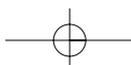
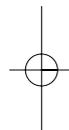
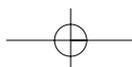
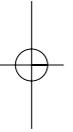
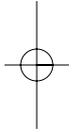
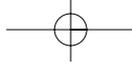


**REQUEST FOR THE PRESCRIPTION OF
PROVISIONAL MEASURES SUBMITTED BY
NEW ZEALAND**





**1982 United Nations Convention on the Law of the Sea
International Tribunal for the Law of the Sea**

**In the Dispute Concerning
Southern Bluefin Tuna**

New Zealand v Japan

**Request for
Provisional Measures**

REQUEST FOR PROVISIONAL MEASURES

INTRODUCTION

1. Pursuant to Article 290(5) of the *United Nations Convention on the Law of the Sea* ('UNCLOS'), New Zealand requests that the International Tribunal for the Law of the Sea ('the Tribunal') prescribe the provisional measures specified below in New Zealand's dispute with Japan over Southern Bluefin Tuna ('SBT'), pending the constitution of an Arbitral Tribunal under Annex VII of UNCLOS ('the Arbitral Tribunal'). The dispute relates to Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999. It concerns the interpretation and application of certain provisions of UNCLOS. The Arbitral Tribunal will also be asked to take into account, in that regard, the provisions of the 1993 *Convention for the Conservation of Southern Bluefin Tuna* ('the 1993 Convention') and the parties' practice in relation to that Convention, as well as their obligations under general international law, in particular the precautionary principle.
2. New Zealand requested the submission of its dispute with Japan to an Arbitral Tribunal established under Annex VII by written notification in the form of a diplomatic Note conveyed to Japan on 15 July 1999. In accordance with Annex VII, Article 1, the written notification was accompanied by a statement of New Zealand's claim and the grounds upon which it is based (together referred to as the 'Statement of Claim'). Certified copies of New Zealand's diplomatic Note to Japan and of its Statement of Claim are provided as Annex 1 and Annex 2 respectively to this Request.
3. In its diplomatic Note of 15 July 1999, New Zealand also requested that, pending the constitution of the Arbitral Tribunal under Annex VII, Japan

agree to provisional measures. A request for provisional measures addressed to Japan was attached to the Note. A certified copy of that request is provided as Annex 3 to this application. New Zealand further requested that if Japan were unable to agree to the provisional measures sought by New Zealand, Japan agree that the question of provisional measures be forthwith submitted to the Tribunal. Two weeks have elapsed since the date on which New Zealand made its request to Japan for provisional measures. Therefore, in accordance with Article 290(5) of UNCLOS, New Zealand submits its request for provisional measures to the Tribunal.

4. New Zealand and Australia are parties in the same interest in this dispute. Australia will likewise submit a request for provisional measures to the Tribunal.
5. As parties in the same interest, New Zealand and Australia agree in jointly nominating Professor Ivan Shearer AM as their judge *ad hoc* pursuant to Article 17 of the Statute of the Tribunal. Professor Shearer is an Australian citizen. He is the Challis Professor of International Law at the University of Sydney, Australia.

THE FACTS

6. The facts of the dispute are set out in paragraphs 3–17 of New Zealand’s Statement of Claim.

THE DISPUTE

7. The history of the dispute is set out in paragraphs 18–35 of New Zealand’s Statement of Claim.

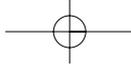
PROVISIONAL MEASURES REQUESTED

8. Pending the constitution of the Arbitral Tribunal, New Zealand requests that the Tribunal prescribe the following provisional measures:
 - (1) that Japan immediately cease unilateral experimental fishing for SBT;
 - (2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna (‘the Commission’), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
 - (3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;

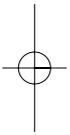
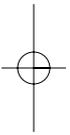
- (4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
- (5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render.

