

1999-05

1999. 12

, ,

< . . . >
()
()
()
()

1999 7

가
가

가

가
가

가

1980

6

1996

1

1980

1993

3

(CCSBT : Convention for the Conservation of Southern Bluefin Tuna)

CCSBT 가

가

가

가

1999 8 27

가

CCSBT 가

가

1999 7

가

(Treves)



가

가

CCSBT

가

가

가

1999 12

韓國海洋水產開發院

院長 李 廷 旭

<ABSTRACT>

**A Study on the Judicial Settlement of the International
Dispute on the Southern Bluefin Tuna**

This study is to analyze, mainly from legal point of view, a dispute over southern bluefin tuna between Australia and New Zealand on one hand and Japan on the other, which was dealt by the International Tribunal for the Law of the Sea (ITLOS). The ITLOS in this dispute ordered interim measures on August 27, 1999 whereby prohibits Japan's unilateral experimental fishing, relying on paragraph 5 of Article 290 of the UNCLOS. This is the second series of interim measures ordered by the ITLOS. The test of the ITLOS to establish jurisdiction on the matter of interim measure seems similar to that of the ICJ, which relies on *prima facie* jurisdiction since the Anglo-Iranian Oil Co. Case in 1951. However, there are some differences between the interim measures of the two judicial institutions. For example, the UNCLOS makes it clear that the interim measure by the ITLOS has a binding force whereas the binding force of the interim measures of the ICJ is doubted. In the Southern Bluefin Tuna Case, the ITLOS has showed its tendency to increase its jurisdiction relying on the theory of "precautionary principle". As the interim measures prescribed by the ITLOS in the Southern Bluefin Tuna Case not only prohibits unilateral experimental fishing but also demands joining of non-members such as Korea to CCSBT (Convention for the Conservation of Southern Bluefin Tuna), Korea should make further efforts to join the CCSBT.

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2)	/ 4	
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2)	/ 7	
3)	/ 8	
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1. 가		40
2.	가	41
3.		44
4.		45

< -1> CCSBT 가 TAC, (1994 98)	19
< -1> CCSBT	32
< -1> SBT (1991 98)	48
< -1> SBT	5
< -1> SBT (1995)	21
< -1> SBT	31
< -1> CCSBT	48

第 1 章 序 論

1.

1999 7 30 ,

가 .

1998 8 27

가 .

가 , 가 .

가 가

(CCSBT : Convention for Conservation of Southern Bluefin Tuna) 가

.

가

가 .

, 가 , CCSBT

. 가 CCSBT가

, 가

가 .

2

2.

,
.
.
.
2

, 가 ,
3 가

,
가

4 가
가 가

, 가
5 가 가

가 CCSBT

6

第 2 章

紛爭事件 概要

1.

1)

1)

(SBT : Southern Bluefin Tuna, *Thunnus Maccoyii*)

1

30 50

(EEZ : Exclusive Economic Zone)

< -1>

(juvenile fish)

SBT

7 20

가

200cm,

가 200kg

SBT

8 12

가

20

. SBT

40 가

, SBT

SBT

가

가

1kg 40

(AUD\$)

가

1) CCSBT

(www.home.aone.net.au/CCSBT)

Request for

Provisional Measures Annex 4, scientific report pp.2 3

2)

SBT 1950 2)
 1960 SBT 7 9 , 1961 8 1
 1980 SBT
 1980 가 SBT 1960 25 35%
 1980 SBT , , 3 SBT
 . 1985 , ,
 (TAC : Total Allowable Catch) ,
 SBT 가 1989 TAC
 1985 TAC 50%가 11,750 ,
 6,065 , 5,265 , 420 .
 (CCSBT : Convention for the Conservation of
 Southern Bluefin Tuna) 3 SBT
 1993 , 1994 5 20 .
 CCSBT SBT (conservation)
 (optimum utilization) (CCSBT 3).
 CCSBT 3 CCSBT (Com-
 mission for the Conservation of Southern Bluefin Tuna)가 (6),
 가 TAC (8 3),
 (8 7).
 CCSBT Scientific Committee SBT 가
 SBT , optimum utilization
 (9).
 CCSBT , CCSBT (1996,
 IOTC), (1979, FFA), (1969, ICCAT)
 가 ,
 가 ,

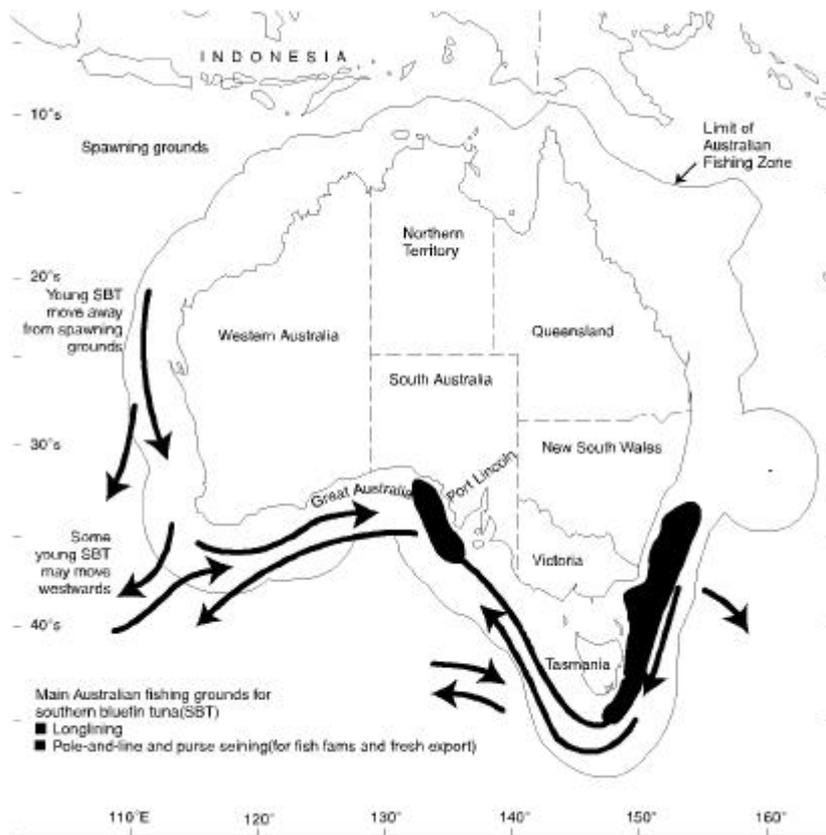
2) surface fishery, longline fishery .

가

3) CCSBT

CCSBT

< -1> SBT



: Statements of the Claim, p.3.

3) , “ ”, 「 」, 1999. 9, p.42

6

2.

