

# The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea

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## I. INTRODUCTION

On July 30, 1999, Australia and New Zealand (the Applicants) filed requests with the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) at Hamburg, Germany, for the prescription of provisional measures in respect of their dispute with Japan concerning southern bluefin tuna (SBT), *thunnus maccoyii*.<sup>1</sup> The dispute related to the conservation of SBT and, in particular, the “experimental fishing program” (EFP) that Japan was undertaking at that time without an agreement with Australia or New Zealand, who, along with Japan, were parties to the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT).<sup>2</sup> The requests were made pursuant to Article

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1. See ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan) 32 I.L.M. 1624 (Provisional Measures Order of Aug. 27, 1999) [hereinafter SBT Order], available at (visited June 10, 2000) <<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>>.

2. See *id.* ¶¶ 28-29; Convention for the Conservation of Bluefin Tuna, May 10, 1993, Austl.-N.Z.-Japan, reprinted in DIVISION FOR OCEAN AFFAIRS & THE LAW OF THE SEA, U.N. OFFICE OF LEGAL AFFAIRS, LAW OF THE SEA BULLETIN No. 26, OCT. 1994, at 57 [hereinafter CCSBT]. The CCSBT was the only legal framework in force at the regional level specifically providing for the conservation and management of SBT. For a discussion of the “experimental fishing program,” see *infra* Part II.

290(5) of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>3</sup> In the *Southern Bluefin Tuna Cases*, the Tribunal held hearings on August 18-20, 1999, and issued an order on August 27.<sup>4</sup>

The Applicants brought their requests to the Tribunal two weeks after they had decided to submit their disputes pursuant to the arbitration procedure of Annex VII of UNCLOS.<sup>5</sup> While Japan insisted on continuing with the dispute settlement procedures under the CCSBT, which does not contain a compulsory procedure, the Applicants invoked compulsory procedures contained in Part XV, section 2 of UNCLOS, and submitted the dispute to an Annex VII arbitral tribunal.<sup>6</sup> Under paragraph 3 of UNCLOS Article 287, Japan was obliged to accept the arbitration procedure because none of the three states had accepted any particular procedure for dispute settlement under that article.<sup>7</sup>

The Applicants immediately appointed Sir Kenneth Keith as one of the five members of the arbitral tribunal, while Japan appointed Professor Chusei Yamada as another member in September. Upon the prescription of provisional measures by ITLOS, the three parties began consultations leading to the appointment of Stephen Schwebel (USA) as President of the arbitral tribunal, and Florentino Feliciano (Philippines) and Per Tresselt (Norway) as members. At the time of the hearings before the Tribunal, Japan raised an interesting theoretical question concerning possible jurisdiction of the International Court of Justice (ICJ). The agent for Japan referred to Article 282 of UNCLOS, which provides, in essence, that if the parties to a dispute have agreed, through an agreement “*or otherwise*, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in [Part XV].”<sup>8</sup> The agent quoted from an article written by Judge Treves of the Tribunal, which read:

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3. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 290(5), U.N. Doc. A/CONF.62/122, 21 I.L.M. 1245, 1261 (1982) [hereinafter UNCLOS]; *see also* SBT Order, *supra* note 1, ¶¶ 37-39.

4. *See* SBT Order, *supra* note 1, ¶ 23.

5. *See id.* ¶¶ 28-29. Australia and New Zealand sent notification to Japan on July 15, 1999. *See id.*

6. *See id.* ¶¶ 46, 54; UNCLOS, *supra* note 3, pt. XV, § 2.

7. *See* SBT Order, *supra* note 1, at 2-3; UNCLOS, *supra* note 3, art. 287, ¶ 3.

8. UNCLOS, *supra* note 3, art. 282 (emphasis added); ITLOS, *Southern Bluefin Tuna Cases* (N.Z. v. Japan), Summary of the Position of the Government of Japan Concerning Jurisdictional Issues Implicated in the Dispute Concerning Southern Bluefin Tuna, at 3 (Aug. 18, 1999) [hereinafter Summary of Japan's Position] (on file with the *Tulane Environmental Law Journal*).

[P]rior agreements entrusting compulsory jurisdiction to a body different from the Tribunal shall prevail over the competence of the Tribunal established through the mechanism of article 287. These agreements would seem to include acceptance of the compulsory jurisdiction of the ICJ as between couples of parties having made the declaration under article 36, para. 2, of the Court's Statute.<sup>9</sup>

Japan, Australia, and New Zealand (collectively, the Parties) have accepted the compulsory jurisdiction of the ICJ through such a declaration.<sup>10</sup> The question therefore is how ITLOS should interpret Article 282 in the context of the present case. The question has been left unanswered, but it may well be raised in the context of a future dispute.

The provisional measures the Applicants requested from ITLOS were pending the formation of an arbitral tribunal under that procedure.<sup>11</sup> They requested the Tribunal to prescribe:

- (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 . . . , 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.<sup>12</sup>

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9. Summary of Japan's Position, *supra* note 8, at 3 (quoting Tullio Treves, *The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 421, 438 (1995)). This interpretation of the words "or otherwise" in Article 282 is also supported by commentators on the Law of the Sea Convention. See CENTER FOR OCEANS LAW AND POLICY, U. VA., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1992: A COMMENTARY, vol. 5, ¶ 282.3 (Shabtai Rosenne & Louis Sohn eds., 1989).

10. See Summary of Japan's Position, *supra* note 8, at 4 (arguing that "prior accession to the jurisdiction of the ICJ confers jurisdiction over this dispute on the ICJ"); see also ITLOS, Southern Bluefin Tuna Cases (Austl. v. Japan; N.Z. v. Japan), Response of the Government of Japan to Request for Provisional Measures & Counter-Request for Provisional Measures, ¶ 58 (Aug. 6, 1999) [hereinafter Japan's Response] (citing Article 16 of the CCSBT, which refers disputes to arbitration or to the ICJ) (on file with the *Tulane Environmental Law Journal*).

11. See SBT Order, *supra* note 1, ¶ 30.

12. *Id.* ¶¶ 31(1)-(5), 32(1)-(5).

In its order of August 27, 1999, responding to the Applicants' request for provisional measures, the Tribunal prescribed the following provisional measures pending a final decision of the Annex VII arbitral tribunal:

- (a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;
- (b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;
- (c) Australia, Japan and New Zealand ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;
- (d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of [SBT], except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);
- (e) [the three States] should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of [SBT]; and
- (f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for [SBT], with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.<sup>13</sup>

## II. FACTUAL BACKGROUND

Based on written materials submitted and statements made by the Parties before the Tribunal, the relevant facts about the *Southern Bluefin Tuna Cases* may be summarized as follows.

SBT is a highly migratory species, included in the list of such species in Annex I of UNCLOS.<sup>14</sup> It is considered to be a single stock,<sup>15</sup> distributed widely across the oceans in the Southern

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13. *Id.* ¶ 90(1)(a)-(f) (votes of the Tribunal omitted).

14. *See* UNCLOS, *supra* note 3, Annex I.

15. A "stock" is a group of individuals that can be identified as a unique unit for the purposes of fishery management.

Hemisphere.<sup>16</sup> The only spawning ground for SBT is located in an area south of Java, Indonesia.<sup>17</sup> Juveniles (SBT less than one year old) migrate south along the Australian coast and develop in the southern coastal waters of Australia.<sup>18</sup> As they mature, they migrate along circumpolar areas throughout the Pacific, Indian, and Atlantic Oceans.<sup>19</sup> There is some dispute about the age of maturity of SBT: Japanese scientists tend to believe that SBT mature in eight years, while Australian scientists tend to believe that the age of maturity is not reached until at least the twelfth year.<sup>20</sup> This disagreement has become the source of one of the crucial disputes regarding the possible recent recovery of the SBT stock, as shall be discussed further.