THE REASONS FOR WHICH THE REQUEST IS MADE

9. The reason for requesting provisional measures is that Japan's unilateral experimental fishing for SBT and its lack of cooperation in the conservation and management of SBT have the potential to cause serious prejudice to the rights of New Zealand.
10. The New Zealand scientific comments at Annex 4 to this application support the view (established in the paper prepared by Australian scientists entitled *A Scientific Overview of the Status of the Southern Bluefin Tuna Stock* and annexed to Australia's Request for Provisional Measures) that the SBT stock is at historically low levels, in the order of 7–15% of that which existed in the 1960s. It is in a condition analogous to that of other fish stocks which have collapsed in the past. The Scientific Committee of the Commission stated in 1998 that "the continued low abundance of the SBT parental biomass is a cause for serious biological concern". The 1980 level of the SBT parental biomass has been identified by the Scientific Committee as corresponding to commonly used thresholds for biologically safe populations. All recent assessments of the SBT stock agree that the parental biomass is substantially below its 1980 level. Natural environmental changes could combine at any time with the vulnerable state of the resource to cause a further and potentially highly damaging decline to the stock. This mechanism has been associated with most fishery collapses.
11. Addressing this vulnerability is made more difficult by uncertainties both in stock assessment and in the underlying biology of SBT. While there is agreement that the SBT stock is at historically low levels, there have been major differences over the years between estimates for the prospects of recovery carried out by Japan and those carried out by New Zealand and Australia. In the past few years, Japan's assessments of the prospects for the recovery of the SBT stock invariably are much more optimistic than the assessments made by New Zealand and Australia. For the reasons given in the paper prepared by Australian scientists referred to in paragraph 10 above, there are serious concerns about Japan's assessments of the prospects for recovery and the conclusions drawn from those assessments.



12. The seriousness of the current situation is heightened by a number of other factors. These include the unwillingness of Japan to cooperate in a meaningful way in the conservation and management of SBT. Also there have been significant recent increases in fishing by countries not parties to the 1993 Convention including the taking of SBT in the single spawning ground with little or no control. The actions of Japan in conducting unilateral experimental fishing outside the accepted scheme for the management of the stock makes it more difficult to encourage those countries to cooperate in the conservation and management of SBT, and to that end, to become members of, or associated with, the 1993 Convention.
13. Given the vulnerable state of the stock, any increase in catch of the order taken by Japan in the course of its unilateral experimental fishing increases the likelihood of recruitment failure and a delay in the rebuilding of the stock without compensating benefit. The lack of benefit to be derived from Japan's unilateral experimental fishing is confirmed in the paper prepared by Australian scientists referred to in paragraph 10 above. Also the unilateral actions of Japan have a potential adverse effect on fishing by New Zealand both within zones under its jurisdiction and on the high seas.
14. Once Japan's unilateral experimental fishing concludes for 1999, its other commercial fishing will continue as part of the normal fishing season and run until December 1999. Japan has indicated it expects as part of this fishing season to take the full amount of its last national allocation, without any allowance for the amount taken as part of its unilateral experimental fishing. If the projected catch from Japan's unilateral experimental fishing is taken into account, it could be expected that Japan would reach the level of its last national allocation no later than September 1999. Furthermore, Japan has indicated that its 1999 EFP is the first in a three year program. It is essential that provisional measures maintaining the catch of Japan at its previously agreed allocation and requiring the parties to act in accordance with the precautionary principle in relation to the fishery be granted pending the constitution of the Arbitral Tribunal.
15. In summary, the reason for requesting provisional measures is that Japan's current and proposed unilateral actions in relation to SBT, taken in the context of a stock at historically low levels, increase the threat to that stock and undermine the disciplines of the accepted scheme for SBT management. If not addressed by way of provisional measures, the unilateral actions of Japan have the potential to cause serious prejudice to the rights of New Zealand. That prejudice could not be the subject of adequate remedy in any subsequent decision of the Annex VII Arbitral Tribunal.



