

The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute

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1. Introduction

Fishery disputes between maritime States are as old as international law itself. At the beginning of the 21st Century, the diminishing resources of the oceans magnify the significance of these controversies. The international community must regard the management of commercial fish stocks, and the resolution of fishery disputes, as a high priority. The capacity of international law, the United Nations Convention on the Law of the Sea (UNCLOS)² in particular, to provide a framework within which fishery management schemes can be developed and enforced fairly and efficiently, will help determine the viability of ocean resources during this century.

The Southern Bluefin Tuna dispute, between Australia and New Zealand on the one hand, and Japan on the other, may presage the capacity of modern law of the sea to address these challenges. The dispute is relevant not only in the realm of substantive fishery management, but also for its implications for the dispute settlement mechanisms of UNCLOS. Although the dispute will be submitted for arbitration, absent a negotiated resolution, it is significant that the International Tribunal for the Law of the Sea (ITLOS or Tribunal)³ has issued provisional measures pending the constitution of the arbitral tribunal.⁴

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² United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

³ ITLOS was established by Part XV of UNCLOS ("Settlement of Disputes"). Article 287 provides that the ITLOS is one of four dispute settlement mechanisms that States may designate when they become members of UNCLOS. UNCLOS, *supra* note 2, at art. 287(1)(a). Annex VI of UNCLOS provides the Statute of the International Tribunal for the Law of the Sea. *Id.* at Annex VI. For a more complete discussion of the overall structure and operation of Part XV see Howard S. Schiffman, *The Dispute Settlement Mechanism of UNCLOS: A Potentially Important*

2. The History of Southern Bluefin Tuna Management

Like many other species of commercial fish stocks, the Southern Bluefin Tuna (SBT) (*Thunnus maccoyii*) is severely depleted.⁵ The main States engaged in fishing operations for SBT are Australia, Japan, and New Zealand.⁶ Japan is not only a major harvester of tuna,⁷ but a major consumer as well.⁸ Although SBT are found in waters throughout the southern hemisphere, the only known breeding ground is in the Indian Ocean, south of Java, Indonesia.⁹ Because all SBT breed in one area they are managed as one breeding stock; unified management thus requires the cooperation of all States that harvest them.¹⁰ The principal methods by which SBT are harvested are longline fishing and, less commonly, poling and purse seining.¹¹

As with any other wildlife conservation scheme, the management of SBT is limited by scientific uncertainty and other genuine difficulties. A particular challenge to the management of SBT is its status as a highly migratory species.¹² Another

Framework for Marine Wildlife Management, 1 J. INT'L WILDLIFE LAW & POL'Y 293 (1998). See also, J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 170-196 (3d ed. 1998).

⁴ *Southern Bluefin Tuna Cases* (New Zealand v. Japan, Australia v. Japan), International Tribunal for the Law of the Sea, Order of August 27, 1999, Request for Provisional Measures (visited Jan. 17, 2000) <<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>> [hereinafter ITLOS Order].

⁵ The fact that the SBT is severely depleted is not disputed by the parties. The ITLOS so noted in its order: “[c]onsidering 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; . . .” *Id.* at para. 71. For relatively recent statistics and analysis on the state of world fisheries see *The State of World Fisheries and Aquaculture, 1998*, Report of the Food and Agriculture Organization of the United Nations (visited Jan. 17, 2000) <<http://www.fao.org/docrep/w9900e/w9900e00.htm>> [hereinafter FAO Report]. For another thorough review of the decline in marine fisheries in general see *Hook, Line and Sinking: The Crisis in Marine Fisheries*, Report of the National Resources Defense Council, February 1997 [hereinafter NRDC Report]. See also, Michael Parfit, *Diminishing Returns: Exploiting the Ocean's Bounty*, NAT'L GEOGRAPHIC, Nov. 1995, at 2.

⁶ Commission for the Conservation of Southern Bluefin Tuna, Fact Sheet (visited Jan. 17, 2000), <<http://www.home.aone.net.au/ccsbt/facts.html>> [hereinafter CCSBT Fact Sheet]. Taiwan, Korea and Indonesia also harvest SBT. See ANTHONY BERGIN & MARCUS HAWARD, JAPAN'S TUNA FISHING INDUSTRY: A SETTING SUN OR NEW DAWN? 133 (1996).

⁷ FAO Report, *supra* note 5. In 1996, Japan was the fourth largest producer of total capture fishery production. *Id.* at Part I/Capture Fisheries. Japan is credited with landing 685,000 tonnes of tuna (all tuna species including SBT) in 1997. *Id.* at Part I/Tuna. For an historical overview of the Japanese tuna fishing industry see *generally* BERGIN & HAWARD, *supra* note 6.

⁸ FAO Report, *supra* note 5, at Part I/Tuna, “Japan is the world's major market for tuna products of which its apparent consumption exceeds 1 million tonnes or nearly 30 percent of world tuna catches.” *Id.* For a discussion of Japan as a fish consumer see *Tsukiji: The Great Tokyo Fish Market*, NAT'L GEOGRAPHIC, Nov. 1995, at 41.

⁹ CCSBT Fact Sheet, *supra* note 6. For a map of the breeding ground see BERGIN & HAWARD, *supra* note 6, at 135, Fig. 6.1.

¹⁰ CCSBT Fact Sheet, *supra* note 6.

¹¹ CCSBT Fact Sheet, *supra* note 6. Longline fishing involves using long lengths of fishing line with many hooks. Longlining is predominantly undertaken by Japanese boats, but several Australian boats also use this method. In poling, a pole with a barbless lure is utilized. In purse seining, a net encloses a school of fish. For a discussion and diagrams of the most utilized fishing methods see NRDC Report, *supra* note 5, at 6-9.

