English Version

ITLOS/PV.99/23/Rev.2

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 3.00 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

Southern Bluefin Tuna Cases

(New Zealand v. *Japan;*

Australia v. *Japan)*

(Requests for provisional measures)

Verbatim Record

Present:	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 *ad hoc*	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,

M. 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.

THE PRESIDENT: Professor Ando, you may proceed.

PROFESSOR ANDO: Mr President, honourable Judges, ladies and gentlemen, it is indeed a great honour for me to be given this opportunity to address various legal issues concerning the dispute brought before this august Tribunal: the dispute between Australia and New Zealand and Japan over fishing of southern bluefin tuna (SBT).

As Mr Greig, the previous speaker, clearly demonstrated this morning, the dispute concerns differences in evaluating scientific data for the purpose of determining the total allowable catch (TAC) of southern bluefin tuna and its allocation among the three States.

A brief history leading to the dispute is as follows: in the face of projection of SBT stock decline, the three States entered into an agreement in 1989. The agreement established annual TAC of 11,750 tonnes, allocating 6,065 tonnes, 5,265 tonnes and 420 tonnes to Japan, Australia and New Zealand respectively. In 1993 the tripartite Convention for the Conservation of SBT (the 1993 Convention or CCSBT as referred to in the written submission) was drafted in order to achieve optimum sustainable yield of southern bluefin tuna. The Convention also established the Commission for the Conservation of SBT which should decide on TAC and its allocation among the three States with the advice of a subsidiary body called the Scientific Committee. In 1994 the Commission set a TAC and its allocation as stated above, which remained the same until 1997. There was no agreement, however, in 1998 and 1999.

For the past several years, however, the Commission has discussed the concept of an experimental fishing programme (EFP) in order to enhance the understanding of the SBT stock and to reduce uncertainties of the state of that stock. Various Japanese proposals on EFP were frustrated by Australian and New Zealand technical opposition and, as a result, Japan, on its own, conducted a pilot EFP in 1998. On the basis of the results of the pilot EFP, Japan commenced in 1999 a three-year EFP involving an additional catch of approximately 2,000 tonnes. Australia and New Zealand were against the Japanese EFP and, following unsuccessful negotiations among the three States, Australia and New Zealand brought Japan before this Tribunal, the International Tribunal for the Law of the Sea (ITLOS).

Australia and New Zealand argue that the dispute comes under the United Nations Convention on the Law of the Sea (the Law of the Sea Convention or UNCLOS), requesting that the Tribunal grant the provisional measures ordering Japan to cease EFP pending the constitution of an arbitral tribunal under Annex VII of the Law of the Sea Convention (Annex VII tribunal). Japan contends that the dispute comes under the 1993 Convention and asserts that the Annex VII tribunal lacks jurisdiction over this dispute and consequently ITLOS is without authority to grant the provisional measures. Alternatively, Japan requests that ITLOS grant Japan's provisional relief prescribing Australia and New Zealand to recommence negotiations.

My role today is to present Japan's legal case against Applicants' claims. For that purpose, I would first like to argue that the dispute does not arise under the Law of the Sea Convention and is not within the jurisdiction of an Annex VII tribunal.

Secondly, I would like to argue that, even if the dispute comes under the Law of the Sea Convention, this Tribunal should abstain from proceeding because Australia and New Zealand have not exhausted procedural requirements under UNCLOS. In addition, they have not met the other conditions for the granting of provisional measures. In that connection, I would also like to address the issue of a precautionary approach. Finally, I would like to argue that the Tribunal grant our counter-request.

Before elaborating my argument, I would like to draw your attention to the following facts. As Mr Togo, the Japanese Agent, pointed out in his presentation this morning, Japan is a narrow island State, heavily populated, and yet 85 per cent of its land consists of hilly mountains. This prevents the development of large scale agriculture and domestic animal raising. As a result, Japanese people must rely on fish as a main source of protein. Thus, fishing as well as fish eating has come to form an integral part of Japanese culture. Unfortunately, we do not have the luxury of raising and perhaps eating cows and sheep, as Australians and New Zealanders can.

Mr President, honourable Judges, I now come to my first point and argue that the dispute does not arise under UNCLOS and is not within the jurisdiction of an Annex VII tribunal.