Japanese SBT fishing started in the 1950s with longlines, and the Australians joined soon thereafter, mainly catching juveniles by net in coastal waters.<sup>21</sup> The catch expanded rapidly and the global catch peaked in 1961 at more than 81,000 tonnes (metric tons).<sup>22</sup> The Japanese catch then started to decline sharply, while the Australian industry developed steadily in the 1960s and through the early 1980s.<sup>23</sup>

In 1982, New Zealand, which was then developing its own industry, joined the informal efforts of Australia and Japan to cooperate in the conservation and utilization of SBT.<sup>24</sup> In 1985, the Parties concluded an informal agreement that set an annual total allowable catch (TAC) together with national allocations.<sup>25</sup> This type of negotiation continued until 1989.<sup>26</sup> The initial TAC for 1985 was 38,650 tonnes, with quotas of 23,150, 14,500, and 1,000 tonnes

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16. See ITLOS, Southern Bluefin Tuna Cases (Austl. v. Japan), Statement of Claim and Grounds on Which it is Based, ¶ 3 (July 15, 1999) [hereinafter Australia's Statement of Claim] (on file with the *Tulane Environmental Law Journal*); ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan), Statement of Claim and Grounds on Which it is Based, ¶ 3 (July 15, 1999) [hereinafter New Zealand's Statement of Claim] (on file with the *Tulane Environmental Law Journal*).

17. See Australia's Statement of Claim, *supra* note 16, ¶ 4; New Zealand's Statement of Claim, *supra* note 16, ¶ 4.

18. See Australia's Statement of Claim, *supra* note 16, ¶ 4; New Zealand's Statement of Claim, *supra* note 16, ¶ 4.

19. See Australia's Statement of Claim, *supra* note 16, ¶ 4; New Zealand's Statement of Claim, *supra* note 16, ¶ 4.

20. See Australia's Statement of Claim, *supra* note 16, ¶ 5; Japan's Response, *supra* note 10, pt. II, vol. 1, Annex 2, ¶¶ 47-48 (statement of Douglas S. Butterworth); see also New Zealand's Statement of Claim, *supra* note 16, ¶ 5 (noting the uncertainty but not expressing or adopting an opinion on the issue).

21. See Japan's Response, *supra* note 10, ¶ 7.

22. See Australia's Statement of Claim, *supra* note 16, ¶ 6; New Zealand's Statement of Claim, *supra* note 16, ¶ 6.

23. See Japan's Response, *supra* note 10, ¶ 7.

24. See *id.* ¶ 8.

25. See *id.*

26. See *id.*

allocated to Japan, Australia, and New Zealand, respectively.<sup>27</sup> After progressive reductions each year, the 1989 TAC was set at 11,750 tonnes, with quotas of 6,065, 5,265, and 420 tonnes, respectively for the three countries.<sup>28</sup> The TAC has remained unchanged since 1989.<sup>29</sup>

In 1994, this informal tripartite arrangement became formalized in the CCSBT.<sup>30</sup> The CCSBT established a Commission for the Conservation of Southern Bluefin Tuna (the Commission), consisting of representatives from all parties to the CCSBT, and entrusted it with the conservation, management, and optimum utilization of SBT, including the establishment of a TAC and its allocation among the Parties.<sup>31</sup> Commission decisions are made by a unanimous vote of the parties present.<sup>32</sup> The CCSBT also established a scientific committee, which makes recommendations “to the Commission *by consensus* on matters concerning the conservation, management and optimum utilization of [SBT].”<sup>33</sup>

Upon being convened, the Commission set 2020 as the target year for achieving its long-term management goal of recovering the SBT spawning stock biomass to the level of 1980.<sup>34</sup> The Commission set this level as its goal because its research indicated that the stock would be self-sustaining at that level without the need to return to the 1960 biomass level.<sup>35</sup>

The Commission thus set the TAC for 1994 at 11,750 tonnes, with allocations of the same amounts as those for 1989 to the three Parties.<sup>36</sup> The same TAC and quotas were adopted for each year through 1997.<sup>37</sup> No agreement, however, was reached regarding the TACs for 1998 and 1999 and the Parties adopted different approaches to allocations following the end of 1997.<sup>38</sup> The Applicants have continued to operate under the 1997 TAC allocations because they believe that “[i]n the absence of a decision by the Commission setting a TAC, there has been acceptance by the parties to continue to adhere to previously agreed

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27. See *id.* pt. II, vol. 1, Annex 3, ¶ 12 (declaration of Dr. Sachiko Tsuji).

28. See *id.*

29. See Australia’s Statement of Claim, *supra* note 16, ¶ 10 (noting that, although the Commission has set the TAC each year since 1994, the TAC has remained the same since 1989); New Zealand’s Statement of Claim, *supra* note 16, ¶ 10 (same).

30. See CCSBT, *supra* note 2; see also Japan’s Response, *supra* note 10, ¶ 10.

31. See CCSBT, *supra* note 2, arts. 6-8.

32. See *id.* art. 7.

33. *Id.* arts. 9(1), (2)(d) (emphasis added).

34. See Japan’s Response, *supra* note 10, ¶ 11.

35. See *id.*

36. See *id.* ¶ 12.

37. See *id.*

38. See *id.*

quota levels.”<sup>39</sup> Japan, however, disagrees, taking the view that because TAC and quotas must be set by consensus, no party can be subject to a quota to which it did not consent.<sup>40</sup>

The disagreement on TAC is due to the difference in the assessments of the SBT stock in the last few years. Japan is convinced, based on available data, that “the stock is recovering from historic lows,” thus, the Commission could increase the TAC and quotas while still meeting its management objectives.<sup>41</sup> On the other hand, the Applicants believe that catch restraint is still necessary to allow the stock to recover; as estimates of parental stock levels continue to decline, the precautionary principle would, therefore, dictate restraint.<sup>42</sup> Accordingly, New Zealand has sought to decrease the TAC.<sup>43</sup>

In response to these divergent assessments, the Parties began discussions on the concept of an experimental fishing program (EFP) with a view towards enhancing their understanding of SBT and reducing the uncertainty regarding the current state of the stock.<sup>44</sup> In May 1996, the Commission adopted “objectives and principles for the design and implementation” (the *Objectives and Principles*) of such a program.<sup>45</sup> The *Objectives and Principles* recognize that that experimental fishing would be a measure to improve the quality and quantity of the scientific information regarding the SBT stock.<sup>46</sup> However, they require that the development and implementation of the EFP should be a collaborative effort, agreed to by all parties.<sup>47</sup> Furthermore, the EFP program should not jeopardize the Commission’s long-term management objective or undermine any management objectives to which the Parties have agreed.<sup>48</sup>

Since the Commission’s adoption of the *Objectives and Principles*, Japan has made multiple proposals for experimental

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39. Australia’s Statement of Claim, *supra* note 16, ¶ 10; New Zealand’s Statement of Claim, *supra* note 16, ¶ 10.

40. See Japan’s Response, *supra* note 10, ¶ 10.

41. *Id.* ¶ 13.