¹² UNCLOS, *supra* note 2, at Annex I(2). Bluefin Tuna: *Thunnus thynnus* (northern bluefin) is specifically enumerated in UNCLOS as a Highly Migratory Species. *Id.* Australia, Japan and New Zealand considered the

management problem is that SBT do not breed until they are eight years old, yet they are fished commercially from the age of two or three.¹³ The harvesting of juveniles is recognized as a major issue in the depletion of this species.¹⁴ Perhaps the most significant problem in the management of SBT is scientific uncertainty as to the population, or biomass.¹⁵

Historically heavy fishing resulted in a dramatic reduction of SBT and it became necessary to rebuild the stock.¹⁶ Australia, Japan and New Zealand decided to impose strict quotas to their fishing fleets in 1985 and thereafter, to enable the recovery of the species.¹⁷ The three States ultimately realized that a voluntary quota system was inadequate and decided to enter into a treaty. In May 1993, the Convention for the Conservation of Southern Bluefin Tuna (SBT Treaty)¹⁸ was signed by Australia, Japan, and New Zealand (members or Parties).¹⁹ The SBT Treaty entered into force on May 20, 1994.²⁰ The most significant achievement of the SBT Treaty is the establishment of the Commission for the Conservation of the Southern Bluefin Tuna (CCSBT or Commission).²¹ The main purpose of the CCSBT is to decide upon measures for the management of the SBT such as total allowable catch (TAC), the amount that each State may catch (national allocation)²² and additional measures.²³ The role of the CCSBT is analogous to that of the International Commission for the Conservation of Atlantic Tuna (ICCAT), which is charged with the conservation of tuna in the Atlantic Ocean.²⁴

migratory nature of the SBT a prime inducement for a conservation convention. *See* SBT Treaty *infra* note 18, at Preamble.

¹³ BERGIN & HAWARD, *supra* note 6, at 133.

¹⁴ *Id.*

¹⁵ Biomass is the term used “. . . to describe the weight of a population or populations of fish, or the spawning adult portion of that population.” *See* NRDC Report, *supra* note 5, at Appendix A. Official documents, as well as scholarly literature, often refer to the uncertainty of a fishery’s biomass. For a list of factors that contribute to the uncertainty of SBT, *see* CCSBT, Report of the 1997 Scientific Committee Meeting, Canberra, July 28-Aug. 8, 1997, at Attachment D (Sources of Uncertainty) (visited Jan. 17, 2000), <<http://www.home.aone.net.au/ccsbt/sc97attchd.html>>. For a discussion of the role of scientific uncertainty in the application of a “precautionary approach” in environmental management, *see infra* notes 81-84.

¹⁶ CCSBT Fact Sheet, *supra* note 6. The SBT catch reached 80,000 tonnes in the early 1960’s. *Id.*

¹⁷ *Id.*; BERGIN & HAWARD, *supra* note 6, at 137.

¹⁸ Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1994 Austl. T.S. No. 16 [hereinafter SBT Treaty].

¹⁹ *Id.*

²⁰ CCSBT Fact Sheet, *supra* note 6.

²¹ SBT Treaty, *supra* note 18, at arts. 6-14. The CCSBT meets annually and may hold additional “special meetings.” *See Id.* at art. 6(3) and (5).

²² *Id.* at art. 8(3)(a).

²³ *Id.* at art. 8(3)(b).

²⁴ The ICCAT was established by the International Convention for the Conservation of Atlantic Tuna (IConCAT). International Convention for the Conservation of Atlantic Tuna, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63. For a basic discussion of the work of ICCAT *see* Elizabeth DeLone, *Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Treaty*, 6 N.Y.U. ENVTL. L.J. 656 (1998). The significance of regional organizations such as CCSBT and ICCAT has increased since UNCLOS. *See*

The CCSBT is the agency with the primary responsibility for the conservation of SBT. Each of the three SBT Treaty members has a vote in the Commission and decisions are taken by unanimous votes of the States present at Commission meetings.²⁵ The factors the CCSBT considers in deciding upon the catch allocations among the Parties are: relevant scientific evidence;²⁶ the need for orderly and sustainable development of [SBT] fisheries;²⁷ the interests of Parties through whose exclusive economic or fishery zones [SBT] migrates;²⁸ the interests of Parties whose vessels engage in fishing for [SBT] including those that have historically engaged in such fishing and those which have [SBT] fisheries under development;²⁹ the contribution of each Party to conservation and enhancement of, and scientific research on, [SBT];³⁰ and any other factors that the Commission deems appropriate.³¹

The SBT Treaty also provides for a Scientific Committee to advise the CCSBT.³² The responsibilities of the Scientific Committee are to: assess and analyze the status and trends of the population of the [SBT];³³ coordinate research and studies of [SBT];³⁴ report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the [SBT] stock and, where appropriate, of ecologically related species;³⁵ make recommendations by consensus, as appropriate, to the Commission on matters concerning the conservation, management and optimum utilization of [SBT];³⁶ and consider any matter referred to it by the Commission.³⁷

A review of the history of SBT management, especially the proceedings of the CCSBT, leads to the conclusion that Japan's primary objective is to attain the present optimum utilization of SBT, while New Zealand and Australia focus more upon conservation. While both objectives are stated goals of the SBT treaty,³⁸ and need to be reconciled, the result of this divergence is an impasse in the most significant

Julie R. Mack, *International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas*, 26 CAL. W. INT'L L.J. 313, 326-328 (1996).

²⁵ SBT Treaty, *supra* note 18, at art. 7. It is noteworthy that Article 7 requires unanimous consent. This indicates the ability of a member State to block, or "veto" a particular conservation measure that it deems objectionable.