The afore-mentioned history leading to the dispute makes it clear that the core of the dispute lies in the difference between Australia and New Zealand on the one hand and Japan on the other hand, in their evaluation of scientific data for the purpose of determining total allowable catch of southern bluefin tuna under the 1993 Convention. However, Australia and New Zealand cite articles 64 and 116 to 119 of the Law of the Sea Convention and allege that Japan's unilateral EFP increases the threat to SBT stock and contravenes Japan's obligation under the Law of the Sea Convention to cooperate in the conservation of a highly migratory species – in this case southern bluefin tuna.

Nevertheless, it must be kept in mind that all these articles contain obligations of a general nature for States to cooperate. It must also be kept in mind that they do not prescribe any specific principles of conservation or concrete conservation measures nor list principal factors to be considered in deciding on such matters. On the contrary, article 64, for example, encourages coastal States and fishing States to cooperate directly or through appropriate international organizations to ensure conservation and promote optimum utilization of a highly migratory species. I am certain that you are aware that this is a kind of compromise reached through the Law of the Sea Convention in relation to the very severe difference of opinion between the long distance fishing States and the coastal States. Thus, as far as the issue of conservation and optimum utilization of a particular fish stock is concerned, the Law of the Sea Convention may be regarded as a framework convention, leaving the specific content of cooperation to be regulated by international agreements on a region-by-region or species-by-species basis. In fact, the 1993 Convention is nothing but the result of such cooperation in which Japan, together with Australia and New Zealand, has sincerely and earnestly participated.

Besides the 1993 tripartite Convention for the Conservation of SBT, there are a number of similar treaties to which Japan is a party. To name a few: the 1950

Convention for the Establishment of an Inter-American Tropical Tuna Commission; the 1952 Agreement of the General Fisheries Commission for the Mediterranean; the 1969 International Convention for the Conservation of Atlantic Tunas; the 1982 Convention on the Conservation of Antarctic Marine Living Resources; and the 1996 Agreement for the Establishment of the Indian Ocean Tuna Commission. Some of them pre-date and others follow the adoption of the Law of the Sea Convention, but each of them regulates fishing of a particular species of fish in a particular region. Thus, some provide for a mechanism to decide on total allowable catch and national allocation; others prescribe seasons for fishing; still others regulate fishing methods as well as the weight and size of catchable fish. All in all, while these treaties concern regulation on the conservation or optimum utilization (or both) of fish stock, each differs in the content of regulation and the accompanying rights and obligations of the States concerned.

Distinguished Judges, as to Australia's and New Zealand's allegation that Japan contravenes its obligation of cooperation in the conservation of SBT, it must be pointed out that the allegation is based on Japan's obligations under the 1993 Convention. However, such an allegation *per se* does not transform Japan's obligation under the 1993 Convention into those of the Law of the Sea Convention. It might be added that a State does not breach its obligation to cooperate merely because a *bona fide* difference over scientific uncertainties precludes the parties from reaching a consensus. When the three States met in December 1998 to try to resolve their differences, the official record of the proceedings was clear as to what the parties understood the dispute to be about:

> Negotiations under article 16, paragraph 1, of the Convention for the Conservation of Southern Bluefin Tuna in relation to the dispute among the parties relating to Japan's experimental fishing programme.

Indeed, were this truly a dispute under the Law of the Sea Convention, the Applicants would surely have named as Respondents the other States that are both parties to UNCLOS and catch SBT. Each of Australia's and New Zealand's scientific experts identify the unregulated catch of non-parties to the 1993 Convention as a source of potential damage to the SBT stock. That catch, as demonstrated this morning, far exceeds the tonnage involved in Japan's EFP. Thus, if the Applicants in fact believed that this dispute arose under the Law of the Sea Convention, under their own theory, Japan could not be the only necessary party to a resolution of this matter. The Applicants' failure to join the Republic of Korea and Indonesia, for example, demonstrates the Applicants' lack of consistency in their approach to this issue.

In Japan's view, as the dispute is under the 1993 Convention and not under the Law of the Sea Convention, this Tribunal has no basis on which to hear the application for provisional measures, because an Annex VII arbitral tribunal has no *prima facie* jurisdiction over this case. Article 288, paragraph 1, of the Law of the Sea Convention limits the jurisdiction of an Annex VII arbitral tribunal, and that of ITLOS, to only those disputes "concerning the interpretation or application" of the Law of the Sea Convention. As this dispute concerns the interpretation or implementation of the 1993 Convention, to use the terms of the Convention itself, there can be no

jurisdiction under article 288, paragraph 1 – the only basis for jurisdiction invoked by Australia and New Zealand.