42. See Australia’s Statement of Claim, *supra* note 16, ¶ 11; New Zealand’s Statement of Claim, *supra* note 16, ¶ 11.

43. See Japan’s Response, *supra* note 10, ¶ 13.

44. See Australia’s Statement of Claim, *supra* note 16, ¶ 12; New Zealand’s Statement of Claim, *supra* note 16, ¶ 12.

45. See *Objectives and Principles for the Design and Implementation of an Experimental Fishing Program*, Comm’n for the Conservation of Southern Bluefin Tuna, 2d Special Meeting, May 3, 1996 [hereinafter *Objectives and Principles*]. For the full text of the *Objectives and Principles*, see Australia’s Statement of Claim, *supra* note 16, Annex 2; New Zealand’s Statement of Claim, *supra* note 16, Annex 3.

46. See *Objectives and Principles*, *supra* note 45, pmb1.

47. See *id.* ¶ 2.

48. See *id.* ¶ 4.

fishing.<sup>49</sup> However, these proposals have been rejected by the Applicants as not in accordance with the Commission's *Objectives and Principles*.<sup>50</sup> Japan conducted a pilot program from July 10 to August 31, 1998, that would be followed by a three-year program, after several rounds of talks between the Parties failed to resolve the differences over the EFP.<sup>51</sup> This program resulted in the taking of 1,464 tonnes of SBT over and above Japan's 1997 allocation of 6,065 tonnes.<sup>52</sup>

Japan explained that one reason for commencing the EFP unilaterally was that neither Australia nor New Zealand was willing to give fair consideration to Japan's proposal for a joint program.<sup>53</sup> Furthermore, due to the lack of an agreed upon TAC at the start of 1998, Australia refused to sign a bilateral fishing agreement that would have allowed Japan to fish for other species in the Australian Exclusive Economic Zone (EEZ) and to visit Australian ports.<sup>54</sup> Australia maintained that the sovereign rights within its EEZ belonged to Australia alone and Japan had no right to take fish without its permission.<sup>55</sup>

In response to Japan's EFP, the Applicants formally requested urgent consultations for the settlement of disputes under the CCSBT.<sup>56</sup> In December 1998, in an effort to resolve the dispute, the Experimental Fishing Program Working Group (the Working Group) was established and directed to report to the Commission with a proposed EFP by April 1999.<sup>57</sup> In addition, a group of independent scientists were appointed to assist the Working Group in developing a joint EFP.<sup>58</sup> If consensus regarding an EFP could not be reached, the Parties were authorized to "invite the independent scientists to play an adjudicating role in completing the Working Group's advice to the Commission."<sup>59</sup>

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49. See Australia's Statement of Claim, *supra* note 16, ¶ 12; New Zealand's Statement of Claim, *supra* note 16, ¶ 12.

50. See Australia's Statement of Claim, *supra* note 16, ¶ 12; New Zealand's Statement of Claim, *supra* note 16, ¶ 12.

51. See Australia's Statement of Claim, *supra* note 16, ¶ 13; New Zealand's Statement of Claim, *supra* note 16, ¶ 13.

52. See Australia's Statement of Claim, *supra* note 16, ¶ 13; New Zealand's Statement of Claim, *supra* note 16, ¶ 13.

53. See Japan's Response, *supra* note 10, ¶ 17.

54. See *id.*

55. ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Aug. 20, 1999, Public Sitting for Hearings on Requests for Provisional Measures, at 7, ll. 20-22, ITLOS/PV.99/24 [hereinafter Aug. 20 Public Sitting] (on file with the *Tulane Environmental Law Journal*).

56. See Australia's Statement of Claim, *supra* note 16, ¶ 14; New Zealand's Statement of Claim, *supra* note 16, ¶ 14.

57. See Japan's Response, *supra* note 10, ¶ 24.

58. See *id.*

59. *Id.*

The Working Group met several times between February and May 1999.<sup>60</sup> No agreement, however, was reached before June 1, when the Japanese EFP for the year was scheduled to start.<sup>61</sup> After the final proposal was rejected, Japan went ahead with its program for 1999.<sup>62</sup>

### III. DISPUTE SETTLEMENT EFFORTS UP TO THE ITLOS PROCEEDINGS

On August 31, 1998, the Applicants sent separate but nearly identical diplomatic notes to Japan, notifying Japan of the existence of a dispute over its 1998 unilateral EFP.<sup>63</sup> The notices stated that, in conducting the EFP, Japan breached its “obligations under international law, in particular its obligations under the (a) [CCSBT]; (b) UNCLOS; and (c) customary international law, including the precautionary principle.”<sup>64</sup> The Applicants requested that urgent consultations be held under Article 16(1) of the CCSBT.<sup>65</sup>

The first round of consultations among the Parties was held on November 9, 1998, where they agreed to hold negotiations under the CCSBT.<sup>66</sup> The negotiations started in December.<sup>67</sup> According to the Applicants, towards the end of May 1999, they were separately advised by Japan that it would recommence fishing “on its own terms” on June 1, unless they accepted its proposal for a joint EFP.<sup>68</sup> Both governments rejected the Japanese proposal.<sup>69</sup> Subsequently, the two governments separately wrote to Japan formally requesting it not to

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60. See Australia’s Statement of Claim, *supra* note 16, ¶ 22; New Zealand’s Statement of Claim, *supra* note 16, ¶ 22.

61. See Australia’s Statement of Claim, *supra* note 16, ¶ 22; New Zealand’s Statement of Claim, *supra* note 16, ¶ 22.

62. See Japan’s Response, *supra* note 10, ¶ 26.

63. See Australia’s Statement of Claim, *supra* note 16, ¶ 18; New Zealand’s Statement of Claim, *supra* note 16, ¶ 18. For the full text of the Applicants’ notes, see Australia’s Statement of Claim, *supra* note 16, Annex 3; New Zealand’s Statement of Claim, *supra* note 16, Annex 4.

64. Australia’s Statement of Claim, *supra* note 16, ¶ 18; New Zealand’s Statement of Claim, *supra* note 16, ¶ 18.

65. See Australia’s Statement of Claim, *supra* note 16, ¶ 18; New Zealand’s Statement of Claim, *supra* note 16, ¶ 18. The specific provision provides, “If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.” CCSBT, *supra* note 2, art. 16(1).

66. See Australia’s Statement of Claim, *supra* note 16, ¶ 20; New Zealand’s Statement of Claim, *supra* note 16, ¶ 20.

67. See Australia’s Statement of Claim, *supra* note 16, ¶ 21; New Zealand’s Statement of Claim, *supra* note 16, ¶ 21.

68. Australia’s Statement of Claim, *supra* note 16, ¶ 22; New Zealand’s Statement of Claim, *supra* note 16, ¶ 22.

69. See Australia’s Statement of Claim, *supra* note 16, ¶ 22; New Zealand’s Statement of Claim, *supra* note 16, ¶ 22.

resume unilateral fishing, as well as expressing the view that such fishing would be contrary to Japan's obligations under international law and would expand the scope of the ongoing dispute.<sup>70</sup> The Applicants also informed Japan that if it recommenced its EFP, they would regard it as a unilateral termination by Japan of the negotiations under Article 16(1) of the CCSBT.<sup>71</sup>

Japan advised Australia and New Zealand, on June 1 and 4 respectively, that it would recommence experimental fishing on June 1 as scheduled.<sup>72</sup> Japan also indicated that it was willing to adjust its experimental fishing catch once consensus was reached on quotas.<sup>73</sup> The Applicants responded by informing Japan that its decision had unilaterally terminated the Article 16(1) negotiations.<sup>74</sup>

Upon receipt of Japan's views on continuation of the dispute resolution process in accordance with the CCSBT, the Applicants restated their view that the dispute involved Japan's obligations under UNCLOS, as well as under the CCSBT.<sup>75</sup> The Applicants considered the exchange of views that had occurred thus far to be sufficient for purposes of Article 283(1) of UNCLOS, which requires expeditious exchange of views on the settlement of a new dispute.<sup>76</sup> The notes further stated that the compulsory dispute settlement procedures under UNCLOS would be the most appropriate and efficient means of resolving the dispute.<sup>77</sup>

Japan then proposed to refer the dispute to mediation under the CCSBT.<sup>78</sup> The Applicants agreed to accept this proposal if "Japan agreed to cease its unilateral experimental fishing" by July 5, and if "the mediation was conducted on a reasonably expeditious

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70. See Australia's Statement of Claim, *supra* note 16, ¶ 23; New Zealand's Statement of Claim, *supra* note 16, ¶ 23.