1) TAC

CCSBT (Scientific Committee)

TAC CCSBT 1994
 TAC 1989 1 1,750
 6,065 , 5,265 , 420 1989

4)

TAC 1994 가
 1960 1997 1960 7 15%
 1990 가

1980 가
 CCSBT 3 가 SBT
 2020 1980

TAC
 가 , ,
 SBT

TAC
 3 SBT
 가

(EFP : Experimental Fishing Program)

1996 CCSBT

(Objectives and Principles for the Design
 and Implementation of an EFP)"

4) 1989 , , CCSBT

2)

,
 . 1995 SBT
 ,
 EFP , CCSBT
 .
 1995 TAC
 TAC CCSBT
 가 ,
 1998 2
 가 EFP , 3
 , 1998 7, 8
 (pilot EFP) , 1,464
 1998 8 EFP
 ,5) 3
 , 1996 CCSBT
 “ ” EFP
 (EFPWG : working group to develop a possible future program
 of experimental fishing)
 EFPWG 1999 2 5 4 가
 1999 ,
 1999

5) Department of Foreign Affairs and Trade 1998. 8. 31 ,
 CCSBT , precautionary
 principle , CCSBT 13 1

8

, 1999 6 1

6)

3)

1998 7, 8

1998 8

3

가

가

, 1999 6

CCSBT

16 1 7)

CCSBT

16 1

가

CCSBT

CCSBT

(mediation)

가

가

CCSBT

1999 7 15

1999 7 2,

9, 14

6) 1999, 2000, 2001 3 EFP
, 2000, 2001

7) 2. CCSBT

CCSBT 16 2

(arbitral proceedings)

가

가

290 5 2
가 , 1999 7 30

Case

No.3

Agent

Timothy Bruce Caughley가

Department

Agent

가

Case No.4

Director of the Legal Division Mr.

Agent Attorney-General's

Mr. William Mcfayden Campbell ,

Mr. Kazuhiko Togo가

(Statute of the Tribunal) 17

(Ad Hoc Judge)

Ivan Shearer 8)

3.

1) 9)

(286).

8)

9) Adede, A. O., *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, Martinus Nijhoff Publishers, 1987, pp.241 251

(279),

가

(280 , 281).
, , 가

가,

(287).

287

(3),

(5).¹⁰⁾

2)

, 가 290 5 가 가
, , 가

7

가 가 *prima facie* .
가 , 가 288 1 .

가

, 64 , 116 119

10)

가

(297),

(,)

가 , 1
 , SBT .
 , CCSBT
 가 , CCSBT가
 SBT .
 , 가 (290 5
 , 288 1 , 64 , 116 119 , 1)
 가 15
 2 15
 1 , 281 ,
 , CCSBT
 15 2 가 ,
 가 .
 가
 15 1 가
 .
 (287),
 가 *prima facie* .

4. 가

가 가 .11) 가 가

가 가

가 41 “ 가

(any provisional measures) (indicate) 가 ” (subject matter) 가

가 가 (irreparable damage)

가 가

가 . Anglo-Iranian (prima facie)

가 가

.12) 가 Interhandel Case(1957), Fisheries Jurisdiction Case(1972), Nuclear Test Case(1973) (prima facie)

. 1972 Fisheries Jurisdiction “ (prima facie)

가 ” .13) 1973 Nuclear Test Elicott

11) Choon-ho Park, “Judicial Settlement of International Maritime Disputes an Overview of the Current System”, *Journal of Stetson Law Review*, Vol. XXVIII, Spring 1999, p. 1043.

12) *ICJ Report*, 1951, p.89.

13) *ICJ Report*, 1972, p.12.

Fisheries Jurisdiction
prima facie

가 가
가

, Nuclear Test
가

가

.14)

“가
가

가

(*prima facie*)
.”15)

가

가

가

가

가 가

1976

, 1992

가

가

Anglo-Iranian

Nuclear Test

가

가

가

가

“ (indicate) ”

가

가가

가

가 .16)

290 가

14) Kaiyan Homi Kaikobad, “The Court, the Council and Interim Protection : A Commentary on the Lockerbie Order of 14 April 1992”, *The Australian Year Book of International Law*, 1996, Vol. 17, p.19.

15) “Nuclear Tests(Australia v France)”, *ICJ Rep.*, 1973, p.99.

16) Harris, D. J., *Cases and Materials on International Law*, Sweet & Maxwell Ltd., 1991, p.955.

290 가 가
 1 5 . 1
 “ 가 가
 (*prima facie*) 가 ,
 (serious harm)
 (any provisional measure)
 (prescribe) ."
 가
 “ ”
 가 ,
 가 가
 41
 ,
 “가 (indicate)”
 가 “가
 (prescribe) ” . “indicate”
 , “prescribe”
 가 . 가
 (enforcement jurisdiction)
 “prescriptive jurisdiction” .
 가
 가
 가 290 5 “
 가 (shall comply promptly)”
 가

가 . 가

가 . 290 5 가

가 . 290 5 가

“ 가 가

가 가, 가

2 가 가

()가

가 , ,

가 가

....”

5 가 가

가

, (urgency of the situation)

. 290 5 가

가

가

가

“ ”

, (temporal dimension)¹⁷⁾ ,

(qualitative dimension) 18)

가

가

가

290 1 가

17) Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982 : A Commentary*, Martinus Nijhoff Publishers, 1989, Vol. V. p.56.

18) Separate Opinion of Judge Treves, , Order, Southern Bluefin Tuna Case

290 5

가

가

“

가

(as a matter of urgency)

”¹⁹⁾

Treves

“가

가

290

5

가

가

1

가

가

가

가

가

290

5

”²⁰⁾

가

SBT

, Agenda 21

21) 6

“

(precautionary principle)”

19) , Southern Bluefin Tuna Cases, Order, para. 80

20) , Separate Opinion of Judge Treves, Order, Southern Bluefin Tuna Case

21) “Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Convention and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” , 1995 8 1995 12

1,464 SBT 1997 TAC , 1998
 , 1999
 3 SBT
 23) 가
 ,
 가
 SBT

2.

CCSBT SBT ,
 . 1996 5 , CCSBT 가
 ,) 가 EFP
 (2),) SBT
 (4),)
 (5).
 '1996 ,
 '1996 ,
 CCSBT
 1998 2 , 1999
 , 3 가 2,010
 . 1998 3 6 , , ,
 ,
 . 1998 6 1 , 1998 7 1 3

23) 가 scientific report , 가 SBT
 12 , 8 가 ,

1,400

1998 7 10

1998 8 31

1,464 SBT

< -1> CCSBT 가 TAC, (1994 98)

	TAC						
1994	11,750	5,265	4,937	6,065	6,064	420	277
1995	11,750	5,265	5,080	6,065	5,866	420	436
1996	11,750	5,265	5,188	6,065	6,320	420	139
1997	11,750	5,265	4,978	5,757	5,588	420	337
1998		5,265 ¹⁾	5,087	6,065 ¹⁾	6,038 + 1464(EFP) ²⁾	420 ¹⁾	334

: *Matters for Further Elaboration by the Parties* p.1
annex A ²⁴⁾

: 1) 1998 가 CCSBT

2) 1998

1998
CCSBT 16 1 , . 1999

, 1999 6
1998 SBT TAC
12.5% . 1999 TAC

24) 76 가

20

20.5%가 가 2,400 가 .
 , 가 CCSBT , 가
 . , 가
 CCSBT ,
 .

3.