In this connection, I would like to note that, although the Applicants have not raised this point, there would similarly be no jurisdiction under article 288, paragraph 2, concerning disputes under international agreements relating to the Law of the Sea Convention. The 1993 Convention, drafted after the Law of the Sea Convention, reflects the conscious choice of the parties not to submit disputes under it for resolution under the Law of the Sea Convention, unless otherwise agreed. This is what article 288, paragraph 2, requires as a precondition to jurisdiction. Since Japan has not agreed otherwise, the precondition required under article 288, paragraph 2, is not met. Consequently, an Annex VII tribunal has no jurisdiction in the instant case.

In any event, it must be emphasized that the request for provisional measures can be accepted only when a relevant court or tribunal has jurisdiction on the merits. In the instant case, Japan has already argued that an Annex VII tribunal has no jurisdiction because Japan has not given its consent to its jurisdiction. In elaborating the majority view of the International Court of Justice concerning the case on the *Legality of Use of Force* – a case between Yugoslavia and Belgium – a member of the court clearly stated as follows:

> It should not be thought that mere invocation of a jurisdictional clause, with nothing more, suffices to establish a *prima facie* basis of the Court's jurisdiction. It cannot be otherwise, because the jurisdiction of the Court … is based on consent, and consent to jurisdiction cannot be established, even *prima facie*, when it is clear from the terms of the declaration under article 36 of the Statute of the International Court of Justice themselves that the necessary content is not *prima facie* present, or simply is not present … The restraint upon the liberty of action of a State that necessarily follows from the indication of provisional measures will not be countenanced unless, *prima facie*, there is jurisdiction.

Moreover, article 290, paragraph 5, of UNCLOS provides:

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

However, since Japan denies the jurisdiction of an Annex VII tribunal, ITLOS consequently is not entitled to grant the request for provisional measures.

I now turn to the next point: even assuming that this dispute arises under UNCLOS, the application does not satisfy procedural requirements to exhaust amicable dispute settlement measures.

In addition to the subject matter requirements of jurisdiction under the Law of the Sea Convention which I just touched on, Australia and New Zealand have not satisfied the procedural requirements that are also preconditions to jurisdiction under article 286. Article 286 requires the exhaustion of amicable means of dispute resolution under the procedures prescribed by Section 1 of Part XV. The intent of Section 1 is to discourage parties from precipitously invoking procedures under Section 2, and to require them first to make their best efforts to resolve the dispute through negotiation or other agreed peaceful means. Australia and New Zealand have failed, in several respects, to comply with this obligation to seek an amicable settlement in good faith.

First, Australia and New Zealand have not let negotiations, which they themselves initiated under article 16, paragraph 1, of the 1993 Convention, proceed. Indeed, they unilaterally decided to terminate those negotiations when Japan refused to submit to their will by suspending EFP. That conduct violates Australia's and New Zealand's obligation under Section 1 of Part XV of UNCLOS. According to the International Court of Justice in its judgment on the *North Sea Continental Shelf* cases, which delineates the obligations on parties when they are required under international law to negotiate:

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement …; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

By refusing to continue with negotiations unless Japan agreed to suspend its EFP, Australia and New Zealand breached their obligations under this standard to negotiate with a willingness to compromise.

Second, Australia and New Zealand have failed to discharge their obligation to exchange views under article 283 of UNCLOS with respect to any dispute arising under that Convention. The simple reason Applicants have failed to discharge that duty is because the dispute does not arise under the Law of the Sea Convention, and they acknowledged that by seeking negotiations solely under the 1993 Convention. Australia and New Zealand recharacterized their negotiations as consultations required under article 283 of UNCLOS and asserted jurisdiction under the Law of the Sea Convention. Such recharacterization should never be permitted.

Honourable Judges now I come to the issue of lack of urgency. Australia and New Zealand want to invoke article 290 as the basis of their request for provisional measures. Article 290, paragraph 1, provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part …, the

> court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances … .

However, as pointed out already, Japan argues an Annex VII tribunal has no jurisdiction, let alone *prima facie* jurisdiction, because the requirements of article 288, paragraph 1, and paragraph 2, are not met.