71. See Australia's Statement of Claim, *supra* note 16, ¶ 23; New Zealand's Statement of Claim, *supra* note 16, ¶ 23.

72. See Australia's Statement of Claim, *supra* note 16, ¶ 24; New Zealand's Statement of Claim, *supra* note 16, ¶ 24.

73. See Australia's Statement of Claim, *supra* note 16, ¶ 24; New Zealand's Statement of Claim, *supra* note 16, ¶ 24.

74. See Australia's Statement of Claim, *supra* note 16, ¶ 25; New Zealand's Statement of Claim, *supra* note 16, ¶ 25.

75. See Australia's Statement of Claim, *supra* note 16, ¶ 28; New Zealand's Statement of Claim, *supra* note 16, ¶ 28.

76. See Australia's Statement of Claim, *supra* note 16, ¶ 28; New Zealand's Statement of Claim, *supra* note 16, ¶ 28; see also UNCLOS, *supra* note 3, art. 283(1).

77. See Australia's Statement of Claim, *supra* note 16, ¶¶ 28-29; New Zealand's Statement of Claim, *supra* note 16, ¶¶ 28-29.

78. See Australia's Statement of Claim, *supra* note 16, ¶ 30; New Zealand's Statement of Claim, *supra* note 16, ¶ 30.

timetable.”<sup>79</sup> These conditions were not acceptable to Japan, which maintained that the matter of its EFP could be addressed through mediation and negotiations as provided for in the CCSBT.<sup>80</sup> On July 14, Japan proposed that it was ready to have the dispute resolved by arbitration pursuant to Article 16(2) of the CCSBT, and further suggested that a mechanism be established simultaneously to resume consultations on a joint EFP.<sup>81</sup>

On July 15, the Applicants informed Japan of their views that its position “amounted to a rejection of [their] conditional acceptance of mediation and stated that [they] could not accept mediation on the basis proposed by Japan.”<sup>82</sup> They also indicated that they planned to institute compulsory dispute resolution proceedings under UNCLOS.<sup>83</sup> The dispute would be referred to arbitration under Annex VII and a request would be made to ITLOS for provisional measures under Article 290(5).<sup>84</sup> The process began when the Applicants transmitted to Japan their separate but nearly identical Statements of Claim.<sup>85</sup>

In their statements, the Applicants requested the Annex VII arbitral tribunal to order and declare:

- (1) That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS in relation to the conservation and management of the SBT stock, including by:
  - (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the SBT stock to levels which can produce the maximum sustainable yield, as required by Article 119 of UNCLOS and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals;
  - (b) carrying out unilateral experimental fishing in 1998 and 1999 which has or will result in SBT being taken by Japan over and above previously agreed Commission national allocations;
  - (c) taking unilateral action contrary to the rights and interests of Australia [and New Zealand] as [coastal states] as recognised in

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79. Australia’s Statement of Claim, *supra* note 16, ¶ 31; New Zealand’s Statement of Claim, *supra* note 16, ¶ 31.

80. See Australia’s Statement of Claim, *supra* note 16, ¶ 32; New Zealand’s Statement of Claim, *supra* note 16, ¶ 32.

81. See Australia’s Statement of Claim, *supra* note 16, ¶ 34; New Zealand’s Statement of Claim, *supra* note 16, ¶ 34.

82. Australia’s Statement of Claim, *supra* note 16, ¶ 35; New Zealand’s Statement of Claim, *supra* note 16, ¶ 35.

83. See Australia’s Statement of Claim, *supra* note 16, ¶ 35; New Zealand’s Statement of Claim, *supra* note 16, ¶ 35.

84. See Australia’s Statement of Claim, *supra* note 16, ¶ 35; New Zealand’s Statement of Claim, *supra* note 16, ¶ 35.

85. See Australia’s Statement of Claim, *supra* note 16; New Zealand’s Statement of Claim, *supra* note 16.

Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian [and New Zealand] fishermen contrary to Article 119(3);  
(d) failing in good faith to co-operate with Australia [and New Zealand] with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS; and  
(e) otherwise failing in its obligations under UNCLOS in respect of the conservation and management of SBT, having regard to the requirements of the precautionary principle.

- (2) That, as a consequence of the aforesaid breaches of UNCLOS, Japan shall:
- (a) refrain from authorising or conducting any further experimental fishing for SBT without the agreement of Australia and New Zealand;
  - (b) negotiate and co-operate in good faith with Australia [and New Zealand], including through the Commission, with a view to agreeing future conservation measures and TAC for SBT necessary for maintaining and restoring the SBT stock to levels which can produce the maximum sustainable yield;
  - (c) ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT by Japan above the amount of the previous national allocation for Japan agreed with Australia and New Zealand until such time as agreement is reached with those States on an alternative level of catch; and
  - (d) restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction of such catch for the current year by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.
- (3) That Japan pay Australia's [and New Zealand's] costs of the proceedings.<sup>86</sup>

Further, in their statements, the governments of Australia and New Zealand reserved their right to seek provisional measures in accordance with Article 290 of UNCLOS.<sup>87</sup> On July 15, 1999, they requested several alternative responses from Japan in their notification.<sup>88</sup> Japan could either agree to "certain provisional measures with respect to the disputes pending the constitution of the arbitral tribunal or agree that the question of provisional measures be forthwith submitted to [ITLOS]."<sup>89</sup> If Japan did not so agree within two weeks, the governments reserved the right to request that ITLOS

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86. See Australia's Statement of Claim, *supra* note 16, ¶ 69; New Zealand's Statement of Claim, *supra* note 16, ¶ 69.

87. See Australia's Statement of Claim, *supra* note 16, ¶ 70; New Zealand's Statement of Claim, *supra* note 16, ¶ 70; see also UNCLOS, *supra* note 3, art. 290.