²⁶ *Id.* at art. 8(4)(a). A Scientific Committee advises the CCSBT. See *infra* text accompanying notes 32-37.

²⁷ *Id.* at art. 8(4)(b).

²⁸ *Id.* at art. 8(4)(c).

²⁹ *Id.* at art. 8(4)(d).

³⁰ *Id.* at art. 8(4)(e).

³¹ *Id.* at art. 8(4)(f).

³² *Id.* at art. 9. The meeting of the Scientific Committee is held prior to the annual meetings of the CCSBT. *Id.* at art. 9(3).

³³ *Id.* at art. 9(2)(a).

³⁴ *Id.* at art. 9(2)(b).

³⁵ *Id.* at art. 9(2)(c).

³⁶ *Id.* at art. 9(2)(d).

³⁷ *Id.* at art. 9(2)(e).

³⁸ *Id.* at art. 3. "The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of [SBT]." *Id.* This closely matches the letter and spirit of UNCLOS. Article 61 of UNCLOS provides for the conservation of living resources in the Exclusive Economic Zone (EEZ) while Article 62 provides for the optimum utilization of the living resources of the EEZ. UNCLOS, *supra* note 2, at arts. 61 and 62.

functions of the CCSBT. Since Australia, Japan, and New Zealand have an equal say in the functioning of the CCSBT, there has been little agreement on TAC and national allocations. This impasse underlies the current dispute.

3. The Current Dispute: Japan's Experimental Fishing Program

Despite disagreements, the SBT Treaty members have agreed in broad terms to several measures with the aim of rebuilding parental SBT stocks to 1980 levels, by the year 2020.³⁹ These measures include: a global total allowable catch of 11,750 tonnes which has been applied to member countries since 1989;⁴⁰ restrictions on fishing in breeding grounds and the taking of juvenile fish;⁴¹ development of fishing practices to reduce albatross by-catch;⁴² comprehensive monitoring and data collection programs;⁴³ and strengthening the research activities on SBT.⁴⁴

The divergent views on whether the parent stock was rebuilding, however, prevented an agreement on a global quota for SBT in 1998.⁴⁵ In that year, Japan unilaterally commenced an "Experimental Fishing Program" (EFP) for the stated purpose of attempting to resolve uncertainty in the SBT stock assessment.⁴⁶ The Japanese proposal for an EFP was not new as it had been tabled at prior meetings.⁴⁷ Specifically, the matter was raised in 1996 at the third annual meeting of the CCSBT.⁴⁸ The EFP involves additional harvesting by 65 vessels off the west coast of Australia.⁴⁹

³⁹ CCSBT Fact Sheet, *supra* note 6.

⁴⁰ *Id.* At the most recent CCSBT meeting, Australia and New Zealand advised that they would restrain national catches to the most recently agreed levels, 5265 tonnes for Australia and 420 tonnes for New Zealand. *See* CCSBT, Report of the Fifth Annual Meeting, Second Part, Tokyo, May 10-13, 1999, at Agenda Item 3 (Total Allowable Catch and its Allocation) (visited Jan. 17, 2000) <<http://www.home.aone.net.au/ccsbt/5-2Main.html#5-2Report>>. Japan "advised that it would restrain its national catch to a level which would be advised at a later date." *Id.*

⁴¹ CCSBT Fact Sheet, *supra* note 6.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See* Report of the Australian Bureau of Rural Sciences, Southern Bluefin Tuna Fishery (updated Dec. 22, 1999) <<http://www.brs.gov.au/fish/status98/sbt.html>>. The management of a fishery through a quota system is understandably quite difficult. For a more complete discussion of quota allocations in modern fisheries law, *see* Julia E. Gutreuter, Comment, *Quota Allocation Methods in the Management of International Marine Fisheries: Future Implications*, 12 TUL. ENVTL. L.J. 479 (1999).

⁴⁶ CCSBT, Report of the Fourth Annual Meeting, Second Part, Canberra, Jan. 19-22, 1998, at Agenda Item 5 (Consideration of an Experimental Fishing Program) (visited Jan. 17, 2000) <<http://www.home.aone.net.au/ccsbt/4-2MainPt1.html>>.

⁴⁷ *Id.* For a reference to Japan's earlier proposal for a "Joint Pilot Program for Experimental Fishing," *see infra* note 49.

⁴⁸ CCSBT, Report of the Third Annual Meeting, Canberra, Sept. 24-28, 1996, at Agenda Item 14 (Experimental Fishing, including Pilot Program) (visited Jan. 17, 2000) <<http://www.home.aone.net.au/ccsbt/ccsbt3-3.html>>.

⁴⁹ *See Environment News Service: Southern Bluefin Tuna Threatened by Japan's Overfishing* (visited Jan. 17, 2000) <<http://www.ens.lycos.com/ens/aug99/1999L-08-23-04.html>> [hereinafter *ENS Report of August 23, 1999*]. Technical aspects of the Japanese EFP proposal have been discussed at the CCSBT annual meetings since 1996. At the third annual meeting, Japan made a presentation on a "Joint Pilot Program for Experimental Fishing" which was submitted to, but never discussed by, the 1996 Scientific Committee. *See* CCSBT, Report of the Third Annual

Rather predictably, the EFP is denounced by environmentalists⁵⁰ and supported by the Japanese fishing industry.⁵¹ Australia and New Zealand, however, are not entirely opposed to the concept of an EFP as a method to assess the stock.⁵² Japan's intention, on the other hand, to implement the EFP outside the framework of the Commission, and in addition to its national allocation, was rejected by New Zealand⁵³ and Australia.⁵⁴

4. The SBT Dispute Goes to the ITLOS

Australia and New Zealand decided to submit the dispute to arbitration,⁵⁵ and on July 30, 1999 filed a request for provisional measures with ITLOS against Japan.⁵⁶

Meeting, *supra* note 48, at Agenda Item 14 (Experimental Fishing, including Pilot Program). At the fifth annual meeting, Japan presented a summary of the 1998 results of its EFP. See CCSBT, Report of the Fifth Annual Meeting, First Part, Tokyo, Feb. 22-26, 1999, at Agenda Item 14/Attachment 33 (Summary of the results of the EFP conducted in 1998) (visited Jan. 17, 2000) <<http://www.home.aone.net.au/ccsbt/5-1Atach33.html#5-1atch33>>.