In addition, Australia and New Zealand fail to establish that there is "urgency" which should justify their request for provisional measures in the instant case. Mr Greig has amply demonstrated how Australia and New Zealand have failed to establish "urgency", and in order to save time, I would limit my statement strictly on legal issues. In this connection Mr Burmester stated yesterday as follows:

> Article 290 was drafted, of course, in the light of the experience of interim measures of protection in the International Court. The drafters of UNCLOS deliberately chose to give this Tribunal a broader as well as a more effective provisional measures jurisdiction than that which the International Court has. For this reason, the Tribunal should be slow to circumscribe the discretion with unstated preconditions, such as "irreparable harm" or "irreparable prejudice", terms which have been used in the past in International Court decisions.

He further stated that:

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

I wish to emphasize, however, that the requirement of irreparable harm or damage is inseparably linked to the very purpose of the institution of provisional measures. Its purpose is to avoid creating a situation which would nullify or virtually destroy the effect of final decision. Also, the "urgency" requires that irreparable damage must be imminent. According to the *Encyclopedia of Public International Law* published under the auspices of the Max Planck Institute for Comparative Public Law and International Law: "Unanimity exists for the view that interim protection can only be awarded if irreparable damage is imminent."

This view is reflected in the jurisprudence of the International Court of Justice, including the cases of *Nuclear Tests* (Australia/New Zealand *v.* France), *Fisheries Jurisdiction* (United Kingdom/Germany *v.* Iceland) and *Passage Through the Great Belt* (Finland *v.* Denmark), all of which were quoted by Mr Burmester himself. Honourable Judges, it is submitted that urgency is the essential precondition for the request for provisional measures and Australia and New Zealand fail to establish that

there is such urgency.

In the case concerning *Trial of Pakistani Prisoners of War* (Pakistan *v.* India), the International Court of Justice refused to indicate provisional measures. In that case, Pakistan asked the Court, in the course of proceedings on provisional measures, to postpone, for an unlimited period of time, further consideration of its request for interim measures. The Court held that "it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a 'matter of urgency'." And that such actions by Pakistan showed that "the Court no longer has before it a request for interim measures."

Honourable Judges, as in the *Pakistani Prisoners* case, Australia and New Zealand have taken actions which clearly indicate that they do not believe there is any imminent threat to the recovery of the SBT stock. The absence of any immediate and irreparable risk to the SBT stock from the EFP catch is evidenced by the fact that Australia and New Zealand are seeking, among forms of relief, a reduction of Japan's future catch allocations by the amounts caught under the EFP. If Australia and New Zealand believe that the additional tonnage caught in Japan's EFP is the decisive factor in causing irreparable damage to the SBT stock, the "payback" – their expression – they seek would be entirely nugatory. Again, there is no urgency established.

Honourable Judges, Mr Burmester further stated:

> The use of the phrase 'appropriate under the circumstances' in article 290 means that award of provisional measures is a matter within the discretion of this Tribunal. The wording differs from that in article 41 of the Statute of the International Court of Justice, which uses the expression 'if it considers that circumstances so require'. It is submitted that this Tribunal has a broader discretion.

Mr President, honourable Judges, the use of the phrase "appropriate under the circumstances" in article 290 should not be construed as depriving provisional measures of their essential requirements as stated above. In addition, the right for which provisional measures are requested must be connected to the right to be adjudicated on the merits, although the decision thereon should not prejudge the final judgment on the merits. Such "a broader discretion" – I am quoting "a broader discretion" from Mr Burmester's expression – if any, still must satisfy these conditions.

At this point I would like to touch on the issue of the precautionary approach. Australia and New Zealand refer to and rely on the precautionary principle to justify their claims, but they intentionally use the term "principle" in place of "approach" in their initial statement. I believe that the only global convention in the field of fisheries which refers to "precautionary" approach is the Agreement for the Implementation of the UNCLOS Provisions Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted in 1995 by the conference convened under the United Nations auspices. That Agreement speaks about the precautionary approach. It must be pointed out, however, that document has not come into force yet, and this is a clear indication that the precautionary

approach is irrelevant as a legal concept capable of serving as a binding norm or rule of international law in this particular case.