88. See SBT Order, *supra* note 1, ¶ 30.

89. *Id.* ¶ 30.

prescribe provisional measures.<sup>90</sup> Since Japan had denied the request, the Applicants submitted their “Requests for Provisional Measures,” with almost identical contents, to ITLOS on July 30, 1999.<sup>91</sup>

#### IV. ITLOS PROCEEDINGS: MAIN ISSUES AND DECISIONS

The Requests for Provisional Measures were made pursuant to Article 290(5) of UNCLOS.<sup>92</sup> Pending the formation of an arbitral tribunal, ITLOS may prescribe provisional measures in accordance with Article 290 “if it considers that *prima facie* the [Annex VII] tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.”<sup>93</sup> Article 290 further provides that, pending a final decision, a tribunal may prescribe provisional measures which it considers appropriate to preserve the rights of the parties or to prevent serious harm to the marine environment.<sup>94</sup>

Because ITLOS did not include any judge from Australia or New Zealand, as parties with the same interest in this dispute, the two states jointly nominated Professor Ivan Shearer as their Judge *ad hoc* pursuant to Article 17 of the Statute of the Tribunal.<sup>95</sup> ITLOS also joined the proceedings in the two cases, and the Tribunal President informed Japan that it may file a single Statement of Response, which Japan did on August 9, 1999.<sup>96</sup> The hearings were thereafter conducted from August 18 to 20.<sup>97</sup>

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90. *See id.*

91. *See* ITLOS, Southern Bluefin Tuna Cases (Austl. v. Japan), Request for Provisional Measures (July 30, 1999) [hereinafter Australia’s Request for Provisional Measures] (on file with the *Tulane Environmental Law Journal*); ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan), Request for Provisional Measures, ¶ 22 (July 30, 1999) [hereinafter New Zealand’s Request for Provisional Measures] (on file with the *Tulane Environmental Law Journal*).

92. *See* UNCLOS, *supra* note 3, art. 290(5).

93. *Id.* (emphasis in original).

94. *See id.* art. 290(1).

95. *See* SBT Order, *supra* note 1, ¶¶ 10-11; UNCLOS, *supra* note 3, Annex VI, art. 17.

96. *See* SBT Order, *supra* note 1, ¶¶ 17-18.

97. *See* ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Public Sitting for Hearings on Requests for Provisional Measures, Aug. 18, 1999, at 10:00 a.m., ITLOS/PV.99/20 [hereinafter Aug. 18 Public Sitting at 10 a.m.] (on file with the *Tulane Environmental Law Journal*); ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Public Sitting for Hearings on Requests for Provisional Measures, Aug. 18, 1999, at 3:00 p.m., ITLOS/PV.99/21 [hereinafter Aug. 18 Public Sitting at 3 p.m.] (on file with the *Tulane Environmental Law Journal*); ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Public Sitting for Hearings on Requests for Provisional Measures, Aug. 19, 1999, at 10:00 a.m., ITLOS/PV.99/22 (on file with the *Tulane Environmental Law Journal*); ITLOS, Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Public Sitting for Hearings on Requests for Provisional Measures, Aug. 19, 1999, at 3:00 p.m., ITLOS/PV.99/23 [hereinafter Aug. 19 Public Sitting at 3 p.m.] (on file with the *Tulane Environmental Law Journal*); Aug. 20 Public Sitting, *supra* note 55.

A number of issues, both procedural and substantive in nature, were raised by the parties in their Statements of Claim, as well as during the oral proceedings. The main arguments are summarized below, along with the opinions of the Tribunal and its members where appropriate.

*A. Issues Relating to the Jurisdiction of the Tribunal*

The Applicants filed their Requests for Provisional Measures with ITLOS, pursuant to Article 290(5) of UNCLOS, on the assumption that the Annex VII arbitral tribunal to which the dispute was submitted would *prima facie* have jurisdiction.<sup>98</sup> The Applicants argued that the dispute concerned the interpretation and application of UNCLOS and therefore the arbitral tribunal had jurisdiction over the case pursuant to Article 287(3).<sup>99</sup> The nature of the dispute was, however, one of the crucial issues on which the positions of the Applicants and Japan were diametrically opposed, as will be discussed below.

The Applicants argued that, by conducting unilateral experi-mental fishing, Japan

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, 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.<sup>100</sup>

Japan, of course, rejected this argument, stating that the dispute, which arose under the CCSBT, did not involve the interpretation or application of UNCLOS and therefore the Annex VII arbitral tribunal did not have jurisdiction.<sup>101</sup> Instead, Japan insisted that the “case involve[d] nothing more than a disagreement about a matter of science,” i.e., the proper method for assessing the SBT stock and the formulation of an EFP that would further such an assessment and contribute necessary scientific data.<sup>102</sup> Regarding the application of UNCLOS, Japan further argued that Article 64 “prescribes no specific

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98. See Australia’s Request for Provisional Measures, *supra* note 91, ¶ 22; New Zealand’s Request for Provisional Measures, *supra* note 91, ¶ 22; see also UNCLOS, *supra* note 3, art. 290(5).

99. See Australia’s Request for Provisional Measures, *supra* note 91, ¶¶ 24-25; New Zealand’s Request for Provisional Measures, *supra* note 91, ¶¶ 24-25; UNCLOS, *supra* note 3, art. 287, ¶ 3.

100. See Australia’s Statement of Claim, *supra* note 16, ¶ 37; New Zealand’s Statement of Claim, *supra* note 16, ¶ 37.

101. See Japan’s Response, *supra* note 10, ¶¶ 29-30.

102. *Id.* ¶ 44.

principles of conservation or concrete conservation measures,” nor does it list the principal factors to be considered in deciding on such measures.<sup>103</sup> Likewise, Articles 116-119 do not “establish any specific cooperation requirements for conservation.”<sup>104</sup> Finally, Japan disputed the incorporation of the precautionary principle in UNCLOS and its status as a “rule of customary international law.”<sup>105</sup> As a supplementary argument, Japan stated that the Applicants had not met the procedural requirements, specified in Article 286, for establishing jurisdiction under Part XV, section 2, of UNCLOS, because they had not fully exhausted opportunities for amicable settlement procedures as prescribed by section 1 of that Part.<sup>106</sup> In addition, Japan contended that, even if the dispute were regarded as one under UNCLOS, the Annex VII arbitral tribunal and ITLOS would have no jurisdiction because the Applicants “had failed to discharge their obligation to exchange views under article 283.”<sup>107</sup> According to Japan, this failure is evident from the lack of consultations between the parties regarding the interpretation or application of UNCLOS.<sup>108</sup>

At the hearing, Bill Mansfield, counsel for New Zealand, expounded the Applicants’ case concerning jurisdiction.<sup>109</sup> He stressed that UNCLOS “creates an overarching regime” establishing

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103. *Id.* ¶ 54.

104. *Id.* ¶¶ 53-54.

105. *Id.* ¶ 55. In order to corroborate its arguments concerning jurisdiction, Japan submitted two legal memoranda, one prepared by Professor William Burke of the University of Washington, and the other prepared by a group of five Japanese professors of international law. *See id.* pt. II, vol. 1, Annexes 5-6. Professor Burke states that “the dispute is in essence over differences about the implementation of the provisions of the [CCSBT] and not about disputed obligations under UNCLOS or any other agreement or alleged principle of law.” *Id.* pt. II, vol. 1, Annex 5, at 2. In his view, the dispute was not over the failure to adopt conservation measures or a failure to cooperate, as provided in UNCLOS, but over the parties’ differences regarding measures taken under the CCSBT. *See id.* pt. II, vol. 1, Annex 5, at 2-3. The Applicants have sought to transform the dispute from a specific disagreement over a specific fishing program under another agreement into a dispute over the very general obligations expressed in UNCLOS. *See id.* pt. II, vol. 1, Annex 5, at 3. The second memorandum, signed by Professors Takane Sugihara, Moritaka Hayashi, Shigeki Sakamoto, Atsuko Kanehara, and Akira Takada, stressed that the dispute concerned the consistency of Japan’s experimental fishing with its obligations under the CCSBT, and not under UNCLOS. *See id.* pt. II, vol. 1, Annex 6, at 1. UNCLOS does not contain substantial and concrete obligations as the Applicants point out; such specific rules and elements to be considered are to be decided within the framework of species-specific or regional agreements, such as the CCSBT. *See id.* pt. II, vol. 1, Annex 6, at 1-2. The memorandum further points out that the UNCLOS provisions cited by the Applicants are in sharp contrast with those relating to the protection of the marine environment, which repeatedly refer to “international rules, standards and recommended practices and procedures.” *Id.* pt. II, vol. 1, Annex 6, at 2 (citing UNCLOS Articles 207, 208, 210, 211, 212, 221, and 235).