SBT 가
 , TAC
 .
 1998 1999 가
 가 가 .
 , 1998 1999 '1996 ,
 .
 TAC 가
 SBT 가
 .25)
 ,
 가 .26) SBT

(CPUE : Catch Per Unit of Effort)²⁷⁾

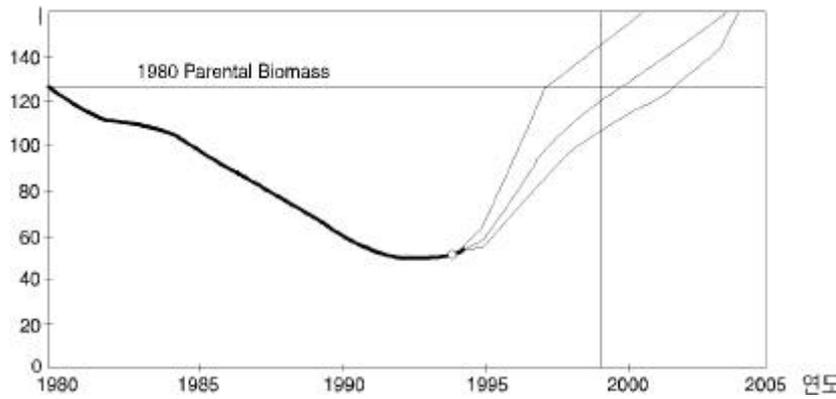
25) '1996 Objectives and Principles' 4 : any increase in catch, recommended above the current TAC to accommodate experimental fishing should not jeopardize the potential recovery of the stock to the 1980 level by 2020, or undermine other agreed management objectives. 4 (a) : prior to any experimental fishing program being implemented, agreement should be reached on specific criteria for determining whether any additional removals will jeopardize stock recovery.

26) 23

27) Catch per Unit Effort (CPUE) is a ratio of the number of fish caught to the amount of fishing effort expended in their capture. It is a frequently used measure of relative

가 , 가 , 가 , SBT , (scientific validity) 가 , 가 SBT 1999 2 CCSBT 5 , SBT , 3 TAC 가 1999 6 1

< -1> SBT (1995)



: 가 ; 1980 1994 parental biomass(:) , SBT , 가 95% confidence intervals .

abundance. In long-line fisheries, the number of fish caught per 1,000 hooks is a commonly used measure of CPUE. 가 scientific report glossary .

, 1998

.

,

가
SBT

CCSBT

. CCSBT

SBT

3

(non-precautionary way)

4.

,

,

1998

, 1998 8 31

CCSBT,

,

(precautionary

principle)

, CCSBT

16 1

(negotiation and consultation)

1998 11 9

가 , 3

CCSBT 16 1

1998 12 20

23

1999 5 26 27 ,

가

1999

1999 6

1

1999 5 31

CCSBT 16 1

1999 6 1

6 1

1999 6 7

가

CCSBT 16 1

1999 6 8

1999 6 15

CCSBT 16 1

가

CCSBT 16 1

가

1999 6 23 ,

CCSBT

283 1 28)

283 2 29)

가

1999 6 24

1999 6 23

CCSBT

(mediation)

가

1999 6 30

가

가

28) 283 1

29) 283 2 ,

가

1999 7 5
 1999 8 31
 1999 7 2, 9, 14 , CCSBT
 CCSBT 16 2 30) 가
 1999 7 15 1999 7 2, 9, 14
 CCSBT
 CCSBT 16 2
 15
 7
 가 290 5

5.

가

1)

300 가

30) CCSBT

2)

(1) 64 :

64 1 가

, EEZ

SBT

64

가

가

CCSBT

CCSBT

. CCSBT

SBT

SBT

CCSBT

64

(2) 117 :

117 SBT

(3) 118 :

118

CCSBT

SBT

CCSBT

CCSBT

SBT

가

(4) 119 :

119 ,

119 가

가 (maximum sustainable

yield) 가

가

가

“ ”

가 ,

(119 1),

119 3 .

(5) 116 :

87 (1)(e) 가

116

116 (a) 가

SBT 가 CCSBT

가

116 (b) 64

, ,

64

64

, , ,

116 (c) 7 2 , 116 116 (b) 120 .
 . 117, 118, 119
 116 .

3)

119

(precautionary principle)

6

1 “ .
 ” .
 , ,

1992 “ (UNCED : Conference on Environment and Development)” Agenda 21 가 .
 Agenda 21 Chapter 17

“precautionary and anticipatory approaches” .³¹⁾

가

(serious or irreversible damage)

가 SBT

. SBT

, SBT

, SBT

18 ,

31) Agenda 21, Chapter 17, para.17.1

가 SBT (long-term conservation and sustainable use) Agreement

가 SBT (long-term conservation Agreement)

가 SBT (long-term conservation Agreement)

6.

가 SBT (precautionary principle)

가 SBT (precautionary principle)

가 SBT (precautionary principle)

가 (33)

281 1

32) UN Fish Stock Agreement 2 : the Objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

33) 3 , , 1. 2) (2)

287 . 286 가
 . 287 1
 , , 가
 , 187 3 , 7
 .
 286 7
 , 290

7. 가 가

1999 7 15 7
 가
 . ,
 . 2
 290 5 가
 290 5
 가
 , SBT
 ,
 , SBT
 ,
 ,

第 4 章 日本 對應 主張 內容³⁴⁾

1.

CCSBT . SBT CCSBT가 , ,
CCSBT 가 , CCSBT 가
가 .
CCSBT (consensus) . 3
가 .
가 TAC ,
1997 TAC 가 .
가 ,
1997 ,
CCSBT , CCSBT

2. ,

가

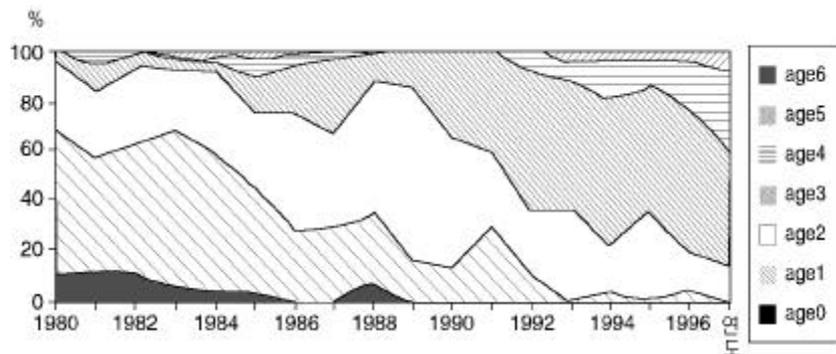
34)

(Statement of Response) , .

(optimum utilization)

SBT 1961 , 1970
 1980
 SBT
 1950 SBT 가
 . 1971
 SBT ,
 1985 2
 3,150 가 1989 6,065 74% ,
 SBT
 SBT
 CCSBT
 CCSBT
 SBT 가

< -1> SBT



: Matters for further elaboration by the Parties , Annex 2.

가 CCSBT CCSBT

< -1>

CCSBT

:

1969		80			80
1970		130			130
1971		30			30
1972		70			70
1973		90			90
1974		100			100
1975		15			15
1976		15	12		27
1977		5	4		9
1978		80	6		86
1979		53	5	4	62
1980		64	5	7	76
1981		92	1	14	107
1982	6	182	2	9	199
1983		161	5	7	173
1984	1	244	11	3	259
1985		241	3	2	246
1986		514	7	3	524
1987		710	14	7	731
1988		856	180	2	1,038
1989		1,395	568	102	2,065
1990		1,177	517	4	1,698
1991	214	1,460	759	77	2,510
1992	36	1,222	1,232	141	2,631
1993	117	959	1,369	18	2,463
1994	147	1,111	926	55	2,239
1995	317	1,474	832	201	2,824
1996	1,179	1,610	1,609	291	4,689
1997	1,325	640	2,241	333	4,539
1998	1,562 ¹⁾	1,439	2,000()	n.a.	n.a.