⁵⁰ *ENS Report of August 23, 1999*, *supra* note 49. “Japan’s experimental fishing program[] is a thinly disguised attempt to increase its quota of the commercially valuable bluefin. . . The attempt to use the pretension of science to contravene the CCSBT in order to catch more fish is irresponsible as well as illegal. . .” *Id.* (quoting Desley Mather of Greenpeace International).

⁵¹ See *Japan Fisheries Association: Southern Bluefin Tuna Experimental Fishing Program for 1999* (visited Jan. 17, 2000) <http://www.suisankai.or.jp/iken_e/iken99_e/ik002_e.html>. “Continuation of the Experimental Fishing Program (for 1999) is necessary to insure an improved scientific assessment.” *Id.*

⁵² Media Release of Mark Vaile, Australian Minister for Agriculture, Fisheries & Forestry, *Good Start to Southern Bluefin Tuna Talks*, Statement of Jan. 5, 1999 (visited Jan. 17, 2000) <<http://www.affa.gov.au/vaile/releases>>. “Our aim is to develop an [EFP] that contributes to a better understanding of the state of SBT stocks, . . . Australia has never opposed that kind of program, . . .” *Id.*; CCSBT, Report of the Third Annual Meeting, *supra* note 48, at Agenda Item 14/Attachment D (New Zealand Comments on Japan’s Proposal for an EFP Pilot), “New Zealand acknowledges that, in principle, an . . . [EFP] is one way to reduce some sources of uncertainty in the SBT stock assessment.” *Id.*

⁵³ CCSBT, Report of the Fourth Annual Meeting, Second Part, *supra* note 46, at Agenda Item 5 (Consideration of an Experimental Fishing Program).

New Zealand was extremely concerned with Japan’s proposal to unilaterally undertake an EFP and stated that action by Japan to undertake an EFP in the absence of a consensus decision by the Commission, using catch in addition to the level of Japan’s national allocation for 1996/97, equated to a predetermined over fishing which is a violation of Japan’s obligation under Article 8 of the [SBT Treaty]. *Id.*

⁵⁴ *Id.* “Australia called upon Japan to give assurance that it would not undertake a unilateral EFP outside of the framework of the Commission.” *Id.*

⁵⁵ ITLOS, Press Release 24, July 30, 1999, *Dispute Concerning Southern Bluefin Tuna, Australia and New Zealand v. Japan, Provisional Measures Requested* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_24.htm> [hereinafter ITLOS, Press Release 24]. Because there was no agreement between the parties as to a method of dispute settlement, Australia and New Zealand decided to submit their dispute with Japan to an arbitration procedure under Annex VII of UNCLOS. *Id.* Where State parties to UNCLOS have not agreed upon a dispute settlement procedure under Article 287, it may be submitted to arbitration. UNCLOS, *supra* note 2, at art. 287(5). This is sometimes referred to as “compulsory” arbitration. See Schiffman, *supra* note 3, at 300. Annex VII of UNCLOS is entitled “Arbitration” and details the functions and procedures of arbitration under UNCLOS. UNCLOS, *supra* note 2, at Annex VII.

⁵⁶ ITLOS, Press Release 24, *supra* note 55. Pending the constitution of the arbitral tribunal, Australia and New Zealand requested the ITLOS grant provisional measures pursuant to Article 290(5) of UNCLOS. *Id.* Article 290(5) of UNCLOS provides,

Australia and New Zealand maintained that Japan's actions in implementing the unilateral EFP amounted to a failure to conserve and cooperate in the conservation of the SBT and threatened serious and irreversible damage to the SBT population.⁵⁷ Specifically, Australia and New Zealand requested the ITLOS to prescribe that:

- Japan immediately cease its unilateral experimental fishing for [SBT];
- Japan restrict its catch to its national quota as last agreed, reduced by the amount taken in the course of its unilateral experimental fishing;
- the parties act consistently with the precautionary principle (caution and vigilance) in fishing for the [SBT] pending final settlement of the dispute;
- the parties ensure that no action is taken to aggravate, extend or render more difficult the solution of the dispute; and
- the parties ensure that no action is taken which might prejudice their respective rights pending final decision of the case.⁵⁸

[p]ending 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. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4. UNCLOS, *supra* note 2, at art. 290(5).

The objective of "provisional measures," is to preserve the parties' rights while litigation is in progress. *See* MERRILLS, *supra* note 3, at 129. Arrangements to protect the legal rights of litigants are a familiar feature to municipal legal systems. *Id.* The equitable remedy of a "preliminary injunction" operates in much the same way. For a discussion of the institution of provisional measures in the International Court of Justice, *see infra* note 77.