106. *See id.* ¶ 56.

107. *Id.* ¶ 74.

108. *See id.* ¶¶ 74-82.

109. *See* Aug. 18 Public Sitting at 10 a.m., *supra* note 97, at 24-30.

fundamental obligations, including substantive legal obligations for state parties, while envisaging the development of detailed measures to give effect to its provisions.<sup>110</sup> In essence, the Applicants argued that the CCSBT was intended only to give effect to the relevant obligations under UNCLOS, not to replace them.<sup>111</sup> Thus, the UNCLOS obligations have primacy over those created under organizations, such as the CCSBT, which are of a subsidiary nature.<sup>112</sup> Mr. Mansfield emphasized that the same relationship also applies to procedural rights and obligations.<sup>113</sup> In this case, the procedural rights and obligations created under the CCSBT, such as those regarding dispute settlement, in no way exclude or override the procedural rights and obligations of the parties under Part XV of UNCLOS.<sup>114</sup> Mr. Mansfield further pointed out that if this was not the case, a state party to UNCLOS would be able to circumvent its compulsory dispute settlement provisions simply by joining a regional organization whose dispute settlement system does not contain a compulsory binding procedure.<sup>115</sup>

With regard to Japan's second argument concerning procedural requirements, Mr. Mansfield explained that the Applicants were engaged in consultations under Article 16 of the CCSBT with a genuine hope that the dispute might be settled through that process.<sup>116</sup> However, it was made clear to the Applicants that no settlement would be possible through the process because of "the nature and manner of the ultimatum delivered by Japan" at the end of May 1999, Japan's insistence on recommencing its unilateral EFP on June 1, and "its steadfast refusal to cease this program to enable further efforts to resolve the dispute".<sup>117</sup>

On the third point raised by Japan, regarding the jurisdiction of the arbitral tribunal, William Campbell, the agent for Australia, pointed out at the hearing on August 18, 1999, that the various exchanges with Japan established that the dispute concerned "fundamental conservation obligations under UNCLOS."<sup>118</sup> These exchanges included the notification, by the Applicants on August 31, 1998, of the

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110. *Id.* at 25, 11.32-33.

111. *See id.* at 25, 11.46-49 ("[E]ven though UNCLOS envisages that some of the most important obligations it establishes should be discharged through appropriate subsidiary organisations the obligations themselves remain . . . . They are not excluded, diluted, or modified . . . by the creation of such organisations.").

112. *See id.* at 26.

113. *See id.* at 27.

114. *See id.*

115. *See id.*

116. *See id.* at 28.

117. *Id.* at 28, 11.29-31.

118. *Id.* at 21, 1.41.

existence of a dispute.<sup>119</sup> This notification specifically referenced Japan's "obligations under the [CCSBT], UNCLOS and customary international law, including the precautionary principle."<sup>120</sup> Furthermore, in the December 1998 negotiations, the Applicants made statements referring expressly to Articles 64 and 116-118 of UNCLOS.<sup>121</sup>

In its order of August 27, 1999, ITLOS considered the issues relating to jurisdiction. The Tribunal took the view that, contrary to Japan's argument, the differences between the parties concerned not only matters of science but also points of law.<sup>122</sup> It also pointed out that Articles 64 and 116-119 of UNCLOS require states parties to cooperate, either directly or via appropriate international organizations, to ensure conservation and promote "optimum utilization of highly migratory species."<sup>123</sup> Furthermore, the Tribunal viewed the conduct of the parties to the Commission as a relevant factor in evaluating the extent to which the parties were meeting their obligations.<sup>124</sup> The Tribunal thus concluded that the above-mentioned UNCLOS articles "appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded."<sup>125</sup> The Tribunal added that the applicability of the CCSBT does not preclude the parties from utilizing the compulsory procedures in UNCLOS.<sup>126</sup>

Despite Japan's contention that the Applicants had not exhausted the amicable dispute settlement procedures under Part XV, section 1, of UNCLOS, the Tribunal accepted the Applicants' statements that negotiations and consultations were held with Japan, presumptively under the CCSBT and UNCLOS.<sup>127</sup> Furthermore, the Tribunal held that "a State Party is not obliged to pursue procedures under Part XV, section 1, of the [CCSBT] when it concludes that the possibilities of settlement have been exhausted."<sup>128</sup> Because the Applicants had stated that the negotiations had been terminated, they had fulfilled the requirements for invoking the procedures under section 2.<sup>129</sup>

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119. *See id.* at 21, 11.43-44.

120. *Id.* at 21, 11.46-48.

121. *See id.* at 22.

122. *See* SBT Order, *supra* note 1, ¶ 43.

123. *Id.* ¶ 48.

124. *See id.* ¶¶ 48, 50.

125. *Id.* ¶ 52.

126. *See id.* ¶ 55.

127. *See id.* ¶¶ 56-57.

128. *Id.* ¶ 60.

129. *See id.* ¶ 61.

Accordingly, the Tribunal concluded that the Annex VII “arbitral tribunal would *prima facie* have jurisdiction over the disputes.”<sup>130</sup>

*B. Requirements for Prescribing Provisional Measures: Urgency of the Situation and Irreparability of Harm*

As noted above, pursuant to UNCLOS Article 290(5), ITLOS “may prescribe . . . provisional measures if it considers that *prima facie* the [Annex VII] tribunal . . . would have jurisdiction” over the dispute.<sup>131</sup> In addition, it is necessary for the applicant to show the urgency of the situation.<sup>132</sup>

In the *Southern Bluefin Tuna Cases*, the Applicants considered the situation to be urgent because the SBT stock was at historically low levels and declining parental biomass and low recruitment could exacerbate the situation.<sup>133</sup> Yet, despite of the potential for stock collapse, Japan continued its unilateral EFP and would likely complete its annual SBT fishing operations before an arbitral tribunal could be established.<sup>134</sup> At the hearing, Henry Burmester, counsel for Australia, further elaborated on this point, stressing that the situation was urgent because requiring the Applicants to wait until the arbitral tribunal would be set up (three or more months longer) would mean “harm and prejudice to the preservation of their rights in relation to the existing SBT stock and its proper conservation.”<sup>135</sup>

Japan responded that the Applicants had failed to establish the requisite urgency. It pointed out that the Applicants had “omitted the caution shown by the scientific report they offered and attribute[d] the entire risk of stock and recruitment collapse to the proportionally smaller incremental tonnage involved” in the Japanese EFP.<sup>136</sup> Japan further highlighted the significance of the total increase in catch, which could be principally attributed to fishing by nonparties to the CCSBT.<sup>137</sup> It also pointed out that the scientific testimony had supported the conclusion that the stock was not at imminent risk.<sup>138</sup> Furthermore, since Japan’s 1999 EFP would end on August 31, a few

130. *Id.* ¶ 62 (emphasis in original).