The precautionary approach may in fact be relevant and offer guidance with respect to imminent irreparable damage such as the case of damage caused by the construction of a dam. However, with respect to renewable living resources such as southern bluefin tuna, different considerations need to be applied. In any event, and in particular with respect to the dispute over southern bluefin tuna stock assessment, scientific research can and should play a decisive role, particularly where such research is designed to reduce uncertainties presently hindering agreement. In this sense it is my humble view that the current EFP activities of Japan do not raise any problems in relation to the precautionary approach.

Honourable Judges, I might add that the improper use of the precautionary approach concept is likely to deny the benefit of knowledge which scientific research could secure in furtherance of conservation and optimum utilization of the SBT stock. In this connection, I would like to emphasize that granting the relief Australia and New Zealand seek works to consolidate the interest of those who profit most from the maintenance of the status quo at the sacrifice of those who might benefit from new scientific knowledge. Granting of such relief may in certain cases be detrimental to the overall interests of the world at large and of developing countries in particular. Indeed, I am afraid that the provisional measures as requested by Applicants, if granted, might defeat the very objective they seek; that is, the conservation of SBT which should, I repeat, be based on well-defined scientific research.

In this connection article 119 of the Law of the Sea Convention, which Applicants claim Japan violates and Japan refutes such claim, is to be noted. Paragraph 2 of that article provides as follows:

> Available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether sub-regional, regional or global, where appropriate, and with participation by all States concerned.

Mr President, honourable Judges, now I turn to draw your attention to the relationship between the requested provisional measures and final remedies. In Japan's view, the provisional measures as requested by Australia and New Zealand are inappropriate, because Applicants are in effect seeking final relief for damage that they claim has already occurred, and not provisional relief to prevent injury pending the resolution of the case. Alternatively, the relief sought as a provisional measure is similarly sought as final relief, and yet Applicants ask this Tribunal to award such relief now before Japan has had an opportunity for a full and fair hearing on the merits of Applicants' claims.

For all these reasons relating to the true nature of the dispute, the truncation of negotiations by Australia and New Zealand and the impropriety and lack of need for any restrictions on Japan's conduct, this Tribunal should deny Applicants' request and grant Japan's counter-request for provisional measures.

Permit me to explore here Japan's counter-request for provisional measures. The request of Australia and New Zealand aims to interrupt Japan's EFP at all costs, and to justify the maintenance of the status quo, the 1997 total allowable catch. However, this request does not provide a lasting solution which will achieve the aim of conservation and optimum utilization of the SBT stock. Such a lasting solution could be reached only through objective scientific research.

The 1997 total allowable catch was agreed upon more than two years ago as a limit applicable only in 1997, not as an everlasting, absolute criterion. Rather, the annual TAC should be constantly re-examined on the basis of data obtained through regularized scientific research and agreed upon year by year. Australia and New Zealand have frustrated attempts to establish a TAC for 1998 and 1999.

Mr President, honourable Judges, Japan is prepared to accept any result that is the product of such regularized scientific research, including where necessary the participation of neutral independent scientists.

This will enable Australia, New Zealand and Japan to speak to States and areas now non-party to the 1993 Convention, and maximally to facilitate the achievement of the aim of conservation and optimum utilization of the SBT stock. Thus, the experimental fishing programme is essential to that aim, and that aim in the end is the very objective that the Law of the Sea Convention exhorts States to accomplish through regional or species-specific agreements.

Mr President, honourable Judges, I would like now to conclude by pleading this august Tribunal to assist Australia, New Zealand and Japan not to prolong the current lack of consensus and not to accelerate confrontation under the 1993 Convention. Rather I implore the Tribunal to assist the three parties in facilitating cooperation among them and in renewing a constructive dialogue over a lasting solution. Such negotiations will best promote the objectives of the Law of the Sea Convention itself and certainly enhance the prestige and vital role this august Tribunal could and should deserve. Past is the prologue to future. Let the past difficulties turn to future happiness!

Mr President, honourable Judges, this concludes my presentation and that of Japan. Thank you very much.

THE PRESIDENT: I thank Professor Ando and the rest of the Japanese representation for the submissions.

That brings us to the end of the business for today. As agreed, the second round of submissions will be held tomorrow morning. The session will start at 9.30, and each party will have one and a half hours for its summing up and final submissions.

The sitting is closed.

(*The Tribunal rose at 3.55 p.m.*)