PRESERVATION OF THE RIGHTS OF THE PARTIES

16. The rights of New Zealand which it seeks to preserve by the grant of provisional measures are those relating to the management and conservation of SBT, in particular its rights under Articles 64 and 116–119 of UNCLOS, as specified in paragraphs 45–68 of its Statement of Claim. Pursuant to these provisions, and in the circumstances of the present case, New Zealand has the following rights vis-à-vis Japan:

- (a) that Japan conserve, and cooperate in conserving, the SBT stock;
- (b) that having agreed pursuant to Article 64 of UNCLOS on a cooperative regime for the conservation and management of the SBT stock, Japan not take unilateral measures detrimental to that stock outside the accepted scheme for the management of the stock;
- (c) that having regard to the accepted objective of the parties of ensuring the recovery of the SBT parental stock by 2020, at least to the level it was in 1980 (that is, the biologically safe level), none of the parties take unilateral steps which threaten the achievement of that aim;
- (d) that, having agreed in 1996 to Objectives and Principles for the design and implementation of an experimental fishing program, Japan not unilaterally conduct a program which does not meet those Objectives and Principles; and
- (e) that Japan not take measures which are capable of having a detrimental effect on the SBT stock, and which produce no countervailing benefit in terms of conservation, and in particular that it not do so except on the basis of best scientific evidence available.

17. The actions of Japan are inimical to the proper conservation and management of SBT. Far from maintaining and restoring the population of SBT, Japan's actions will only be detrimental to, and serve to delay, the restoration of the SBT stock. Therefore, New Zealand submits that provisional measures are required to preserve its rights.

POSSIBLE CONSEQUENCES OF NOT GRANTING PROVISIONAL MEASURES

18. In the present case, provisional measures are necessary to ensure that any final decision of the Annex VII Arbitral Tribunal can be implemented effectively and is not meaningless. As established in the paper prepared by Australian scientists referred to in paragraph 10 the SBT stock is in a vulnerable state. The conduct of unilateral experimental fishing by Japan and the resultant catch by Japan of SBT above its previously agreed national

allocation pending the hearing of the matter by the Arbitral Tribunal risks a decline in recruitment and a delay in the rebuilding of the stock to biologically safe levels. This would threaten New Zealand's interests in the proper conservation and management of the stock, including its interests as a coastal state under Article 64 of UNCLOS. A failure to prescribe provisional measures would prejudice the rights of New Zealand.

19. On the other hand, the grant of the provisional measures sought by New Zealand would not cause irreparable prejudice to the rights of Japan. In the event that the conduct of unilateral experimental fishing by Japan is found by the Annex VII Arbitral Tribunal to be consistent with international law, including UNCLOS, Japan would then be able to conduct experimental fishing for SBT. The delay in the conduct of that unilateral experimental fishing would not cause irreparable harm to Japan or to the SBT stock.

THE URGENCY OF THE SITUATION

20. Japan's 1998 unilateral experimental fishing constituted a 12.5% increase in the catches of SBT above the last agreed total allowable catch ('TAC') agreed to in the Commission. Japan has indicated that its 1999 unilateral experimental fishing may involve taking catch up to 2,400 tonnes of SBT, representing an increase of 20.5% above the last agreed TAC and an increase of 39.5% on the last agreed national allocation to Japan. In this context, it should be noted that Japan did not set a catch limit on its unilateral experimental fishing in 1999 and this figure of 2,400 tonnes is the upper end of the range given by Japan for its likely catch under the 1999 phase of its unilateral experimental fishing. Given that the SBT stock is at historically lowest levels, and that the best scientific evidence available suggests that parental biomass had continued to decline and that recruitment has remained low, further catch over and above the TAC significantly increases the risk of harm to the SBT stock and fishery and consequential immediate harm to the rights of New Zealand referred to in paragraph 16.
21. The situation is urgent, given that there is little or no prospect that the Annex VII Arbitral Tribunal will be established and able to render a decision on provisional measures during the current year. In the interim, damage would be done to the SBT stock which would threaten the conservation and recovery of the SBT stock in both the medium and long term. Also the continuing unilateral actions of Japan are threatening the existing and accepted scheme for the management of SBT thus making it more difficult to gain the cooperation of countries not party to the 1993 Convention in the proper conservation and management of SBT. If an Annex VII Arbitral