⁵⁷ ITLOS, Press Release 24, *supra* note 55. The duty to cooperate in the conservation of a SBT is found in the SBT Treaty. SBT Treaty, *supra* note 18, at Preamble. "Recognizing that it is essential that they cooperate to ensure the conservation and optimum utilisation of [SBT]." *Id.* The duty to cooperate in the conservation and optimum utilization of highly migratory species is also found in UNCLOS. UNCLOS, *supra* note 2, at art. 64(1). Article 64(1) provides,

[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work. *Id.*

Recall that SBT is enumerated as a highly migratory species under Annex I of UNCLOS. *See supra* note 12. The concept of "irreversible damage" or "irreparable harm" to the interests of a moving party, is often discussed in the context of injunctive relief. Despite a requirement of "urgency," such a threshold standard is conspicuously absent from the jurisprudence of the ITLOS. UNCLOS, *supra* note 2, at art. 290(5). Article 290(5) is reproduced in full in *supra* note 56.

⁵⁸ ITLOS, Press Release 24, *supra* note 55.

On August 9, Japan responded by challenging the jurisdiction of the ITLOS to award provisional measures and maintained that even if it had jurisdiction, provisional measures were not warranted.⁵⁹ Japan contended that the prescription of provisional measures was not appropriate because Japan's actions presented no risk of irreparable injury to the SBT stock.⁶⁰ Japan further contended that there was no urgency in the requests and that Australia and New Zealand could be fully compensated by future reductions in Japan's catch.⁶¹ Finally, Japan counter requested provisional measures of its own (assuming ITLOS found jurisdiction) and asked the ITLOS to prescribe that:

- Australia and New Zealand urgently and in good faith resume negotiations and consultations with a view toward reaching agreement on the Total Allowable Catch (TAC), annual quotas, and the continuation of the [EFP] on a joint basis;
- If there is no disagreement on these matters within six months, Australia and New Zealand should agree to have the unresolved issues referred for resolution to the independent scientists that have been engaged by the parties.⁶²

5. The ITLOS Prescribes Provisional Measures

The ITLOS conducted a hearing on the requests between August 18-20, 1999.⁶³ On August 27, 1999 the Tribunal rendered its Order, consisting of six (6) provisional

⁵⁹ ITLOS, Press Release 25, Aug. 9, 1999, *Japan files Response and counter Request for provisional measures in case concerning conservation of Tuna* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_25.htm> [hereinafter ITLOS, Press Release 25].

⁶⁰ *Id.* Japan specifically stated that the EFP was “in its last few days of 1999” and since it might concern “only a few hundred tons” of SBT, it could not have any material effect on the stock. *Id.* At the same time, Japan contended that stopping the EFP in “mid-course” would cause irreparable damage to its scientific research. *Id.*

⁶¹ *Id.*

⁶² *Id.* The use of external scientists, alluded to in the second prong of Japan's counter request, has been the subject of some controversy before the Scientific Committee of the CCSBT. See CCSBT, Report of the 1998 Scientific Committee, Tokyo, Aug. 3-6, 1998, at Appendix 1 (Invitation of External Scientists) (visited Jan. 17, 2000) <<http://www.home.aone.net.au/ccsbt/Sc98Appendix1.html>>. Japan expressed a greater interest in the participation of external scientists than either Australia or New Zealand. *Id.* A panel of independent scientists, Messrs. McQuire, Tanaka, Sullivan and Mohn were engaged by the parties to conduct peer review of the Scientific Committee in 1998. See Argument by Robert T. Greig, Counsel for Japan, (Aug. 19, 1999), Verbatim Record of ITLOS *Southern Bluefin Tuna Cases, Requests for Provisional Measures* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/ITLOS/PV99_22_E.htm>.

⁶³ ITLOS, Press Release 27, *Hearings conclude - Judges deliberate - decision due on 27 August* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_27.htm> [hereinafter Press Release 27]. Although Japan already had a national serving as a judge of the ITLOS (Judge Yamamoto), neither Australia nor New Zealand had a national presiding on the Tribunal. See ITLOS, Press Release 26, *Hearing to commence on 18 August 1999* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_26.htm>. Pursuant to the ITLOS statute, Australia and New Zealand were entitled to have a national judge, or a judge *ad hoc*, presiding at the hearing. UNCLOS, *supra* note 2, at Annex VI, art. 17(2). “If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.” *Id.* For the purposes of this provision, Australia and New Zealand were considered one party. See *Id.* at Annex VI, art. 17(5). “Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be considered as one party only. Any doubt on this point shall be settled by the decision of the Tribunal.” *Id.* Australia and New Zealand chose Ivan A. Shearer, a Professor of International Law at the University of Sydney to serve as their judge *ad hoc*. See ITLOS, Press Release 26, *supra*. The practice of appointing a national

measures.⁶⁴ The ITLOS prescribed the following measures pending a decision by the 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;⁶⁵

(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;⁶⁶

(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 [EFP];⁶⁷

(d) Australia, Japan and New Zealand shall each refrain from conducting an [EFP] 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);⁶⁸

(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 [SBT];⁶⁹

(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;⁷⁰

judge, or judge *ad hoc*, is also found in the International Court of Justice (ICJ). STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 31. For a complete list of Tribunal judges that heard the SBT dispute, see ITLOS, Press Release 28, *Tribunal Prescribes Provisional Measures* (visited Jan. 17, 2000) <http://www.un.org/Depts/los/Press/ITLOS/ITLOS_28.htm>. For a discussion of the substance of the August 18-20, 1999 hearing, see ITLOS, Press Release 27, *supra*.

⁶⁴ See ITLOS Order, *supra* note 4, at para. 90(1)(a)-(f).

⁶⁵ *Id.* at para. 90(1)(a). The vote was 20 to 2 (Judges Vukas and Eiriksson voted against).

⁶⁶ *Id.* at para. 90(1)(b). The vote was 20 to 2 (Judges Vukas and Eiriksson voted against).

⁶⁷ *Id.* at para. 90(1)(c). The vote was 18 to 4 (Judges Zhao, Yamamoto, Vukas and Warioba voted against).