: Matters for further elaboration by the Parties

Annex 3.

: 1)

2,022

3.

10 SBT , SBT
 CCSBT 가 TAC
 가 , TAC CCSBT
 . CCSBT 가 SBT
 ,
 (scientific uncertainty) SBT
 ,
 SBT 가
 가
 1996 CCSBT 가 가 2020 1980
 가 SBT 가
 . CCSBT 가 3
 3 TAC 2020 1980
 , 75%, 가 67% ,
 . ,
 SBT
 SBT 가
 . SBT 가 가
 CCSBT 가 가
 SBT
 .
 가 가 Constant Square Hypothesis Variable Square Hypothesis
 , 가 가 . Constant
 Squares Hypothesis
 가
 . Variable Squares Hypothesis

SBT 가 . 가
 , 가 가
 가 가
 1998 CCSBT “peer review”
 Variable Squares Hypothesis 가 ,
 CPUE 가 ,
 Constant Square Hypothesis
 Variable Squares Hypothesis가
 , 가
 가 ,
 1998
 1998 , Variable
 Squares Hypothesis , ,
 ,
 EFP가 CCSBT
 ,
 ,
 .35)

4.

1998
 1998 12 “ (EFPWG : Experimental
 Fishing Program Working Group)”

35)

1999 6
 para 33

,
 . 1999 3 1,200
 1,500 .
 1999 4 , .
 , EFPWG 6
 1999 , 가
 .
 1999 6 ,
 . EFPWG
 1999 6 1 .
 1999 CCSBT
 .
 CCSBT
 (mediation) ,
 .
 , CCSBT
 .
 ,
 7 (arbitration) ,
 .
 5.
 1)
 CCSBT ,
 가 ,
 , 가 SBT
 (factual
 issues) .

2) 가

36)

가 7 가
 가 7 가 *prima facie*
 가 , CCSBT
 , 290 5 가 가
 7 가 *prima facie*
 1 가 288
 15 2
 . 1998 8 , 가
 가 , CCSBT
 가
 가 CCSBT
 , SBT
 , SBT
 CCSBT
 , 가

36) para.44 120.

15
283 15

CCSBT

가 , 7
prima facie 가

가 가 ,
7 가 가
가 가

가 (irreparable damage) ,
가 290 5 가

가 (merits) 가

SBT 가 “ ” , 가

가 SBT 가 가

가 , SBT
가 SBT
(domestic catch) 6

가 가
가 (material effect)

, 가 가

가 .
 . SBT
가 .
CCSBT

6. 가

가 1999 8 9
(Statement in Response)
 , 가 가 , 가 CCSBT가
 . SBT
 , , 3
가 , SBT CCSBT
 , 가
CCSBT TAC, ,
1999 8 20
 ,
 ,
 , 7 가
 , *prima facie* , 가
 , 89 (5)
 , 가 .

EFP, 2000	TAC		
6	.	6	
	,	1998 12	(the Parties'
December 1998)			(Terms of
Reference to the Working Group)	,		
	.		

第 5 章 國際海洋法裁判所 判決文 分析³⁷⁾

1. 가

가 가 .
Saiga 1998 3 11 가
. St. Vincent & Grenadines Saiga
1997 12 4
40 Guinea
Guinea
, Saiga 1998 1 11
가 가
Guinea가 1997 12 4
. St. Vincent & Grenadines
290 5 가
, 290 1
가
Saiga 가
“가
,
(*prima facie*)

37) 5
”)

(1999. 10. 23, “

가
297 1
"38)

가

2. 가

290 5 가

, 가

“ 가 ” 가

가 .” 가 가

가

(irreparability)

가 , 290 5 가

290 1

1998 1,700

12.5% , 1999

2,400 TAC 20.5%, 39.5%

(in both the medium and long term) 가

38) , M/V “SAIGA”(No.2) Case, Order, para. 29 30

(damage)

(irreparable damage)

가

가

가

가

CCSBT

가

3

CCSBT

8

290 1

가

“

”

“

”

가

290

5

가

100%

가

(scientific uncertainty)

, SBT

, SBT 1999
 , CCSBT SBT 1996 가
 , (with prudence and
 caution) SBT
 , SBT optimum
 utilization
 .
 , SBT
 가 가 SBT 가 가
 ,) SBT as a matter of
 urgency 가
 , 가
 가 , ,
 , 가 가 .
 (a) , ,
 (b) , ,
 (c) , , , 가 ,
 5,265 , 6,065 , 420
 . 1999 2000 1999
 (d) , , 가
 (c)
 SBT 가 .

44

(e) , , SBT

(f) , , SBT optimum utilization
가 (entities)

3.

(precautionary principle)

,
39)

1992 Agenda 21

“precautionary and anticipatory approach”⁴⁰⁾

, 6 “ 가

precautionary principle

”

18

가 가

“

가

(with prudence and caution)

39) precautionary principle , Patrica W. Birnie & Alan Boyle, *International Law & the Environment*, Claredon Press, 1992, pp.97-98 .

40) Agenda 21 Chapter 17, para 17.1

,”41)

가 precautionary principle

4.

CCSBT

, CCSBT 16

CCSBT가 282

CCSBT
subsidiary

CCSBT

64

. CCSBT

15

CCSBT 16

CCSBT

41) , Southern Bluefin Tuna Case, Order, para. 77.

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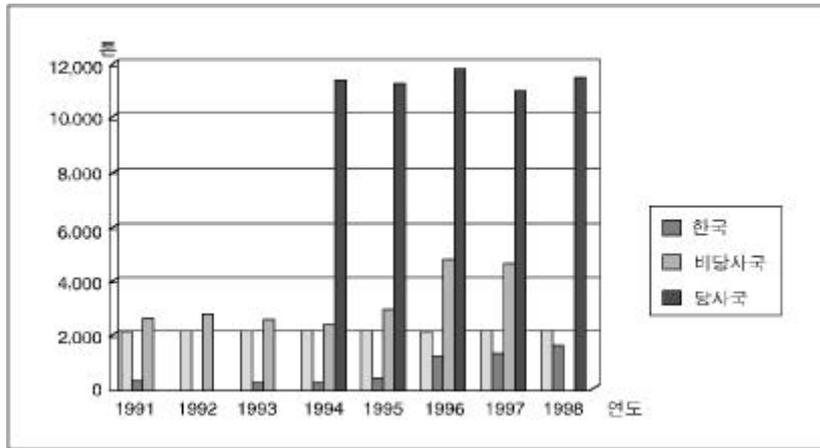
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Year	Number of vessels	CPUE (number per 1,000 hooks)
1991	3	214
1992	1	36
1993	1	80
1994	1	119
1995	3	317
1996	8	1,179
1997	14	1,325
1998()	19	1,562

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- Statement of the Government of Japan to Request for Provisional Measures and Counter-Request for Provisional Measures

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- 1) 1994 5 20 , CCSBT , ,
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- 2) 1998 7 10 1998 8 31 : pilot EFP
- 3) 1998 8 31 , , ,
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- 4) 1998 11 9 , , , 가
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- 6) 1999 2 5 , (the EFPWG)
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- 12) 1999 6 15 , CCSBT 16 1
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- 13) 1999 6 23 , , CCSBT

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, Mr. Kazuhiko Togo()

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Mr. Ivan Shearer ()

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Shearer AM, Challis

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Mr. Timothy Caughley
Mr. William Campbell

Mr. Daryl Williams
Mr. Bill Mansfield
Mr. James Crawford SC
Mr. Henry Burmester QC

Mr. Kazuhiko Togo
Mr. Robert T. Greig
Mr. Nisuke Ando

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25. 1999 8 18 Mr. John Beddington 가
가 (Mr. Matthew Slater
, Mr. Crawford, Mr. Slater).