131. UNCLOS, *supra* note 3, art. 290(5) (emphasis in original).

132. *See id.*; *see also* SBT Order, *supra* note 1, ¶ 63.

133. *See* Australia’s Request for Provisional Measures, *supra* note 91, ¶ 20; New Zealand’s Request for Provisional Measures, *supra* note 91, ¶ 20.

134. *See* Australia’s Request for Provisional Measures, *supra* note 91, ¶ 21; New Zealand’s Request for Provisional Measures, *supra* note 91, ¶ 21.

135. Aug. 18 Public Sitting at 3:00 p.m., *supra* note 97, at 27, 11.10-11.

136. Japan’s Response, *supra* note 10, ¶ 94.

137. *See id.* n.33.

138. *See id.* ¶ 95.

days after the expected decision by the Tribunal on provisional measures, terminating the EFP upon an order of the Tribunal would not appreciably reduce the overall 1999 SBT catch—a few hundred tons, at most, might be saved.<sup>139</sup> Japan asserted that such negligible savings would not have a significant impact on the stock when compared to the 16,500 tons of total global catch estimated to occur each year.<sup>140</sup> Japan also pointed out that its 1998 EFP had cast doubt upon the Applicants' modeling assumptions and indicated that the SBT stock could be recovering.<sup>141</sup> Japan contended that the Applicants themselves had realized the more favorable state of the stock, noting that they had advocated a trilateral EFP during the negotiations in early 1999.<sup>142</sup> Lastly, Japan argued that any risk caused by its EFP could not be considered an immediate danger to the stock, as the Applicants were seeking “pay back” in the form of a reduction in Japan's future catch allocations by the amount of fish taken under the EFP.<sup>143</sup> Japan had formally indicated its willingness to “pay back” its EFP catch if the outcome of the dispute settlement procedure indicated that the EFP was indeed a risk to the recovery of the SBT stock.<sup>144</sup>

Furthermore, Japan advanced the argument that the Applicants had not shown the irreparability of any damage that might be caused by the EFP.<sup>145</sup> Such a showing is an essential requirement for the prescription of provisional measures because the “concept [of irreparability] is integral to both the notion of urgency and the need to preserve the rights of the parties.”<sup>146</sup> For Japan, the irreparability requirement in the case at hand could only be satisfied by a showing that the SBT stock was irrecoverable, which it apparently was not given the fact that the stock had been recovering at a faster rate than predicted.<sup>147</sup>

In response to this argument, Mr. Burmester noted at the hearing that UNCLOS Article 290 does not require irreparable harm for the prescription of provisional measures.<sup>148</sup> He further argued that it would be inappropriate to require such a strict standard under UNCLOS, because the scientific evidence regarding fishery resources cannot

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139. *See id.* ¶ 100.

140. *See id.*

141. *See id.* ¶ 105.

142. *See id.*

143. *See id.* ¶ 108.

144. *See id.*

145. *See id.* ¶ 109.

146. *Id.*

147. *See id.* ¶ 112.

148. *See* Aug. 18 Public Sitting at 3:00 p.m., *supra* note 97, at 28.

provide the exactness necessary to show actual irreparable harm.<sup>149</sup> In his view, the “drafters of UNCLOS deliberately chose to give [ITLOS] a broader as well as a more effective provisional measures jurisdiction” than that of the ICJ, which requires the more stringent showing of actual irreparable harm.<sup>150</sup> In response, Japan’s counsel, Professor Ando, replied that irreparable harm or damage was a well-established requirement, “inseparably linked to the very purpose of the institution of provisional measures,” and that the requirement of “urgency” demanded that the irreparable damage be imminent.<sup>151</sup>

On this issue, the Tribunal’s order started with a recital of the urgency requirement, as provided by Article 290(5) of UNCLOS, for prescribing provisional measures pending the constitution of the arbitral tribunal.<sup>152</sup> The Tribunal concluded that “measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the [SBT] stock.”<sup>153</sup> It appears that the Tribunal may have relied heavily on the provision of Article 290(1), which allows a tribunal to “prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.”<sup>154</sup> In fact, that paragraph, unlike paragraph 5, provides that a court or tribunal to which “a dispute has been duly submitted” may prescribe provisional measures, thus apparently excluding ITLOS in cases like the *Southern Bluefin Tuna Cases*.<sup>155</sup> The Tribunal, however, confirmed the application of paragraph 1 to the present case.<sup>156</sup> Although none of the parties had raised the question of the marine environment, the Tribunal noted “that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”<sup>157</sup> It appears that the Tribunal made this point in order to establish a direct linkage between the question of conservation of SBT, which is clearly a living resource of the sea, and the protection and preservation of the marine environment, thereby justifying the application of Article 290(1). As

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149. *See id.* at 25.

150. *Id.*

151. Aug. 19 Public Sitting at 3:00 p.m., *supra* note 97, at 11, 1.28.

152. *See* SBT Order, *supra* note 1, ¶ 63.

153. *Id.* ¶ 80.

154. UNCLOS, *supra* note 3, art. 290(1). The Tribunal’s reasoning is hard to follow since the various factors that it considered were enumerated in short sentences without indication of any causal links between them. *See generally* SBT Order, *supra* note 1, ¶¶ 36-89.

155. UNCLOS, *supra* note 3, art. 290(1) (emphasis added).

156. *See* SBT Order, *supra* note 1, ¶ 67.

157. *Id.* ¶ 70.

further support, the Tribunal noted that the parties agreed that the SBT stock is “severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern.”<sup>158</sup> Next, the Tribunal recited the disagreement between the parties regarding the effects of the experimental fishing program on the existence of the SBT stock and the fact that the catches of nonparties to the CCSBT had increased considerably since 1996.<sup>159</sup> Having recited these factors, the Tribunal concluded that the parties should “act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the [SBT] stock.”<sup>160</sup>

The Tribunal made no reference to the irreparability standard used by other institutions, although it reached its conclusion by “considering” the Applicants’ argument that the scientific evidence showed that the amount of tuna taken under the experimental fishing program “*could endanger* the existence of the stock.”<sup>161</sup> Thus, the Tribunal avoided taking a clear position on the irreparability criterion and tacitly accepted a less stringent standard for approving provisional measures. This point is further clarified in the separate opinion by Judge Laing, who wrote that it was clear to him that “the Tribunal has not chosen to base its decision on the criterion of ‘irreparability,’ which is an established aspect of the jurisprudence of some other institutions.”<sup>162</sup> He “believe[d] that that ‘grave standard’ is inapt for application in the wide and varied range of cases that, pursuant to UNCLOS, are likely to come before this Tribunal.”<sup>163</sup>

### C. Purpose of Provisional Measures

According to the Applicants, the purpose of provisional measures under UNCLOS was not to avoid irreparable harm but “to preserve the *status quo pendente lite* by preserving the respective rights of the parties.”<sup>164</sup> The applicants urged that the Tribunal was not required to conclude that particular measures are necessary, but merely that they are appropriate to preserve the rights of the parties.<sup>165</sup> The Applicants argued that their rights to exploit SBT would be prejudiced if Japan were allowed to take unlimited catch, or to continue to exceed its

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158. *Id.* ¶ 71.

159. *See id.* ¶¶ 73-74, 76.

160. *Id.* ¶ 77.

161. *Id.* ¶ 74 (emphasis added).