⁶⁸ *Id.* at para. 90(1)(d). The vote was 20 to 2 (Judges Yamamoto and Vukas voted against).

⁶⁹ *Id.* at para. 90(1)(e). The vote was 21 to 1 (Judge Vukas voted against).

⁷⁰ *Id.* at para. 90(1)(f). The vote was 20 to 2 (Judges Vukas and Warioba voted against).

In addition to the above Order, several Judges appended additional declarations and separate opinions.⁷¹ The SBT case was the first opportunity for the ITLOS to conduct proceedings on, and grant provisional measures for, a fishery dispute.⁷²

6. The Effect of the ITLOS Order for Provisional Measures

Although both sides reacted positively to the Tribunal's Order,⁷³ the issue of implementation remains. Japan has indicated its intention "to take all necessary measures without delay."⁷⁴ It is likely the parties will continue negotiations until the matter is resolved or an arbitral tribunal reaches a final decision on the merits of the case. The provisional measures of the ITLOS are binding in international law.⁷⁵ Article 290(6) of UNCLOS provides: "[t]he parties to the dispute shall comply with the provisional measures prescribed under this article."⁷⁶ The interpretation of this article can leave little doubt as to its binding character.⁷⁷ Furthermore, four of the six

⁷¹ *Id.* Vice-President Wolfrum, Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson appended a joint declaration. Judge Warioba appended a declaration. Judges Laing and Treves appended separate opinions. Judges Yamamoto and Park appended a joint separate opinion. Judge *ad hoc* Shearer appended a separate opinion. Judges Vukas and Eiriksson appended dissenting opinions. For the full text of these declarations and opinions, see *id.* For a brief review of the Order, joint declarations, separate and dissenting opinions see American Society of International Law, August 30-Sept. 3 1999, *International Law in Brief* (visited Jan. 17, 2000), <<http://www.asil.org/ilib44.htm>>.

⁷² In fact, this is the second dispute to come before the ITLOS. The first was the *M/V "Saiga"* (Saint Vincent and the Grenadines v. Guinea). See *M/V "Saiga" Cases* (visited Jan. 17, 2000), <http://www.un.org/Depts/los/ITLOS/Saiga_cases.htm>. The *M/V "Saiga"* dispute concerned a maritime claim for the release of the vessel. *Id.* The Tribunal granted a request for provisional measures in the *M/V "Saiga"* as well. *Id.*

⁷³ Australia immediately issued a statement declaring, "Australia Wins Southern Bluefin Tuna Case." Joint Press Release of the Commonwealth Attorney-General and Minister for Agriculture, Fisheries and Forestry, August 28, 1999, *Australia Wins Southern Bluefin Tuna Case* (visited Jan. 17, 2000), <http://law.gov.au/aghome/agnews/1999newsag/joint17_99.htm>. New Zealand issued a similar statement applauding the Tribunal's Order. See Press Release of the Ministry of Fisheries, August 28, 1999, *Landmark Decision - New Zealand tuna fishing case* (visited Jan. 17, 2000), <<http://www.fish.govt.nz/currebt/press/pr990828.htm>>. Even Japan highlighted positive aspects of the decision, but found it "regrettable that Japan's views were not fully understood." See Ministry of Foreign Affairs of Japan, August 27, 1999, *Statement by Foreign Minister Masahiko Koumura on the International Tribunal for the Law of the Sea's Order on the Request for Provisional Measures Concerning Japan's [EFP] on [SBT]* (visited Jan. 17, 2000) <<http://www.mofa.go.jp/announce/announce/1999/8/827.html>> [hereinafter Statement by Foreign Minister Koumura].

⁷⁴ See Statement by Foreign Minister Koumura, *supra* note 73.

⁷⁵ UNCLOS, *supra* note 2, at art. 290(6).

⁷⁶ *Id.*

⁷⁷ This may be contrasted with the more ambiguous language of the ICJ Statute establishing the power of the ICJ to grant provisional measures. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 41.

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. *Id.*

The question of whether or not provisional measures of the ICJ are binding is the source of some debate. See generally Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures*, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323 (Lori F. Damrosch ed., 1987). This issue was passionately debated

measures granted in this case ((a)-(d)) contain the word “shall” denoting a binding obligation.⁷⁸ The final two measures ((e)-(f)) contain the more precatory word “should” indicating suggestion, rather than obligation.⁷⁹

Regardless of whether the order for provisional measures is a meaningful step towards the resolution of the SBT dispute it has advanced the use of provisional measures, in international law in general, and in the ITLOS in particular, as a tool to be applied in environmental disputes. Judge Laing stated in a separate opinion, “[a]bove all, in this case the Tribunal makes decisions of fundamental importance to the institution of provisional measures and potentially of critical relevance to an aspect of international environmental law.”⁸⁰

Judge Laing also noted the significance of the “precautionary approach”⁸¹ to marine resource disputes, stating that it cannot be denied that UNCLOS adopts a “precautionary approach.”⁸² He observed that the Tribunal adopted the “precautionary approach” rather than the “precautionary principle.”⁸³ He concluded, “. . . adopting an *approach*, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures.”⁸⁴

Despite Judge Laing’s distinction between the “precautionary approach” and the “precautionary principle” six other members of the Tribunal asserted that “a reduction in the catches of all those concerned in the fishery in the immediate short term would

recently when the Commonwealth of Virginia executed a Paraguayan national, Angel Francisco Breard, in the face of an ICJ provisional order to the contrary. *See* Louis Henkin, *AGORA: Breard, Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679 (1998) (discussing the role of ICJ provisional measures where Breard was tried, convicted and sentenced to death despite never having been advised of his rights to consular notification and access under the Vienna Convention on Consular Relations).

