24 experience of its individual judges. You were elected to your posts, not only for the
25 breadth of your learning, but for your first-hand experience with the struggles and
26 compromises that led to the adoption of the Law of the Sea Convention and to the
27 many regional covenants that render concrete that document's lofty objections.

28
29 So it is perhaps natural that a party might look to you when confronted with difficult
30 questions concerning the management of the oceans' renewable resources. Yet
31 wisdom often counsels restraint, and this is a case where some measure of restraint
32 is warranted. By necessity, the Law of the Sea Convention is in most cases not a
33 blueprint for specific conduct but a broad covenant calling for mutual cooperation to
34 properly manage the oceans' vast treasures. By necessity, the Law of the Sea
35 Convention relies for realization of its broad goals upon international cooperation to
36 solve concrete problems that arise on a region-by-region and a species-by-species
37 basis. You, as the Tribunal, strengthen the Law of the Sea Convention when you
38 affirm, first, that the growing pains of regional cooperation as the solution to specific
39 problems cannot be avoided by invocation of the Convention itself, and, second, that
40 regional cooperation cannot be bypassed by appeals to this Tribunal for
41 micro-management of scientific disputes. The parties to this dispute entered into the
42 1993 Convention with the understanding that decisions would be reached by
43 consensus, not judicial decision. Yet the relief sought here by Australia and
44 New Zealand subverts that very framework.

45
46 While all the parties seek the best means to achieve optimum utilization and
47 conservation of SBT stock, they must strike that balance through consensus
48 achieved by negotiation, and, where necessary, with guidance from neutral
49 scientists. So, while this Tribunal no doubt has wisdom to impart, it can confer the
50 benefits of that wisdom while nonetheless exercising restraint. It can promote its

1 critical institutional mission under the Law of the Sea Convention, first and foremost,
2 by declining to exercise jurisdiction over this dispute and by declaring that, were it
3 inclined to act, the relief Australia and New Zealand seek is inappropriate and
4 unwise. In doing so, it could nonetheless exercise its great moral authority by
5 exhorting the parties to work to resolve their differences in light of neutral scientific
6 principles rather than narrow, short-term national interests. If the Tribunal is inclined
7 to do more than exhort – to prescribe some form of relief – it should order, as Japan
8 has conditionally requested, that the parties negotiate in good faith to reach a
9 settlement. If such negotiation fails, the parties should refer their dispute, which is –
10 and always has been – scientific in nature, to the group of independent scientists for
11 resolution, as the parties previously agreed.

12

13 **THE PRESIDENT:** Thank you, Mr Greig. We are close to our normal closing time.
14 The rest of the time is at your disposal.

15

16 **MR GREIG:** May I suggest this. We are not going to be short of time. We will
17 probably finish slightly early within our time this afternoon. I would propose, with your
18 indulgence, to introduce Professor Ando very briefly but then defer his remarks so
19 that they can be given as one presentation in the afternoon session.

20

21 **THE PRESIDENT:** That is agreeable to the Tribunal.

22

23 **MR GREIG:** As you all know, Professor Ando will present Japan's legal arguments.
24 Professor Ando is a very famous Professor Emeritus of the University of Kyoto,
25 Faculty of Law. He is also Professor of International Law at Doshisha University in
26 Kyoto. He is the President of the Japanese Association of International Law. He is
27 a member and former Chairman of the Human Rights Committee under the
28 International Covenant on Civil and Political Rights. Finally, I note that
29 Professor Ando is a judge on the Administrative Tribunal of the International
30 Monetary Fund.

31

32 With that, I thank you, Mr President and honourable Members of the court.

33

34 **THE PRESIDENT:** As agreed, the sitting will be resumed at 3 o'clock this afternoon,
35 at which point Professor Ando will complete the submissions on behalf of Japan.

36

37 *(The Tribunal rose at 12.52 p.m.)*

38