162. *Id.* Separate Op. by Judge Laing, ¶ 3.

163. *Id.*

164. Aug. 18 Public Sitting at 3:00 p.m., *supra* note 97, at 28, 1.27-28 (emphasis in original).

165. *See id.* at 29.

annual national allocation through the EFP.<sup>166</sup> If Japan were allowed to continue these practices, the Applicants would suffer the loss of their future fishing rights and the increased risk of a recruitment collapse in the SBT stock.<sup>167</sup> Japan, for its part, contended that scientific evidence showed that its EFP would not threaten the stock, and that its program was necessary to reliably assess the potential for the stock to recover.<sup>168</sup>

The Tribunal concluded that provisional measures were appropriate because the depletion of the SBT stock was a cause for serious concern and there was an urgent need to preserve the rights of the parties and avoid further deterioration of the stock.<sup>169</sup> By mentioning the avoidance of further deterioration of the stock, which would harm the marine environment, as well as the preservation of the parties' rights, the Tribunal apparently sought to stress that both of the two purposes of provisional measures mentioned in Article 290(1) had been fulfilled.

#### V. SOME OBSERVATIONS

This dispute constituted the third and fourth cases addressed by ITLOS which were combined by the Tribunal. The Tribunal handled the Southern Bluefin Tuna cases quite expeditiously, taking less than a month from the submission of the Applicants' request until the issuance of the order of provisional measures.<sup>170</sup> Therefore, consideration should be given to the short time frame involved when making any evaluation of the Tribunal's performance relating to these cases. With this in mind, a few observations may be made regarding the three issues that likely were of crucial importance to the Tribunal in reaching its conclusions: (1) the jurisdiction of the arbitral tribunal, (2) the standard for prescribing provisional measures, and (3) the precautionary approach/principle.

With regard to the issue of jurisdiction, the Tribunal confirmed the obligations of states parties under Articles 64 and 116-119 of UNCLOS, holding "that the fact that the [CCSBT] applies between the parties [did] not exclude their right to invoke the [UNCLOS] provisions," and concluding that these provisions of UNCLOS "appear[ed] to afford a basis on which the jurisdiction of the arbitral

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166. *See id.* at 30.

167. *See id.* at 29.

168. *See* SBT Order, *supra* note 1, ¶ 73.

169. *See id.* ¶¶ 71, 80, 85.

170. The Applicants' requests were filed on July 30, 1999, and the Tribunal's order was issued August 27, 1999.

tribunal might be founded.”<sup>171</sup> The Tribunal did not, however, analyze the dispute between the Parties over the nature of the obligations involved and the relationship of their obligations under each of the two conventions. As previously discussed, these were highly contentious issues. It is expected that the arbitral tribunal will devote full attention to these issues should Japan raise them again. However, because it was not known at the time whether Japan would actually raise these issues in the future, the Tribunal could have included at least some reasoning for its conclusions on these issues.

With regard to the standard for prescribing provisional measures, the Tribunal departed from the ICJ’s well-established practice of requiring proof of the irreparability of damage likely to be caused if no provisional measure is taken.<sup>172</sup> In his separate opinion, Judge Laing suggests that the “irreparability standard” is inapt for application in the wide and varied range of cases that are likely to come before ITLOS pursuant to UNCLOS.<sup>173</sup> This is obviously not the opinion of the Tribunal as a whole. Should this view prevail in future cases involving law of the sea issues, ITLOS jurisprudence possibly could develop independent of that of ICJ, as states likely will not cease to refer law of the sea cases to ICJ.

It is apparent that the Tribunal carefully and deliberately avoided making any judgement on the dispute between the parties over the legal status of the precautionary approach or principle. It has, however, shown great appreciation for the reasoning behind such an approach, which is evident from the fact that it characterized the conservation of the living resources of the sea as an element in the protection and preservation of the marine environment.<sup>174</sup> The Tribunal also opined that, under the circumstances where the SBT stock is severely depleted and there is scientific uncertainty regarding the measures to be taken, the parties should “act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock.”<sup>175</sup> Although not in a mandatory form, these words of the

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171. SBT Order, *supra* note 1, ¶¶ 48, 51, 52.

172. “Unanimity exists for the view that interim protection can only be awarded if irreparable damage is imminent. If, however, the damage could be repaired easily or if it is neither probable nor imminent, there is then no place for interim protection.” Karin Oellers-Frahm, *Interim Measures of Protection*, in 1 ENCYCLOPEDIA OF PUB. INT’L L. 70 (Rudolf Bernhardt ed., 1986) (commenting on the jurisprudence of the Permanent Court of International Justice and the ICJ with regard to interim measures of protection, on which the concept of provisional measures is based).

173. SBT Order, *supra* note 1, Separate Op. by Judge Laing, ¶ 17.

174. *See id.* ¶ 70.

175. *Id.* ¶ 77.

Tribunal are reminiscent of the concept employed in Article 6 of the 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which provides that “[s]tates shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”<sup>176</sup>

In their separate opinions, some members of the Tribunal recorded their views of what the Tribunal has done. Judge Laing noted that the Tribunal “recites the apparently key importance in this case of serious harm to the marine environment as a crucial, perhaps *the* crucial criterion or condition for provisional measures.”<sup>177</sup> He concluded that it is “evident that the Tribunal has adopted the precautionary approach for the purposes of provisional measures in such a case as the present.”<sup>178</sup> Judge Treves explained that the Tribunal has “hinted at” a precautionary approach in paragraph 77 of its order, cited above.<sup>179</sup>

It is clear, however, that the Tribunal did not apply a precautionary approach in its order, as it did not order the immediate cessation of experimental fishing nor forbid action by the parties as would be consistent with the precautionary principle and as was requested by the Applicants. In this sense, the true thinking of the Tribunal may be best reflected by Judge *ad hoc* Shearer, who observed that the measures ordered by the Tribunal were “based upon consideration deriving from a precautionary approach.”<sup>180</sup>

The concept of the precautionary approach or principle is still evolving despite its rapid rise in recent years in the international environmental and natural resource treaty regime.<sup>181</sup> Some authors are of the view that a “good argument” may be made “that it has emerged

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176. Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, art. 6, U.N. Doc A/CONF.164/37, 34 I.L.M. 1542 (1995). The essence of Article 6 has also been incorporated in Article 7.5 of the Code of Conduct for Responsible Fisheries, adopted by the Food and Agriculture Organization (FAO) Conference in 1995. See U.N. FAO, Code of Conduct for Responsible Fisheries, *adopted* Oct. 31, 1995, art. 7.5, *available at* (visited June 10, 2000) <<http://www.fao.org/WAICENT/FAOINFO/FISHERY/agreem/codecond/codecon.asp>>.

177. SBT Order, *supra* note 1, Separate Op. by Judge Laing, ¶ 18 (emphasis in original).

178. *Id.* Separate Op. by Judge Laing, ¶¶ 18-19.

179. See *id.* Separate Op. by Judge Tullio Treves, ¶ 8.

180. *Id.* Separate Op. by Judge *ad hoc* Shearer, at 5.

181. See David Freestone, *International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 135 (A. Boyle & D. Freestone eds., 1999).

as a principle of customary international law.”<sup>182</sup> But, even a strong supporter of this view, David Freestone, has recently concluded that it is still “an abstract concept” and “[t]he issue for the next century is the extent to which the rhetoric of the principle can be operationalized.”<sup>183</sup>

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182. *Id.* at 137.

183. *Id.* at 135-36.