⁷⁸ ITLOS Order, *supra* note 4, at para. 90(1)(a)-(d). For the full text of these measures, *see supra* notes 65-68.

⁷⁹ *Id.* at para. 90(1)(e)-(f). For the full text of these measures, *see supra* notes 69-70.

⁸⁰ Separate Opinion of Judge Laing, at para. 1, *Southern Bluefin Tuna Cases, Requests for Provisional Measures*, (visited Jan. 17, 2000), <<http://www.un.org/Depts/los/ITLOS/3Laing.htm>> [hereinafter Separate Opinion of Judge Laing].

⁸¹ *Id.* at paras. 12-21. Judge Laing traces the history of the concept of “precaution” in marine environmental management. *Id.*

⁸² *Id.* at para. 17. Judge Laing refers to several key provisions of UNCLOS as establishing a precautionary approach including, Arts. 61, 63-66, 116-117, 119 and 290(1). *Id.* In addition, the Straddling Fish Stocks Treaty, a progeny of UNCLOS, directly refers to a “precautionary approach” when faced with scientific uncertainty. 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 Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature*, Dec. 4, 1995, U.N.G.A. Doc. A/CONF. 164/37, *reprinted in*, 34 I.L.M. 1542, at arts. 5 and 6 (not yet in force.).

⁸³ Separate Opinion of Judge Laing, *supra* note 80, at paras. 13 & 19. “The Tribunal’s Order does not refer to the “Precautionary Principle.” *Id.* at 13.

⁸⁴ *Id.* at 19. He distinguishes the precautionary approach from the more formal “precautionary principle” when faced with scientific uncertainty. *Id.* at paras. 12-21. In addition, he observed that it was not possible to determine from materials submitted to the Tribunal in this case, whether customary law recognizes a “precautionary principle.” *Id.* para. 16.

assist the stock to recover over the medium to long term.”⁸⁵ This statement underscores the argument that a limitation of fishery operations, exceeding previously agreed levels, is necessary to restore depleted SBT stocks. The clear message of the Tribunal’s Order, favoring conservation over additional short-term consumptive utilization, is a significant step for fishery management.

7. A Brief Discussion of the Legal Merits

Apart from the application for provisional measures to the ITLOS, the substantive legal arguments available to the parties have yet to be fully evaluated. Provisional measures are, after all, an interim remedy. As previously noted, it is a characteristic of international disputes to resolve themselves in a fashion other than a final decision or adjudication on the merits. The SBT dispute is no exception. Nevertheless, some of the substantive legal issues invoked by a unilateral EFP are worthy of review. The fundamental question of this dispute is: can a unilateral experimental fishing program, exceeding previously agreed catch limits, be justified under the existing SBT regime? If so, Japan’s actions are legal and New Zealand and Australia have no remedy except further negotiations in the CCSBT. If, on the other hand, there is no legal justification for Japan’s EFP, then an arbitral award may be granted to redress the harm to Australia and New Zealand.

What follows is not meant to be an exhaustive list of legal arguments available to the parties in future proceedings. To presuppose legal arguments before a tribunal that has yet to be constituted would be presumptuous. Similarly, it is not merely a reiteration of the arguments advanced by the parties before the ITLOS, as the ITLOS was concerned with the narrower, and more procedural, question of provisional measures.

7.1 Japan’s Arguments

Arguably, the text of the SBT Treaty provides support for a unilateral EFP. Specifically, Article 8(4)(e) seems to recognize the individual scientific contributions of the member States. As discussed in Section 2, Article 8(4)(e) provides, “[i]n deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider: the contribution of *each Party* to conservation and enhancement of, *and scientific research on*, [SBT]; . . .”⁸⁶ This language seems to recognize, or perhaps even value, scientific studies on the status of the fishery, undertaken by individual members. This provision is illuminated by the Preamble, which provides, “[a]cknowledging the importance of scientific research for the conservation and management of [SBT] and the importance of collecting scientific information relating to [SBT] and ecologically related species[.]”⁸⁷

⁸⁵ Joint Declaration by Vice-President Wolfrum, Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson, *Southern Bluefin Tuna Cases, Requests for Provisional Measures* (visited Jan. 17, 2000), <http://www.un.org/Depts/los/ITLOS/3Joint_decl.htm>.

⁸⁶ SBT Treaty, *supra* note 18, at art. 8(4)(e) (emphasis added). This treaty provision was first discussed in Section 2. *See supra* text accompanying note 30.

⁸⁷ *Id.* at Preamble.

In addition to those treaty provisions, Japan can argue that the goal of “optimum utilization” of the SBT is fundamental and co-equal with the duty to conserve.⁸⁸ Therefore, absent present consensus on catch limits, additional harvesting beyond the previously agreed limit would be acceptable if it is consistent with all other treaty obligations. Finally, and in conjunction with the previous argument, Japan may contend that Australia and New Zealand breached their own duty to cooperate by failing to renegotiate new catch limits beyond the 1989 level.⁸⁹ As such, principles of equity might release Japan from its previous national allocation and justify an increase in its catch if consistent with all other treaty obligations.

7.2 Australia and New Zealand’s Arguments

Perhaps the most compelling legal argument available to Australia and New Zealand was raised effectively in the motion for provisional measures. That is, the Japanese EFP is a violation of its duty to cooperate in conservation as set forth in the SBT Treaty and UNCLOS.⁹⁰ Admittedly, the term “duty to cooperate” is a somewhat amorphous concept, perhaps evincing a certain intentional ambiguity in treaty drafting. Nevertheless, a competent tribunal would construe this term minimally to require a State to act consistently with its relevant treaty obligations. The national allocations agreed to by the CCSBT, albeit years earlier, seemingly constitute such an obligation.