Tribunal were to order that all parties only fish at the previously agreed TAC and national allocations, then there is a need to ensure that Japan's catch, including that taken in the course of its unilateral experimental fishing, does not exceed its national allocation before the Annex VII Arbitral Tribunal makes a decision. As noted in paragraph 14, taking into account the catch taken in the course of its unilateral experimental fishing in 1999, Japan is likely to reach the level of its last agreed national allocation by September 1999.

***PRIMA FACIE* JURISDICTION OF ANNEX VII TRIBUNAL**

22. Australia, Japan and New Zealand are Parties to UNCLOS. Article 290(5) of UNCLOS provides that the Tribunal may prescribe provisional measures if, *inter alia*, it considers that, *prima facie*, the tribunal to be constituted would have jurisdiction. An Arbitral Tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute pursuant to Article 288(1) of UNCLOS.
23. UNCLOS Part XV section 2 provides a mechanism by which a party may invoke compulsory procedures for the resolution of the dispute where no settlement has been reached by recourse to Part XV section 1. Article 286 permits these compulsory procedures to be invoked by any party to the dispute by submitting the dispute to a court or tribunal having jurisdiction under section 2.
24. Article 287 relates to the choice of court or tribunal for settling disputes. Article 287(1) permits a State Party, by way of a written declaration, to choose one or more of the means for the settlement of disputes listed in the paragraph, which include an Arbitral Tribunal established under Annex VII. As neither New Zealand nor Japan has made a written declaration pursuant to Article 287(1), both countries are deemed by operation of Article 287(3) to have accepted arbitration in accordance with Annex VII as the means of settling disputes between them concerning the interpretation or application of UNCLOS.
25. New Zealand's dispute with Japan concerns the interpretation or application of UNCLOS. Relevant provisions of UNCLOS have been raised consistently in diplomatic correspondence with Japan since the commencement of this dispute. Japan, in conducting unilateral experimental fishing, has failed to take required measures for the conservation and management of the living resources of the high seas, specifically SBT, and has thereby placed itself in breach of its obligations under international law,

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SOUTHERN BLUEFIN TUNA

specifically articles 64 and 116–119 of UNCLOS, and in relation thereto Article 300 and the precautionary principle which, under international law, must direct any party in the application of those articles.

26. Article 286 also provides that a dispute can only be submitted at the request of any party to the court or Tribunal having jurisdiction under Part XV Section 2 where no settlement has been reached by recourse to Part XV Section 1. That condition is met in the present case.

APPOINTMENT OF AGENT AND ADDRESS FOR SERVICE

27. The Government of New Zealand appoints as its Agent Timothy Bruce Caughley, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, Wellington, New Zealand.

28. The Agent's address for service:

New Zealand Embassy
Bundeskanzlerplatz 2–10
53113 Bonn
Federal Republic of Germany

Telephone 228 228 070
Fax 228 221 687

29. The Agent may be contacted in New Zealand by:

Telephone 64 4 473 2072
Fax 64 4 473 2103
Email tim.caughley@mfat.govt.nz

[Signed]
Tim Caughley
Agent for the Government of New Zealand

30 July 1999

ANNEXES

- Annex 1** New Zealand's diplomatic Note to Japan dated 15 July 1999
- Annex 2** New Zealand's Statement of Claim dated 15 July 1999
- Annex 3** New Zealand's Request for Provisional Measures addressed to Japan dated 15 July 1999
- Annex 4** Comment by NZ Scientists on *A Scientific Overview of the Status of the Southern Bluefin Tuna Stock* (Polachek and Preece)