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” (Mavrommatis Palestine Concessions, Judgement

No.2, 1924, P.C.I.J., Series A, No.2, p.11), “

가 ”(South West Africa, Preliminary Objections,

Judgement, I.C.J. Reports 1962, p.328)

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3. ()

1. Whereas Australia, Japan and New Zealand are States Parties to the Convention;
2. Whereas, on 30 July 1999 at 8 : 38 a.m., New Zealand filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between New Zealand and Japan concerning southern bluefin tuna;
3. Whereas a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;
4. Whereas the original of the Request and documents in support were filed on 4 August 1999;
5. Whereas, on 30 July 1999 at 2 : 30 p.m., Australia filed with the Registry by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in the dispute between Australia and Japan concerning southern bluefin tuna;
6. Whereas a certified copy of the Request was sent the same day by the Registrar to the Minister for Foreign Affairs of Japan, Tokyo, and also in care of the Ambassador of Japan to Germany;
7. Whereas the original of the Request and documents in support were filed on 5 August 1999;
8. Whereas, on 30 July 1999, the Registrar was informed of the appointment of Mr. Timothy Bruce Caughley, international Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, as Agent for New Zealand, and Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia; and of the appointment of Mr. Kazuhiko Togo, Director General of the Treaties Bureau, Ministry of Foreign Affairs of Japan, as Agent for Japan on 2 August 1999;

9. Whereas the Tribunal does not include upon the bench a judge of the nationality of Australia or of New Zealand;
10. Whereas, pursuant to article 17 of the Statute, Australia and New Zealand are each entitled to choose a judge ad hoc to participate as a member of the Tribunal in the proceedings in the respective cases;
11. Whereas Australia and New Zealand in their Requests informed the Tribunal that, as parties in the same interest, they had jointly nominated Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, as judge ad hoc;
12. Whereas, by a letter dated 6 August 1999, the Agent for Japan was informed, in accordance with article 19 of the Rules, of the intention of Australia and New Zealand to choose Mr. Shearer as judge ad hoc and was invited to furnish any observations by 10 August 1999;
13. Whereas, since no objection to the choice of Mr. Shearer as judge ad hoc was raised by Japan and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the proceedings after having made the solemn declaration required under article 9 of the Rules in relation to each of the two cases at a public sitting of the Tribunal held on 16 August 1999;
14. Whereas, after having ascertained the views of the parties, the President of the Tribunal, by separate Orders of 3 August 1999 with respect to each Request, fixed 18 August 1999 as the date for the opening of the hearing, notice of which was communicated forthwith to the parties;
15. Whereas the Secretary-General of the United Nations was notified of the Requests by a letter dated 30 July 1999, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 4 August 1999;
16. Whereas additional documents were submitted on 5, 12 and 17 August 1999 by Australia, copies of which were transmitted in each case to the other parties;
17. Whereas, by a letter dated 6 August 1999, the parties were informed that the

President, acting in accordance with article 47 of the Rules and with the consent of Australia and New Zealand, had directed that Japan might file a single Statement in Response by 9 August 1999;

18. Whereas, on 9 August 1999, Japan filed with the Registry its Statement in Response, which was transmitted via electronic mail to the Agent for Australia on the same date and on 10 August 1999 to the Agent for New Zealand; certified copies of the Statement in Response were transmitted by courier to the Agents for Australia and New Zealand on 10 August 1999;
19. Whereas, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 16 and 17 August 1999 and noted the points and issues it wished the parties specially to address;
20. Whereas, at a meeting with the representatives of the parties on 17 August 1999, the President ascertained the views of the parties regarding the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;
21. Whereas, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal; and information regarding an expert to be called by Australia before the Tribunal pursuant to article 72 of the Rules;
22. Whereas, pursuant to article 67, paragraph 2, of the Rules, copies of the Requests and the Statement in Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;
23. Whereas oral statements were presented at five public sittings held on 18, 19 and 20 August 1999 by the following :

On behalf of Australia and New Zealand : Mr. Timothy Caughley, Agent and
Counsel for New Zealand,
Mr. William Campbell, Agent and
Counsel for Australia,

Mr. Daryl Williams AM QC MP,
Attorney-General of the
Commonwealth of Australia, Counsel
for Australia,
Mr. Bill Mansfield, Counsel and
Advocate for New Zealand,
Mr. James Crawford SC, Counsel
for Australia,
Mr. Henry Burmester QC, Counsel
for Australia;

On behalf of Japan :

Mr. Kazuhiko Togo, Agent,
Mr. Robert T. Greig, Counsel,
Mr. Nisuke Ando, Counsel;

24. Whereas in the course of the oral statements a number of maps, charts, tables, graphs and extracts from documents were presented, including displays on computer monitors;
25. Whereas, on 18 August 1999, Mr. John Beddington BSc (Econ) MSc PhD, Director, T.H. Huxley School of Environment, Earth Sciences and Engineering, Imperial College of Science, Technology and Medicine, London, United Kingdom, was called as expert by New Zealand and Australia (examined on the voir dire by Mr. Matthew Slater, Advocate for Japan), examined by Mr. Crawford and cross-examined by Mr. Slater;
26. Whereas, on 19 and 20 August 1999, the parties submitted written responses to certain points and issues which the Tribunal wished them specially to address:
27. Whereas, during the hearing on 20 August 1999, the Tribunal addressed questions to the parties, responses to which were provided in writing on the same date;

28. Whereas, in the Notification of 15 July 1999 and the attached Statement of Claim, New Zealand alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, inter alia, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to be constituted under Annex VII (hereinafter the arbitral tribunal to adjudicate and declare:

- (1) That Japan has breached its obligations under Articles 64 and 116 to 119 of UNCLOS [United Nations Convention on the Law of the Sea] in relation to the conservation and management of the SBT [southern bluefin tuna] 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 and contrary to the obligation in Article 76(1) 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 [Commission for the Conservation of Southern Bluefin Tuna] national allocations;
 - (c) taking unilateral action contrary to the rights and interests of New Zealand as a coastal State as recognised in Article 76(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against New Zealand fishermen contrary to Article 79(3);
 - (d) failing in good faith to co-operate with New Zealand with a view to ensuring the conservation of SBT, as required by Article 64 of UNCLOS;
 - (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 New Zealand and Australia;
 - (b) negotiate and co-operate in good faith with New Zealand, including through the Commission, with a view to agreeing future conservation measures and TAC [total allowable catch] 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 above the amount of the previous national allocations agreed with New Zealand and Australia 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 by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999.
 - (3) That Japan pay New Zealand's costs of the proceedings;
29. Whereas, in the Notification of 15 July 1999 and the attached Statement of Claim, Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, inter alia, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999 and, accordingly, had requested the arbitral tribunal to adjudge 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