Furthermore, notwithstanding Article 8(4)(e), discussed above, Australia and New Zealand may argue that unilateralism is not in the spirit of the SBT Treaty. For whatever ambiguities are presented by the “duty to cooperate,” it is a theme that resonates in UNCLOS, and modern fisheries law in particular. A “duty to cooperate” cannot have substance if State parties to a regional fishery organization disregard an existing management framework in favor of more narrowly defined national interests. This is especially true where the national interest at issue, the Japanese EFP, is a consumptive use of the resource.

The consumptive nature of the EFP is another salient factor. Obviously, if Japan’s EFP was not consumptive, it would not be regarded as additional catch. While it may not be possible to conduct meaningful research on the SBT stock in a non-consumptive manner, Australia and New Zealand have a legitimate argument that a decision to conduct research that consumes the resource cannot be considered outside of the total allowable catch, and national allocations if conducted unilaterally.

Japan’s penchant for consumptive, or lethal, scientific research is apparent in the marine mammal context as well. For example, Japan continues to conduct “scientific whaling” for minke whales despite the current whaling moratorium of the International Whaling Commission (IWC).⁹¹ Although the scientific value of any experimental

⁸⁸ *Id.* at Preamble. “Recognizing that it is essential that they cooperate to ensure the conservation and optimum utilisation of SBT[.]” *Id.*

⁸⁹ *See supra* text accompanying notes 40-45. Recall, that in 1999 Japan signaled its intention to reserve the right to “advise[.]” of its catch limit at a later date. *See* CCSBT, Fifth Annual Meeting, Second Part, *supra* note 40, at Agenda Item 3.

⁹⁰ *See supra* note 57.

⁹¹ *See generally*, CNN Report, April 9, 1998, *Japanese kill 440 minke whales* (visited Jan. 17, 2000), <<http://cnn.com/EARTH/9804/09/minke.whales/index.html>>. Although controversial, the practice of “scientific

program must be judged on its own merits, Japan's ongoing pursuit of scientific research that consumes otherwise carefully managed resources is problematic.

In addition, Australia and New Zealand will no doubt argue, as they did in the ITLOS, that the "precautionary approach," if not the "precautionary principle" should inform an evaluation of the Japanese EFP. The value of the Japanese scientific research must be measured against its impact on the parental biomass and the precautionary approach is the standard of measurement. This argument will likely rise or fall on the level of scientific uncertainty prevailing at the time of the EFP. In actuality, a precautionary argument may prove problematic for Australia and New Zealand. Since both Australia and New Zealand have indicated their acceptance of the concept of an EFP,⁹² then only the specific contours of the Japanese EFP, not the EFP itself, should be subject to this scrutiny.

Finally, Australia and New Zealand will likely contend that Japan is not a defenseless bystander in the CCSBT, but rather is a full, voluntary participant in a three member regional organization. Japan has absolute parity with Australia and New Zealand in all matters and its voice is equal to the others in negotiations. Recall, that as a member of the CCSBT, Japan enjoys a functional "veto" over its decisions.⁹³ As such, it is difficult to conclude that Japan is somehow victimized by the actions of the CCSBT. Any disagreements among the member States should be addressed within the framework of the CCSBT.

Whatever legal arguments are set forth by Japan, Australia, and New Zealand, it is probable that a tribunal will attempt to balance and reconcile the goals of conservation and optimum utilization to the greatest extent possible. These objectives, as well as maintaining viable and sustainable SBT stocks for future generations, are nominally shared by the parties. Regardless of whether a tribunal reaches a final judgment on the merits, continued negotiation within the framework of the CCSBT will ultimately be necessary to successfully resolve the dispute.

8. Conclusions

The Southern Bluefin Tuna case is but one of many current fishery disputes where disagreements over catch limits underlies a deeper friction between conservation and present utilization. These disputes must be addressed within the regime of UNCLOS and other legal instruments. If present legal regimes and international organizations are unable to develop workable policies in the area of fishery management, current disputes will worsen and new ones will develop. This is undoubtedly a key challenge of modern international law of the sea.

This particular dispute underscores the importance of cooperation and negotiation within a designated regional organization, the Commission for the Conservation of Southern Bluefin Tuna. The success of the CCSBT will depend on the ability of Australia, Japan and New Zealand, working together, to balance the need for a

whaling" is recognized in the International Convention for the Regulation of Whaling, International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, at art. VIII (entered into force Nov. 10, 1948).

⁹² See *supra* note 52.

⁹³ SBT Treaty, *supra* note 18, at art. 7. See also *supra* note 25.

robust future stock against the present needs of the fishing industry and the demands of the consumer.

The decision on the part of Australia and New Zealand to pursue provisional measures in the International Tribunal for the Law of the Sea, pending arbitration, is a demonstration of confidence in the ability of the ITLOS to address fishery disputes. The ITLOS Order of provisional measures must be regarded as a victory for the conservation of fishery resources. Specifically, the Tribunal's Order highlights the argument that unilateral experimental fishing cannot exceed a State's national allocation. Irrespective of whether or not Australia and New Zealand obtain relief on the final merits of the case, the ITLOS Order signals a cautionary note to any State that might seek to circumvent a previously negotiated management scheme in a unilateral way. The ITLOS Order also bodes well for the use of provisional measures as an instrument of environmental dispute settlement. Future tribunals will be guided by their application in the SBT dispute.

The SBT dispute is a harbinger of the many marine conservation disputes that will transpire in the 21st Century. The success or failure of the CCSBT and the ITLOS to address this dispute, will help decide the outcome of similar disputes in the future and will help define the necessary role of the legal institutions to address them. The coordinated efforts of individual States, regional organizations, and multilateral institutions promise the greatest likelihood of success.