- I 19 of UNCLOS and contrary to the obligation in Article 7 17 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 as a coastal state as recognised in Article 116(b) and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against Australian fishermen contrary to Article 7 19 (3);
 - (d) failing in good faith to co-operate with Australia 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, 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 costs of the proceedings;
30. Whereas, in their Notifications of 15 July 1999, Australia and New Zealand requested that Japan 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 the Tribunal and furthermore reserved the right, if Japan did not so agree within two weeks, immediately on the expiry of the two-week period and without further notice to request the Tribunal to prescribe the provisional measures;
 31. Whereas the provisional measures requested by New Zealand in the Request to the Tribunal dated 30 July 1999 are as follows:
 - (1) that Japan immediately cease unilateral experimental fishing for SBT;
 - (2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna (the Commission'), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
 - (3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
 - (4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
 - (5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;
 32. Whereas the provisional measures requested by Australia in the Request to the Tribunal dated 30 July 1999 are as follows:
 - (1) that Japan immediately cease unilateral experimental fishing for SBT;
 - (2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna (the Commission'), subject to the reduction of such catch by the

amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;

- (3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
- (4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
- (5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;

33. Whereas submissions and arguments presented by Japan in its Statement in Response include the following:

Australia and New Zealand must satisfy two conditions before a tribunal constituted pursuant to Annex VII would have jurisdiction over this dispute such that this Tribunal may entertain a request for provisional measures pursuant to Article 290(5) of UNCLOS pending constitution of such an Annex VII tribunal. First, the Annex VII tribunal must have prima facie jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1. Since Australia and New Zealand have satisfied neither condition, an Annex VII tribunal would not have prima facie jurisdiction and accordingly this Tribunal is without authority to prescribe any provisional measures.

...

in the event that the Tribunal determines that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction, then, pursuant to ITLOS [International Tribunal for the Law of the Sea] Rules Article 89(5), Japan respectfully requests that the Tribunal grant Japan provisional

relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP [experimental fishing programme] and the determination of a TAC and national allocations for the year 2000. Should the parties not reach a consensus within six months following the resumption of these negotiations, the Tribunal should prescribe that any remaining disagreements would be, consistent with Parties' December 1998 agreement and subsequent Terms of Reference to the EFPWG [experimental fishing programme working group]..., referred to the panel of independent scientists for their resolution.

The ... Statement of Facts and the history of negotiations between Australia, New Zealand and Japan concerning conservation of SBT, chronicles the bad faith exhibited by Australia and New Zealand in terminating consultations and negotiations over the terms of a joint experimental fishing program and their rash resort to proceedings under UNCLOS despite the absence of any controversy thereunder and the failure to exhaust the amicable provisions for dispute resolution that Part XV mandates be fully utilized. Accordingly, this Tribunal should require Australia and New Zealand to fulfill their obligations to continue negotiations over this scientific dispute.

. . . **Submissions**

Upon the foregoing Response and the Annexes hereto, the Government of Japan submits that the Request for provisional measures by Australia and New Zealand should be denied and Japan's counter-request for provisional measures should be granted;

34. Whereas Australia and New Zealand, in their final submissions at the public sitting held on 20 August 1999, requested the prescription by the Tribunal of the following provisional measures:
 - (1) that Japan immediate/y cease unilateral experimental fishing for SBT;

- (2) that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna (the Commission'), subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999;
 - (3) that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute;
 - (4) that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Arbitral Tribunal; and
 - (5) that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex VII Arbitral Tribunal may render;
35. Whereas, at the public sitting held on 20 August 1999, Japan presented its final submissions as follows:

First, the request of Australia and New Zealand for the prescription of provisional measures should be denied,

Second, despite all the submissions made by Japan, in the event that the Tribunal were to determine that this matter is properly before it and an Annex VII tribunal would have prima facie jurisdiction and that the Tribunal were to determine that it could and should prescribe provisional measures, then, pursuant to ITLOS Rules Article 89(5), the international Tribunal should grant provisional measures in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000. The Tribunal should prescribe that any remaining disagreements would be, consistent with the Parties' December 1998 agreement and subsequent Terms of Reference to the EFP Working Group, referred to the panel of independent scientists for their

resolution, should the parties not reach consensus within six months following the resumption of these negotiations;

36. Considering that, pursuant to articles 286 and 287 of the Convention, Australia and New Zealand have both instituted proceedings before the arbitral tribunal against Japan in their disputes concerning southern bluefin tuna;
37. Considering that Australia and New Zealand on 15 July 1999 notified Japan of the submission of the disputes to the arbitral tribunal and of the Requests for provisional measures;
38. Considering that on 30 July 1999, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, Australia and New Zealand submitted to the Tribunal Requests for provisional measures;
39. Considering that article 290, paragraph 5, of the Convention provides in the relevant part that:

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, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;
40. Considering that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that prima facie the arbitral tribunal would have jurisdiction;
41. Considering that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

42. Considering that Japan maintains that the disputes are scientific rather than legal;
43. Considering that, in the view of the Tribunal, the differences between the parties also concern points of law;
44. Considering that, in the view of the Tribunal, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests? (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11), and [I]t must be shown that the claim of one party is positively opposed by the other?(South West Africa, Preliminary Objections, Judgment, I. C. J. Reports 1962, p.328);
45. Considering that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter the Convention of 1993) and with rules of customary international law;
46. Considering that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;
47. Considering that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;
48. Considering that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;
49. Considering that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*;
50. Considering that the conduct of the parties within the Commission for the

Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. Considering that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;
52. Considering that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;
53. Considering that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;
54. Considering that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;
55. Considering that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;
56. Considering that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;
57. Considering that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by

Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. Considering that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;
59. Considering that Australia and New Zealand have stated that the negotiations had terminated;
60. Considering that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;
61. Considering that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;
62. Considering that, for the above reasons, the Tribunal finds that the arbitral tribunal would prima facie have jurisdiction over the disputes;
63. Considering that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;
64. Considering, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;
65. Considering that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;
66. Considering that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;
67. Considering that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. Considering that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;
69. Considering that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;
70. Considering that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;
71. Considering that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;
72. Considering that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;
73. Considering that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;
74. Considering that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;
75. Considering that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. Considering that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;
77. Considering that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;
78. Considering that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;
79. Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;
80. Considering that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;
81. Considering that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;
82. Considering that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;
83. Considering that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 20 August 1999, Japan made a clear commitment that the 1999 experimental fishing programme will end by 31 August;
84. Considering, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. Considering that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;
86. Considering that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;
87. Considering the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;
88. Considering that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;
89. Considering that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;
90. For these reasons,

THE TRIBUNAL,

2. Prescribes, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

- (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;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, NDIAYE ; Judge ad hoc SHEARER;

AGAINST : Judges VUKAS, EIRIKSSON.

By 20 votes to 2,

- (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;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO, D

CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO,
KOLODKIN, PARK, BAMELA ENGO, NELSON,
CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA,
LAING,
TREVES, MARSIT, NDIAYE; Judge ad hoc SHEARER;

AGAINST : Judges VUKAS, EIRIKSSON.

By 18 votes to 4,

- (c) Australia, Japan and New Zealand shall 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;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges CAMINOS,

MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA
ENGO, NELSON, CHANDRASEKHARA RAO, AKL,
ANDERSON,
LAING, TREVES, MARSIT, IRIKSSON, NDIAYE; Judge ad

hoc
SHEARER;

AGAINST : Judges ZHAO, YAMAMOTO, VUKAS, WARIOBA.

By 20 votes to 2,

- (d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, 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);

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO, CAMINOS, MARO-I-TA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Judge ad hoc SHEARER;

AGAINST : Judges YAMAMOTO, VUKAS.

By 21 votes to 1,

- (e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING,

TREVES, MARSIT, EIRIKSSON, NDIAYE;
Judge ad hoc SHEARER;

AGAINST : Judge VUKAS.

By 20 votes to 2,

3. Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO,
CAMINOS, MAROII-A RANGEL, YANKOV, YAMAMOTO,
KOLODKIN, PARK, BAMELA ENGO, NELSON,
CHANDRASEKHARA RAO, AKL, ANDERSON, LAING,
TREVES, MARSIT, EIRIKSSON, NDIAYE;
Judge ad hoc SHEARER;

AGAINST : Judges VUKAS, WARIOBA.

By 21 votes to 1,

3. Decides that each party shall submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 6 October 1999, and authorizes the President of the Tribunal to request such further reports and information as he may consider appropriate after that date;

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO,
CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO,
KOLODKIN, PARK, BAMELA ENGO, NELSON,
CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA,
LAING,
TREVES, MARSIT, EIRIKSSON, NDIAYE;

Judge ad hoc SHEARER;

AGAINST : Judge VUKAS.

By 21 votes to 1,

3. Decides, in accordance with article 290, paragraph 4, of the Convention and article 94 of the Rules, that the provisional measures prescribed in this Order shall forthwith be notified by the Registrar through appropriate means to all States Parties to the Convention participating in the fishery for southern bluefin tuna.

IN FAVOUR : President MENSAH ; Vice-President WOLFRUM ; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMEIA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE;
Judge ad hoc SHEARER;

AGAINST : Judge VUKAS.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of August, One Thousand Nine Hundred and Ninety-Nine, in four copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of New Zealand, the Government of Australia and the Government of Japan, respectively.

Thomas A. MENSAH,
President.

Gritakumar E. CHIT-T-Y,

Registrar.

Vice-President WOLFRUM, Judges CAMINOS, MAROTA RANGEL, YANKOV, ANDERSON and EIRIKSSON append a joint declaration to the Order of the Tribunal.

Judge WARIOBA appends a declaration to the Order of the Tribunal.

Judges LAING and TREVES append separate opinions to the Order of the Tribunal.

Judges YAMAMOTO and PARK append a joint separate opinion to the Order of the Tribunal.

Judge ad hoc SHEARER appends a separate opinion to the Order of the Tribunal.

Judges VUKAS, EIRIKSSON append dissenting opinions to the Order of the Tribunal.

4.

CONVENTION FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA

The Parties to this Convention:

Considering their mutual interest in southern bluefin tuna;

Recalling that Australia, Japan and New Zealand have already taken certain measures for the conservation and management of southern bluefin tuna;

Paying due regard to the rights and obligations of the Parties under relevant principles of international law;

Noting the adoption of the United Nations Convention on the Law of the Sea in 1982;

Noting that States have established exclusive economic or fishery zones within which they exercise, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploring and exploiting, conserving and managing the living resources;

Recognising that southern bluefin tuna is a highly migratory species which migrates through such zones;

Noting that the coastal States through whose exclusive economic or fishery zones southern bluefin tuna migrates exercise sovereign rights within such zones for the purpose of exploring and exploiting, conserving and managing the living resources including southern bluefin tuna;

Acknowledging the importance of scientific research for the conservation and management of southern bluefin tuna and the importance of collecting scientific information relating to southern bluefin tuna and ecologically related species;

Recognising that it is essential that they cooperate to ensure the conservation and optimum utilisation of southern bluefin tuna;

Here agreed as follows:

Article 1

This Convention shall apply to southern bluefin tuna (*Thunnus Maccoyi*).

Article 2

For the purposes of this this Convention:

- (a) ecologically related species means living marine species which are associated with southern bluefin tuna, including but not restricted to both predators and prey of southern bluefin tuna;
- (b) “fishing” means:
 - () the catching, taking or harvesting of fish, or any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish; or
 - () any operation at sea in preparation for or in direct support of any activity described in sub-paragraph (i) above.

Article 3

The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.

Article 4

Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

Article 5

1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under

paragraph 7 of Article 8.

2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.
3. The Parties shall cooperate in collection and direct exchange, when appropriate, of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecologically related species.
4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to this Convention.

Article 6

1. The Parties hereby establish and agree to maintain the Commission for the Conservation of Southern Bluefin Tuna (hereinafter referred to as “the Commission”).
2. Each Party shall be represented on the Commission by not more than three delegates who may be accompanied by experts and advisers.
3. The Commission shall hold an annual meeting before 1 August each year or at such other time as it may determine.
4. At each annual meeting the Commission shall elect from among the delegates a Chair and a Vice-Chair. The Chair and the Vice-Chair shall be elected from different Parties and shall remain in office until the election of their successors at the next annual meeting. A delegate, when acting as Chair, shall not vote.
5. Special meetings of the Commission shall be convened by the Chair at the request of a Party supported by at least two other Parties.
6. A special meeting may consider any matter of relevance to this Convention.
7. Two-thirds of the Parties shall constitute a quorum.
8. The rules of procedure of the Commission and other internal administrative

regulations as may be necessary to carry out its functions shall be decided upon at the first meeting of the Commission and may be amended by the Commission as occasion may require.

9. The Commission shall have legal personality and shall enjoy in its relations with other international organisations and in the territories of the Parties such legal capacity as may be necessary to perform its functions and achieve its ends. The immunities and privileges which the Commission and its officers shall enjoy in the territory of a Party shall be subject to agreement between the Commission and the Party concerned.
10. The Commission shall determine the location of its headquarters at such time as a Secretariat is established pursuant to paragraph 1 of Article 10.
11. The official languages of the Commission shall be Japanese and English. Proposals and data may be submitted to the Commission in either language.

Article 7

Each Party shall have one vote in the Commission. Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.

Article 8

1. The Commission shall collect and accumulate information described below:
 - (a) scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species;
 - (b) information relating to laws, regulations and administrative measures on southern bluefin tuna fisheries;
 - (c) any other information relating to southern bluefin tuna.
2. The Commission shall consider matters described below:
 - (a) interpretation or implementation of this Convention and measures adopted pursuant to it;

- (b) regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;
 - (c) matters which shall be reported by the Scientific Committee prescribed in Article 9;
 - (d) matters which may be entrusted to the Scientific Committee prescribed in Article 9;
 - (e) matters which may be entrusted to the Secretariat prescribed in Article 10;
 - (f) other activities necessary to carry out the provisions of this Convention.
3. For the conservation, management and optimum utilisation of southern bluefin tuna:
- (a) the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and
 - (b) the Commission may, if necessary, decide upon other additional measures.
4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider:
- (a) relevant scientific evidence;
 - (b) the need for orderly and sustainable development of southern bluefin tuna fisheries;
 - (c) the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates;
 - (d) the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development;
 - (e) the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna;
 - (f) any other factors which the Commission deems appropriate.
5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.

6. In deciding upon measures under paragraph 3 above and recommendations under paragraph 5 above, the Commission shall take full account of the report and recommendations of the Scientific Committee under paragraph Z(c) and (d) of Article 9.
7. All measures decided upon under paragraph 3 above shall be binding on the Parties.
8. The Commission shall notify all Parties promptly of measures and recommendations decided upon by the Commission.
9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.
10. The Commission may establish such subsidiary bodies as it considers desirable for the exercise of its duties and functions.

Article 9

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.
2. The Scientific Committee shall:
 - (a) assess and analyse the status and trends of the population of southern bluefin tuna;
 - (b) coordinate research and studies of southern bluefin tuna;
 - (c) report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;
 - (d) make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;

- (e) consider any matter referred to it by the Commission.
- 3. A meeting of the Scientific Committee shall be held prior to the annual meeting of the Commission. A special meeting of the Scientific Committee shall be called at any time at the request of a Party provided that such request is supported by at least two other parties.
- 4. The scientific Committee shall adopt and amend as necessary its rules of procedure. The rules and any amendments thereto shall be approved by the Commission.
- 5. (a) Each party shall be a member of the Scientific Committee and shall appoint to the Committee a representative with sustainable scientific qualifications who may be accompanied by alternates, experts and advisers.
(b) The Scientific Committee shall elect a Chair and a Vice-Chair. The Chair and the Vice-Chair shall be elected from different Parties.

Article 10

- 1. The Commission may establish a Secretariat consisting of an Executive Secretary to be appointed by the Commission and appropriate staff on conditions as may be determined by the Commission. The staff shall be appointed by the Executive Secretary.
- 2. Until such time as a Secretariat is established, the Chair of the Commission shall nominate from within his or her Government an official to act as Secretary to the Commission to perform the secretariat functions set out in paragraph 3 below for a term of one year. At each annual meeting of the Commission, the Chair shall advise the Parties of the name and address of the Secretary.
- 3. The Secretariat functions shall be prescribed by the Commission, and shall include the following:
 - (a) receiving and transmitting the Commission's official communications;
 - (b) facilitating the collection of data necessary to accomplish the objectivity of this Convention;

- (c) preparing administrative and other reports for the Commission and the Scientific Committee.

Article 11

1. The Commission shall decide upon an annual budget.
2. the contributions to the annual budget from each Party shall be calculated on the following basis:
 - (a) 30% of the budget shall be divided equally among all the Parties; and
 - (b) 70% of the budget shall be divided in proportion to the nominal catches of southern bluefin tuna among all the Parties.
3. Notwithstanding the provisions of Article 7, any Party that has not paid its contributions for two consecutive years shall not enjoy the right to participate in the decision-making process in the Commission until it has fulfilled its obligations, unless the Commission decides otherwise.
4. The Commission shall decide upon, and amend as occasion may require, financial regulations for the conduct of the Commission and for the exercise of its functions.
5. Each Party shall meet its own expenses arising from attendance at meetings of the Commission and of the Scientific Committee.

Article 12

The Commission shall collaborate with other inter-governmental organisations which have related objectives, inter alia, to obtain the best available information including scientific information to further the attainment of the objective of this Convention and shall seek to avoid duplication with respect to their work. The Commission may make arrangements with such inter-governmental organisations to these ends.

Article 13

With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable.

Article 14

1. The Commission may invite any State or entity not party to this Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, to send observers to meetings of the Commission and of the Scientific committee.
2. The Commission may invite inter-governmental or, on request, non-governmental organisations having special competence concerning southern bluefin tuna to send observers to meetings of the Commission.

Article 15

1. The Parties agree to invite the attention of any State or entity not party to this Convention to any matter relating to the MING activities of its nationals, residents or vessels which could affect the attainment of the objective of this Convention.
2. Each Party shall encourage its nationals not to associate with the southern bluefin tuna fishery of any State or entity not party to this Convention, where such association could affect adversely the attainment of the objective of this Convention.
3. Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention or measures adopted pursuant to it.
4. The Parties shall cooperate in taking appropriate action, consistent with

international law and their respective domestic laws, to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention where such activity could affect adversely the attainment of the objective of this Convention.

Article 16

1. 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.
2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

Article 17

1. This Convention shall be open for signature by Australia, Japan and New Zealand.
2. This Convention is subject to ratification, acceptance or approval by these three States in accordance with their respective internal legal procedures, and will enter into force on the date of deposit of the third instrument of ratification, acceptance or approval.

Article 18

Aver the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it. This Convention shall become effective for any such other State on the date of deposit of that State's instrument of accession.

Article 19

Reservations may not be made with respect to any of the provisions of this Convention.

Article 20

Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.

Article 21

1. Any Party may at any time propose an amendment to this Convention.
2. If one-third of the Parties request a meeting to discuss a proposed amendment the Depositary shall call such a meeting.
3. An amendment shall enter into force when the Depositary has received instruments of ratification, acceptance or approval thereof from all the Parties.

Article 22

1. The original of this Convention shall be deposited with the Government of Australia, which shall be the Depositary. The Depositary shall transmit certified copies thereof to all other Signatories and acceding States.
2. This Convention shall be registered by the Depositary pursuant to Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention.

DONE AT Canberra on the tenth day of May 1993, in a single original, in the English and Japanese languages, each text being equally authentic.

ANNEX FOR AN ARBITRAL TRIBUNAL

1. The arbitral tribunal referred to in paragraph 3 of Article 16 shall be composed of three arbitrators who shall be appointed as follows :

The party commencing proceedings shall communicate the name of an arbitrator to the other party which, in turn, within a period of forty days following such notification, shall communicate the name of the second arbitrator. The parties shall, within a period of sixty days following the appointment of the second arbitrator, appoint the third arbitrator, who shall not be a national of either party and shall not be of the same nationality as either of the first two arbitrators. The third arbitrator shall preside over the tribunal.

If the second arbitrator has not been appointed within the prescribed period, or if the parties have not reached agreement within the prescribed period on the appointment of the third arbitrator, that arbitrator shall be appointed, at the request of either party, by the Secretary-General of the Permanent Court of Arbitration, from among persons of international standing not having the nationality of a State which is a Party to this Convention.

2. The arbitral tribunal shall decide where its headquarters will be located and shall adopt its own rules of procedure.
3. The award of the arbitral tribunal shall be made by a majority of its members, who may not abstain from voting.
4. Any Party which is not a Party to the dispute may intervene in the proceedings with the consent of the arbitral tribunal.
5. The award of the arbitral tribunal shall be final and binding on all parties to

the dispute and on any party which intervenes in the proceedings and shall be complied with without delay. The arbitral tribunal shall interpret the award at the request of one of the parties to the dispute or of any intervening party.

6. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

國際紛爭 司法的 解決 研究

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